Title and Escrow Claims Guide

2020 Edition

J. Bushnell Nielsen

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TM

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This book is dedicated to Timothy Richard Hennessy, a true friend who is sorely missed, and to my wife, Sarah, and sons John, Ted and Peter.

Bush Nielsen

Introduction

This treatise is intended as a guide for the resolution of disputes about title insurance policies, real estate escrows and closings, and related issues involving title insurers, title agents, approved attorneys and escrowees. It is intended for claim administrators, retained counsel, insurance underwriters and others who deal with title claims and coverage disputes. The commentary is intended to be practical rather than academic. The goal is to give guidance on commonly-encountered issues, whether or not they have been addressed by the courts. This work is limited in scope. It is not intended as an all-encompassing treatise on the land title industry.

The book is organized to follow the decision-making process used by claims counsel or claim administrators. The first chapter provides decision trees and addresses essential issues about claim handling. Chapter 2 addressed more claim administration issues. Chapters 3 and 4 cover the resolution of covered claims and defense of the insured, which are the two primary means by which claims are resolved. Chapter 5 is on recoupment and subrogation rights. Chapter 6 concerns the title insurance commitment. Chapters 7 through 12 discuss the terms of the title insurance policy. Chapters 13 through 17 discuss non-policy liability (escrows, closing protection letters, title searches and tort liability on insurance policies) and issues concerning title agents and approved attorneys.

The claims practices suggested by this treatise indicate general rules or practices only. Every claim situation is different, and state laws regarding claim settlement practices vary significantly. The approaches suggested in this volume are not appropriate or correct in all cases. In fact, some of the rules and practices described are *not* appropriate in some jurisdictions, as the book explains wherever possible. The book also does not attempt to describe every possible decision or position that might be appropriate in a particular case. Therefore, any use of words such as "should," "must," "shall," "will" or the like, in describing an insurer's duties or options, is strictly for brevity's sake rather than to state a mandate imposed by policy terms, statutes, regulations or the courts.

The views expressed in this book are those of the author, and are not the official views of the American Land Title Association or any of its members. This book also does not represent the uniform custom and practice in the title insurance industry in the administration of claims, or any insurer's internal claim standards or practices. This work is not sanctioned, sponsored or approved by any title insurer.

However, the practices and views expressed herein are not mere opinions developed in a vacuum. I have resolved thousands of claims and title disputes for more than 38 years. I was employed by title insurers for 16 years and received superlative training from my supervisors and peers. The handling of title disputes remains my nearly-exclusive employment as a practicing lawyer, and I continue to receive information and insights from title industry members from all regions of the United States. This book is intended to impart the wisdom that I have received, in addition to my own analysis of cases, statutes and regulations. I believe it is the combination of practical knowledge with scholarship that has made this book useful since it was first published in 1996.

Finally, the analysis in this book reflects my belief that most cases on this subject can be reconciled to indicate a level of consistency in the interpretation of the policy language. Where there is a split of authority that the courts themselves recognize or which is obvious, the book explains the differing positions. Throughout the book, my goal is to present an honest and objective explanation of the subject and the decisions, and not to suggest what the law should now be or how it should evolve.

J. Bushnell Nielsen

1 Decision Trees and Forms

1.1 Decision Trees

The decision trees below provide a method by which a claim administrator may assess the insurer's rights and duties in responding to a claim. They also suggest the more common options available to the insurer when resolving a claim. The decision trees and checklists cover most situations.

1.1.1 Tender Of Defense--General

The following two decision trees are for use with tenders of defense.

1.1.2 Tender Of Defense--Deciding Whether To Accept Or Reject

Consider the following issues in determining whether or not the insurer has a duty to accept a proffered defense of an action.

Has a policy been issued, or paid for and the commitment requirements met?	See §2.3.4 regarding proof that policy has been issued and §6.4 regarding commitment requirements and cancellation.
Is the claimant an insured or a party entitled to a defense?	See Chapter 7 regarding the definition of insured.
What standard is applicable to the scope of the duty to defend?	See Chapter 4 regarding the "four corners of the complaint" rule versus the "allegations of the complaint plus extrinsic facts" rule.
Does the lawsuit allege a matter involving the land insured?	See Chapter 8 regarding the definition of Land.
Does the pleading contain an allegation which creates the potential for coverage?	See Chapter 9 regarding covered title risks. See Chapter 4 regarding the duty to defend.
Is the matter excluded?	See Chapter 11 regarding policy exclusions.
Has the insured prejudiced the right to a defense by delay or otherwise?	See §2.3.3 regarding prejudice because of tardy notice.
Is the matter excepted?	See Chapter 12 regarding "standard" exceptions, including §12.7 as to "special" exceptions.

If it appears that there is a duty to defend, proceed to **§1.1.3 Tender Of Defense--Options On Acceptance.**

1.1.3 Tender Of Defense--Options On Acceptance

The following are the most common options when the insurer accepts a tendered defense:

Accept full defense without limitation	See Chapter 9 regarding defense of the insured.
Accept defense of covered counts only	See §4.7 regarding provision of a limited defense.
Accept defense with reservation of rights	See §4.9 regarding reservations of rights. As discussed therein, the insurer must further decide whether or not it elects or is required to accept the insured's choice of counsel, if any.
Accept or deny, and bring declaratory action	See §4.14 regarding declaratory judgment actions.

See the full discussion of the duty to defend at the above-referenced sections, and the forms and letters referenced within those sections.

1.1.4 Claim Of Loss Decision Tree 1--General

The following decision tree is for use with claims of loss. Under the method contemplated by these decision trees and the letters on the Forms CD-ROM, the following will be the ordinary course of a claim of loss:

1. Knowledge of claim
2. Acknowledgment of claim and delivery of claim notice form
3. Investigation of claim by insurer
4. Proof of loss by insured
5. Analysis of claim by letter, if not covered, or resolution of claim, if covered
6. Response, if any, by insured to claim analysis
7. Reply of insurer and acceptance of claim if warranted
8. If no response by insured, notice by insurer that it will close file

1.1.5 Claim Of Loss Decision Tree 2--Basis For Coverage

Consider the following issues in evaluating a claim of loss. Any one of the following issues may be a proper basis on which to deny a claim.

Has a policy been issued, or the premium paid and the commitment requirements met?	See §2.3.4 regarding proof that policy has been issued and §6.4 regarding commitment requirements and commitment cancellation.
Is the claimant an insured?	See Chapter 7 regarding the definition of insured.
Does the claim involve the land insured?	See Chapter 8 regarding the definition of Land.
Does the claim involve a covered title risk?	See Chapter 9 regarding covered title risks.
Is the matter excluded?	See Chapter 11 regarding policy exclusions.
Has the insured prejudiced rights by delay or otherwise?	See §2.3.3 regarding prejudice because of tardy notice.
Is the matter excepted?	See Chapter 12 regarding "standard" exceptions, including §12.7 as to exceptions specific to the insured title chain ("special" exceptions).

If it appears that the claim is covered, proceed to **§1.1.6 Claim Of Loss Decision Tree 3--Resolving Covered Claims.**

1.1.6 Claim Of Loss Decision Tree 3--Resolving Covered Claims

If a claim of loss is covered by the policy, the insurer will normally pursue one or more of the following options:

Pay policy limits	See §3.5 regarding this option.
Pay loss of less than policy limits	See §1.1.7 Paying Partial Loss decision tree.
Pay off a third party claimant	See §3.6 regarding this option.
Bring an action to clear title	See §3.4, discussing the right to clear title.
Get an easement or other instrument that will correct title	See §3.7 as to this option.
Pay the insured the salvage value of the real estate or mortgage	See §5.11 regarding the insurer's right of salvage.
Arbitrate with the insured as to liability, and/or damages	Arbitration is addressed at §2.10.

1.1.7 Paying Partial Loss

The following list gives the most common factors which go into deciding how to value a partial loss of land:

Review proof of loss	See §2.7 regarding proofs of loss.
Appraisal	Appraisal is one of two common methods of setting value. Appraisals and appraisal method are discussed at §3.2.3.6.
Mathematical formula	The second common means of valuing a partial loss is by use of a mathematical formula explained beginning at §3.2.3.5.
Does the coinsurance provision apply?	The coinsurance provision of the 1992 ALTA Owner's policy reduces the loss paid if the property is underinsured, is discussed at §3.2.3.3.
Should the parties arbitrate the amount of loss?	Arbitration is addressed at §2.10.

1.2 Using Included Sample Claim Forms

Sample claim letters, notices and other forms are printed in Appendix A and included in electronic format with the electronic version of this book. The Appendix A Forms are numbered. The electronic file names correspond to those numbers. Relevant Appendix A Forms are noted at the beginning of certain sections of the book. The use of these documents permits a claim administrator to further automate the claim handling process.

Appendix B contains ALTA and other policy forms. Those forms are also included in electronic format with the electronic version of this book.

2 Claim Administration

This chapter is intended as a guide to procedures and deadlines in responding to claims, the claim investigation, the insured's notice of claim and proof of loss, the effect of a tardy claim notice or a voluntary settlement of the claim, payment of loss, arbitration, and claim denials. The reader should also consult Chapter 1, which includes claim analysis decision trees and checklists, and instructions on use of the letters found in Appendix A.

The reader should take care to be familiar with applicable state insurance statutes or regulations. A number of states impose duties and standards regarding the subjects discussed in this chapter. This treatise does not attempt to annotate each state's regulations on the subjects discussed.

2.1 Unfair Claims Practice Acts

A number of states have adopted variants of the National Association of Insurance Commissioners' model Unfair Claims Practice Act (UCPA), deceptive trade practices acts, or similar statutes.[1] These statutes identify certain insurance claim handling practices that are prohibited by

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[1] Alaska Stat. § 21.36.125; Ariz.Rev.Stats. § 20-461; Ark.Stat.Ann. § 23-66-206; Cal.Ins. Code § 790.03 and Admin. Code Title 10 § 2695 et seq.; Colo.Rev.Stat. § 10-3-1104; Conn.Gen.Stat. § 38a-816 and § 42-110b; Del. Code Ann. title 18 § 2304 and Ins. Reg. 26; Fla.Stat.Ann. § 626.9541; Ga.Code Ann. §§ 33-6-30 to 33-6-37; Hawaii Rev.Stat. § 431:13-103; Idaho Code § 41-1329; 215 Illinois Compiled Statutes 5/154.6 (Insurance Act as to Improper Claims Practices) and 215 I.L.C.S. 155/1 et seq. (Title Insurance Act); Ind. Code Ann. § 27-4-1-4.5; Kan.Stat.Ann. § 40-2404 and §304.34-110; Ky.Rev.Stat.Ann. § 304.12-230; La.Rev.Stat.Ann. § 22:1214; Maine Rev.Stat.Ann. title 24-A § 2164-D; Md.Ann. Code article 48A § 230A; Mass.Gen.L. Chapter 176D § 3; Mich.Comp.Laws §§ 500.2006(4), 500.2026; Minn.Stat.Ann. § 72A.20(12); Mo.Rev.Stats. §375.1000 et seq. and 20 CSR 100-1 et seq.; Mont. Code Ann. § 33-18-201; Neb.Rev.Stat. §§ 44-1536 to 44-1544; Nev.Rev.Stat. §686A.310; N.H.Rev.Stat.Ann. § 417:4; N.J.Rev.Stat. § 17:29B-4; N.M.Stat.Ann. 59A-16-20; N.Y.Ins. Law § 2601 and N.Y.Admin. Code Title 11 §216.0 et seq.; N. Carol.G.S. §§ 58-63-15 and 75-1.1; N.D.Cent. Code § 26.1-04-03; Ohio Ins.Regs. Rules 3901-1-54 and 3901-1-07; Or.Rev.Stat. § 746.230; Pa.Stat. title 40 § 1171.5; R.I. Gen. Laws 27-29-4; S.C. Code Ann. §§ 38-59-10 to 38-59-50; S.D.Cod.Laws Ann. § 58-33-67; Tenn. Code Ann. § 56-8-104; Tex.Admin.Regs. § 21.203; Utah Code Ann. § 31A-26-303; Vt.Stat.Ann. title 8 § 4724; Va. Code Ann. § 38.2-510-17; Wash.Rev. Code Ann. § 284-30-300 and Wash.Admin.Code R. § 284-30-330; W.Va. Code § 33-11-4; Wis.Adm. Code § Ins. 6.11(3); Wyo.Stat. § 26-13-124.

See Annotation, *Scope and Exemptions of State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 399 for a good overview of these laws. For an excellent compilation of references to state insurance laws, see law.

Sections 3 and 4 of the UCPA list a number of prohibited acts:

Section 3. Unfair Claims Settlement Practices Prohibited
It is an improper claims practice for any domestic, foreign, or alien insurer transacting business in this State to commit any act defined in Section 4 of this Act if:

A. It is committed flagrantly and in conscious disregard of this Act or any rules promulgated hereunder; or

B. It has been committed with such frequency to indicate a general business practice to engage in that type of conduct.

Section 4. Unfair Claims Practices Defined
Any of the following acts by an insurer, if committed in violation of Section 3, constitutes an unfair claims practice:

A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;

B. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;

D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

F. Refusing to pay claims without conducting a reasonable investigation;

G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;

H. Attempting to settle or settling claims for less than the amount to which a reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;

I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;

J. Making claims payments to an insured or beneficiary without indicating the

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Rhodes, *Insurance Laws Annotated: Federal and Model Acts*, Standard Publishing Corporation (1994). The book covers all of the model acts promulgated by the NAIC, including the Property and Casualty Insurance Policy Simplification Model Act, Unfair Claims Practices Model Act, and the Unfair Trade Practices Model Act. It also gives good detail regarding the state variants of these model acts. This is a particularly handy reference for the person who must administer claims in more than one state.

coverage under which each payment is being made;

K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;

L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;

M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use;

N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner.

2.1.1 Regulations Promulgated Under UCPA--California

In 1977, the NAIC promulgated a set of regulations that correspond to the UCPA. The state of California adopted regulations on December 15, 1992 that are similar to the NAIC model regulations. The California regulations are found at Subchapter 7.5 of the California Administrative Code (§§ 2695.1-.17). Because of the high level of oversight created by the California regulations, the standards imposed by those regulations are referenced in this chapter. The NAIC model regulations are also noted. The reader should be familiar with the regulations in effect in the jurisdiction applicable to a claim.

2.1.2 Torts Based On Deceptive Trade Or Claims Practice Act

Claims practice and deceptive trade practice statutes have been applied to title insurers in several contexts other than as standards for claim administration. The Texas Deceptive Trade Practices Act, for example, has been the basis for an insurer's liability in tort for having failed to except an encumbrance on title, as discussed at §15.8. Also, compliance or lack thereof with an unfair claims practice act is sometimes considered evidence that an insurer acted in good or bad faith, in the context of a first-party bad faith suit, as discussed at §16.1.3.[2] Finally, some states have adopted insurance claim practice, vexatious refusal to pay or bad faith statutes that prescribe penalties for improper claim practices, as discussed at §16.1.3. Unfair claims practices acts may or may not support private causes of action, depending on the jurisdiction.[3] However, a court will sometimes permit the introduction of the practices described in such an act as evidence that the insurer acted in good faith or failed to do so. Most states do not consider an insurer to have a fiduciary duty toward the insured, as is discussed at §9.1.3.1.

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[2] See also Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 9:26, Thomson Reuters.

[3] See, for example, *Moradi-Shalal v. Fireman's Fund Ins. Co's*, 46 Cal.3d 287, 758 P.2d 58, 250 Cal.Rptr. 116 (1988); *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 498 N.W.2d 905 (Dist. 1 1993); Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 9:25, 9:35, Thomson Reuters.

2.1.3 Complaint To Insurance Department Based On Claim Denial

All or most state insurance departments have the statutory authority to investigate a complaint by an insured that an insurer has acted without justification in denying a claim for indemnity or tender of defense in litigation, and to sanction an insurer if state law or regulations are violated in the handling of a claim or by a pattern or practice in the insurer's claim administration. When an insured submits a complaint to the insurance department based on a claim denial or other claimed violation of state law, the insurance department typically asks the insurer to respond to the complaint by explaining its decision. The insurer typically has a specific and rather short period of time in which to respond.

Title insurers treat any complaint to or inquiry from an insurance department as an important matter. A title insurer responds to the insurance department within the allotted time and by giving a full explanation of its actions and the bases therefor. It is not uncommon for an insured to use the complaint process as a means of applying pressure on the insurer to reconsider its coverage determination. A reconsideration is always appropriate if the insured presents new facts or information suggesting that the coverage decision was incorrect or fairly debatable. However, absent such additional information, the insurer typically responds to the complaint by reiterating its original coverage position, sometimes with further elaboration for the benefit of the insurance department personnel. The insurer will sometimes further explain the status of the claim, especially if litigation has been brought by either party about the claim.

An insurance department may bring an administrative action against a title insurer if its handling of one or more claims is deemed by the department to violate state law. However, the filing of a complaint with the insurance department is not an administrative action by the department, or evidence that such an action is imminent.[4]

2.2 Claim File Retention And Documentation

Some states impose standards as to the number of years a claim file must be retained and preserved after a claim is resolved. In California, for example, the insurer must retain claim files for the preceding four years.[5] Another common requirement is that the insurer document all communication between its representatives and the insured. The NAIC Model Regulations require that claim records be available for inspection by a member of the insurance department, and that they "contain all notes and work papers pertaining to the claim in such detail that pertinent events and the dates of such events can be reconstructed."[6] California requires that the claim file contain all:

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[4] In *WFG Nat'l Title Ins. Co. v. Peniel Holdings, LLC*, 2016 WL 7117252 (N.D.Tex.) (unpublished), the court held that the fact that the insured had filed a complaint with the state insurance department over the insurer's refusal to pay a claim did not compel a federal court to abstain from ruling in the insurer's declaratory judgment action, under the notion that there was a pending administrative action before the state department. The court ruled that the complaint was not an administrative action, and its filing did not suggest that the insurance department was about to bring such an action.

[5] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.3.

[6] Section 4, Model Regulations (1977).

> documents, notes and work papers (including copies of all correspondence) which reasonably pertain to each claim in such detail that pertinent events and the dates of the events can be reconstructed and the licensee's actions pertaining to the claim can be determined... .[7]

To accomplish the above purpose, the state may obligate the insurer to mark each communication with the insured with the date on which it was sent or received.[8]

2.3 Notice Of Claim

FORM 58, Appendix A
Notice of claim form

The policy states that the insured is to give the insurer prompt, written notice of a claim. Conditions 3 and 18 of the 2006 ALTA policies state:

> 3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT
> The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.
>
> 18. NOTICES, WHERE SENT
> Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at [address].

The policy's notice provision has been found to be unambiguous and enforceable.[9] Despite the policy's clear requirement of notice to the company at the specified address, however, some state laws broaden the definition of notice of claim. In California, a "notice of claim" is defined as follows:

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[7] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.3(a).

[8] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.3(b)(2).

[9] In *Lurie v. Commonwealth Land Title Co., LLC*, 558 S.W.3d 583 (Mo.App.E.D. 2018), the insured argued that the notice provision in the 1992 ALTA owner's policy was "vague, undefined, and unenforceable." The court disagreed, saying that "policy conditions requiring the insured immediately to notify the insurance company of a claim and forward all legal documents to the insurer are valid, enforceable, binding, and of vital importance to the insurer." The court said that the ALTA notice provision "uses direct and clear language and 'prompt' is defined in the case law." The court took its definition of the word "prompt" from Missouri decisions construing policies under other lines of insurance.

> a verbal or written communication or communications by a claimant to an insurer or its claims agent that reasonably appraises the insurer of the following:
>
> (A) the date, time and place of the loss;
>
> (B) the name and address of the claimant and any other person(s) known by the claimant to be involved in the loss;
>
> (C) the name and address of the insured under the insurance policy in question; and
>
> (D) the insurance policy number, if known by the claimant... .[10]

However, the California regulations permit the insurer to require written notice of claim if the policy so states.[11]

2.3.1 Notice To Agent

State law controls on the issue of whether delivery of a claim notice to a policy-issuing agent is adequate notice of a claim. The court may apply general insurance or agency law to find that such notice is or is not an adequate substitute for the policy's requirement of written notice delivered directly to the insurer at the address stated in the policy.[12] In California, notice to a title agent (termed an "underwritten title company") is addressed by regulation specific to the title insurance industry:

> If a notification of a claim against the policy of title insurance is given to an underwritten title company which participated in the issuance of that policy of title insurance, then the insurer which issued that policy shall be under the duty to ensure that such underwritten title company immediately forward such claim to the insurer

[10] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.2(o).

[11] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.5(d).

[12] See *The Security Title Guar. Corp. of Baltimore v. GMFS, LLC*, 910 So.2d 787 (Ala.Civ.App. 2005), in which a statute stating that knowledge of an agent is imputed to the principal gave effect to a notice of claim that was delivered to the agent only, to excuse the insured's failure to deliver a tender of defense to the insurer until after the insured mortgage had been extinguished by a foreclosure and sale. In *Gibbs v. Williams*, 2015 WL 5440628 (W.D.Wis. 2015) (unpublished), the court found that an attorney did not commit malpractice by failing to submit a tender of defense to the insurer because a Wisconsin statute says that notice to an insurance agent is deemed to be notice to the insurer. See Wis.Stat. §631.09. Similarly, in *Purcell v. Land Title Guarantee Co.*, 94 Mo.App. 5, 67 S.W. 726 (1902), when an agent told the insured to ignore a mortgage and that the claim would be handled, the insured was justified in assuming that he had given sufficient claim notice. See also *Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 512 P.2d 667 (1973); *New Jersey Dep't of Environmental Protection v. DiFlorio*, 2007 WL 4553046 (N.J.Super.A.D.) (unpublished) (notice to agent only, and only orally rather than in writing, was not sufficient under state law or the terms of the policy); *Chicago Title Ins. Co. v. Bristol Heights Associates, LLC*, 2011 WL 4031565 (Conn.Super.) (unpublished) (meeting between agent who was also counsel for insured and underwriting counsel for insurer not deemed to be notice of claim); *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018) (insurer not entitled to summary judgment on tardy notice defense when insured alleged that he had given notice of the policy claim to the agent).

> responsible for the issued policy. The underwriting agreement between the insurer and underwritten title company shall provide for the duty of the underwritten title company to immediately forward such claim to the insurer.[13]

An insured sometimes seeks to overcome the prejudicial effect of his or her tardy notice of claim or tender of defense by asserting that he or she gave prompt notice to the policy-issuing agent. See §17.6 for a discussion of an agent's duties when it receives a notice of claim or tender of defense from the insured. The effect of an insured's submission of a tardy claim notice or tender of defense is discussed at §2.3.3.

2.3.2 Notice Of Claim Affecting More Than One Insured

Sometimes, the insurer receives notice of a title matter that affects more than one parcel or interest, and thus has the potential to affect more than one insured. For example, a construction lien or easement may affect several subdivision lots or condominium units.

An insured sometimes seeks to overcome the prejudicial effect of his or her tardy notice of claim or tender of defense by asserting that another insured put the insurer on notice. The effect of an insured's submission of a tardy claim notice or tender of defense is discussed at §2.3.3. An insured should not succeed in asserting that notice by a commonly-situated insured has excused the insured from giving separate notice of the claim to the insurer, for the reasons stated in §4.3 concerning tenders of defense. One important such reason is that a title insurer does not have a database of current insureds and their addresses, since title insurance policies can remain in effect for many years and no renewal premiums are paid. It would be extremely time-consuming for a title insurer to determine from public records whether or not any other policies it had issued that might be affected are still in force. In fact, only the insured has accurate information on policy termination, since the policy can be terminated by partnership dissolution, a person's death, corporation dissolution, stock transfer and other events that cannot be detected by a search of real estate records. See §7.8 regarding the termination of owner's policies.

If the insurer has actual knowledge that other insureds are affected, however, the insurer may wish to contact those insureds and ask what, if anything, the insureds want the insurer to do. The insurer should not assume that all insureds having the same title defect have the same policy coverage or loss. Thus, if the insurer contacts other insureds, the claim administrator may wish to request that they submit notices of claim and proofs of loss.

[13] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.11(a).

2.3.3 Prejudice Caused By Late Notice

FORM 91, Appendix A
Prejudice by tardy notice of claim

The policy states that the insurer's duties are terminated to the extent that the insurer is prejudiced by the insured's failure to give timely notice of a claim for indemnity. Condition 3 of the 2006 ALTA policies states that the insured shall give prompt notice of a claim, and that:

> If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

This provision corresponded to Conditions & Stipulations 3 of the 1992 ALTA policies. The 1992 ALTA policies and some other versions also contained provisions concerning tardy submission of a proof of loss. See §2.7 for a discussion of the proof of loss. The 2006 ALTA policies do not contain a corresponding provision concerning tardy submission of a proof of loss. The notice provision has been found not to be ambiguous.[14]

See below, this section, for a discussion of cases concerning a tardy tender of defense by the insured. An insured who tenders his or her defense to the insurer also has an obligation to cooperate with the insurer in the defense of the case, which includes a duty to act promptly. The cooperation duty in the defense of the insured in litigation is discussed at §4.10. The insured's duty to cooperate in the clearing of title is discussed at §3.4.1.2.

An insurer cannot have breached a duty to indemnify an insured when the insured has not submitted a claim notice and the insurer has not been given the opportunity to investigate the claim and make a coverage decision. Thus, an insured's lawsuit for breach of a duty to indemnify the insured is premature and not ripe unless the insured can allege that it has submitted a claim notice and the insurer has denied the claim.[15] One court found that the insured's delivery of a claim notice and proof of loss was not a condition precedent to policy coverage, but rather that the tardy notice limited the insured's recovery to the extent that the tardiness prejudiced the insurer.[16]

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[14] In *Lurie v. Commonwealth Land Title Co., LLC,* 558 S.W.3d 583 (Mo.App.E.D. 2018), the insured argued that the notice provision in the 1992 ALTA owner's policy was "vague, undefined, and unenforceable." The court disagreed, saying that "policy conditions requiring the insured immediately to notify the insurance company of a claim and forward all legal documents to the insurer are valid, enforceable, binding, and of vital importance to the insurer." The court said that the ALTA notice provision "uses direct and clear language and 'prompt' is defined in the case law." The court took its definition of the word "prompt" from Missouri decisions construing policies under other lines of insurance.

[15] See *Lennen v. Marriott Ownership Resorts, Inc.*, ___ F.Supp.3d ___, 2019 WL 1440092 (M.D.Fla. 2019) (permanent citation not yet available), appeal filed August 21, 2019, in which the court said that the insureds "have not sufficiently alleged that their cause of action is ripe as Plaintiffs do not state whether they have made a claim under their policy." The court cited *Yacht Club on the Intercoastal Condo. Ass'n v. Lexington Ins. Co*., 509 F. App'x 919, 922–23 (11th Cir. (Fla.) 2013) for the rule that, in Florida, a claim for breach of an insurance contract is not ripe until a claim has been made and denied by the insurer.

[16] *Commercial Credit Plan, Inc. v. Estate of Smith*, 1998 WL 312855 (Tenn.App.) (unpublished).

When the insured gives the insurer late notice of a claim, tender of defense, or proof of loss, the issue is the resulting harm to the insurer. A court will typically balance the economic harm to the insurer caused by a tardy claim notice, such as the loss of its subrogation rights against others, versus the harm to the insured in losing its policy benefits because of its tardy claim notice.[17]

The insurer is prejudiced when the insured or its agent or attorney became aware of the claim issue at a time when the insurer could have taken action to protect the insured, but gave notice to the insurer after that time had passed.[18] However, the insurer must prove that the insured was aware of the title issue when it was still possible to protect the insured.[19] The insurer has not sustained its burden of proof when it does not adduce evidence of a loss of rights or benefits.[20] A mere lapse of time between discovery of the title problem and notice to the insurer does not establish a bar to recovery, because harm does not automatically result from passage of time.[21] The prejudicial effect of a tardy claim notice may be ameliorated by a separate, prompt notice to the insurer's agent, even if notice to an agent is not generally deemed to be compliance with the policy's terms.[22] Also, a court may find that an insurer was not harmed by the insured's tardy claim notice when the insurer caused the title defect or knew of it on date of policy, and thus could have taken action to protect against the title risk before receiving the claim notice.[23]

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[17] See *Costagliola v. Lawyers Title Ins. Corp.*, 560 A.2d 1285 (N.J. Super. 1988), in which the court found that New Jersey law required proof of "appreciable harm" in order for late notice to bar the duty to pay an otherwise compensable defense cost.

[18] For example, in *Emigrant Bank v. Commonwealth Land Title Ins. Co*., 2017 WL 4286335 (S.D.N.Y.) (unpublished), the insurer was harmed because the tardiness of the claim notice prevented it from defending the priority of the insured mortgage or recovering from the borrowers and others. The court imputed the knowledge of the insured lender's counsel to the insured in finding that the insured knew of the title issue at a time when prompt notice would have prevented the prejudice. In *Lurie v. Commonwealth Land Title Co., LLC*, 558 S.W.3d 583 (Mo.App.E.D. 2018), the court held that the insured lost the right to make his insurer pay for a title lawsuit when he gave notice to the insurer years after the lawsuit was filed and dismissed.

[19] In *U.S. Bank, N.A. v. Ticor Title Ins. Co*., 2012 WL 2362456 (Mich.App.) (unpublished), the insured mortgage was extinguished by foreclosure of a prior condominium association lien that could have been resolved inexpensively by redemption. However, the court held that the insurer had not proven that the insured knew about the association lien before the redemption period expired, and thus did not establish the required prejudice.

[20] See *Resolution Trust Corp. v. American Title Ins. Co.*, 901 F.Supp. 1122, 1125 (M.D.La. 1995); *Personal Finance Co. v. Commonwealth Land Title Ins. Co.*, 678 So.2d 463 (Fla.App. 3 Dist. 1996); *Hilliard Properties, Inc. v. Commonwealth Land Title Ins*., 1997 WL 781727 (Ohio App. 8 Dist.) (unpublished); *U.S. Bank, N.A. v. Stewart Title Ins. Co*., 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007).

[21] *First Carolinas Joint Stock Land Bank v. New York Title & Mortgage Co.*, 172 S.C. 435, 174 S.E. 402 (1934).

[22] In *The Security Title Guar. Corp. of Baltimore v. GMFS, LLC*, 910 So.2d 787 (Ala.Civ.App. 2005), the insurer was found not to have been prejudiced by late notice when the insured gave notice to the title agent reasonably promptly. See §2.3.1 concerning notice of claim sent to a policy-issuing agent.

[23] In *Dreibelbiss Title Co., Inc. v. MorEquity, Inc.*, 861 N.E.2d 1218 (Ind.App. 2007), when a title insurer paid off a home equity loan but failed to deliver the borrowers' "close my account" instruction, and the insured lender was wiped out by the equity lender's foreclosure, the insured lender's failure to either tender the foreclosure to the title company or to contest priority was found not to negate policy coverage. In *U.S. Bank, N.A. v. Stewart Title Ins. Co*., 37 A.D.3d 822,

The most common form of prejudice is the loss of the opportunity to assert a meritorious defense.[24] Prejudice occurs when the insured makes a tender after a default judgment has been taken against it or the lawsuit has been concluded, if the insurer could have asserted meritorious defenses on behalf of the insured.[25] Tender of defense after the lawsuit has been settled has been found to prejudice the insurer by depriving it of the opportunity to present any meritorious defenses.[26] A

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832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007), an insurer was found to have waived the defense of tardy notice when it was aware of the lien and had agreed to indemnify against it, albeit on the mistaken assumption that the debt had been paid. In *Moe v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 289, 98 Cal.Rptr. 547 (Cal.App. 1 Dist. 1971), the property was sold by a bankruptcy trustee free and clear of liens, including the insured deed of trust. The insurer had removed from its policy a reference to the already-pending bankruptcy and certain prior liens. The insured defended against the sale free and clear with some vigor, but without success. The court found that the insurer was not prejudiced by the insured's tardy claim notice because it was aware of the sale terms when it issued the policy.

[24] *Worthey v. Sedillo Title Guaranty, Inc*., 85 N.M. 339, 512 P.2d 667 (1973); *Countrywide Home Loans, Inc. v. Stewart Title Guar. Co*., 2008 WL 2595185 (E.D.Wis. 2008) (unpublished); *SAA Group, LLC v. Old Republic Nat'l Title Ins. Co*., 2011 WL 1815725 (Mass.Super.) (unpublished) (claim notice sent a year after a lawsuit was filed that did not refer to lawsuit or request a defense was not a tender of defense; tender made eight months later, after judgment was entered, was tardy and prejudicial, because several valid defenses had not been asserted, terminating coverage); *U.S. Bank, N.A. v. First American Title Ins. Co*., 2012 WL 1080876 (M.D.Fla.) (unpublished) (lender's tender one week before summary judgment was entered prevented insurer from asserting equitable subrogation, which would have reduced loss payable to lender; prejudice equal to amount of paid-off loan). In *Huntington Nat'l Bank v. First American Title Ins. Co*., 2012 WL 1890233 (Mich.App.) (unpublished), an insured lender was found to have terminated coverage as to two construction liens by tendering its defense in the lien foreclosure action 16 months after the suit was filed and, most importantly, three weeks after signing a stipulation admitting that the liens had priority over the insured mortgage. The court said the insurer need not prove that it could have succeeded in the litigation, but only that, bound by the stipulations, it faced "almost certain liability" and had "little opportunity to control the direction of the legal proceedings."

[25] In *Washington Mutual Bank v. Commonwealth Land Title Ins. Co.*, 2010 WL 135685 (Tex.App.-Corpus Christi) (unpublished), a lender voided its policy coverage because it prevented the title insurer from defending the deed of trust by sending its notice of claim four months after the insured deed of trust was extinguished in bankruptcy under an agreed judgment. In *Countrywide Home Loans, Inc. v. Stewart Title Guar. Co.*, 2008 WL 2595185 (E.D.Wis. 2008) (unpublished), the insured lender tendered after it had been wiped out in the foreclosure of a senior lien. The insurer established that it could have raised meritorious defenses, including equitable subrogation. The court found that the tardy tender negated coverage. It rejected the lender's argument that the insurer might still have settled with the competing lender: "… Countrywide argues that Stewart could have asserted the defenses despite the fact that by the time it learned of the action, a default judgment had already been entered in favor of Associated Bank. In Countrywide's view, "[t]he entry of judgment did not preclude Stewart from attempting to settle the title claim." … But of course, this makes no sense. Once judgment is entered against a party, it is too late to assert a defense, no matter how meritorious, unless the judgment is vacated and the case reopened. Countrywide attempted to do that here, but its motion to vacate the judgment was denied because it was unable to show excusable neglect. … Stewart was unable to assert either of the two potentially meritorious defenses to Associated Bank's claim of priority. The untimely notice resulted in 'a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim.'" In *Lurie v. Commonwealth Land Title Co., LLC*, 558 S.W.3d 583 (Mo.App.E.D. 2018), the court held that the insured lost the right to make his insurer pay for a title lawsuit when he gave notice to the insurer years after the lawsuit was filed and dismissed.

[26] In *Gayheart v. Midland Title Security, Inc.*, 2004-Ohio-2536, 2004 WL 1109525 (Ohio App. 5 Dist.) (unpublished), the proposed insured's deed was attacked as a forgery. The insured was sued, but failed to tender the action until it was resolved. The court found the commitment had expired, and that its requirement for a "proper deed"

notice of claim made prior to the time the insured is sued is not a tender of defense, and the lack of a tender of defense after the litigation is commenced will typically prejudice the insurer.[27] An insurer may be prejudiced by a tardy tender that prevents the insurer from selecting defense counsel and supervising the litigation, which are its rights under the ALTA policy.[28]

The insurer is prejudiced when the insured gives notice to the insurer after it has already lost the ability to protect the title insured, or the delay in giving notice increases the cost of preserving the insured's rights.[29] For example, the insurer is prejudiced when an insured lender gives notice of a claim concerning a superior lien after the foreclosure of that lien has extinguished the insured mortgage.[30] An insured's tardy tender of its defense in litigation, or its failure to make a tender

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had not been met. It also found the tardy claim notice negated any duty to aid the insured: "[Gayheart's] present damages claim rings hollow when he proposes that Midland 'should have come to his rescue at the time of the settlement conference and/or paid his legal expenses in trying to get the matter resolved.' ... [I]t is difficult for a title insurer to come to the rescue when its alleged insured voluntarily intervenes in a prior action and no notice is provided to the insurer."

[27] *Armitage v. First American Title Ins. Co.*, 2007 WL 2137954 (Cal.App. 1 Dist.) (unpublished).

[28] In *Lurie v. Commonwealth Land Title Co., LLC*, 558 S.W.3d 583 (Mo.App.E.D. 2018), the court said the prejudice to the insurer was in the fact that "it was deprived of its specifically expressed contractual rights under the Policy to direct the litigation, pursue a settlement, and most importantly in this case, select the counsel of its choice." In *Huntington Nat'l Bank v. First American Title Ins. Co*., 2012 WL 1890233 (Mich.App.) (unpublished), an insured lender was found to have terminated coverage by tendering its defense 16 months after suit was filed and after signing a stipulation admitting the priority of competing liens over the insured mortgage. The court said the insurer proved prejudice by showing that it was bound by the stipulations and faced "almost certain liability," and that it had "little opportunity to control the direction of the legal proceedings."

[29] *Pike v. Conestoga Title Ins. Co.*, 44 N.E.3d 787 (Ind.App. 2015) (owner insured's delivery of claim notice about tax foreclosure after redemption period expired was tardy and prejudiced insurer, voiding policy coverage). However, in *Emigrant Mortgage Co. v. Commonwealth Land Title Ins. Co.*, 4 N.Y.S.3d 491, 126 A.D.3d 636, 2015 N.Y. Slip Op. 02684 (N.Y.A.D. 2015), a lender's claim notice that informed the insurer that the deed to its borrower might not have been signed by all of the owners was adequate notice of the dispute, although the lender did not inform the insurer of a judgment voiding the deed until after it was entered.

[30] *Countrywide Home Loans, Inc. v. First American Title Ins. Co*., 2012 WL 516824 (Cal.App. 1 Dist.) (unpublished) (rejecting lender's assertion that it was excused from giving prompt notice because it assumed that other lender's deed of trust was junior and its trustee's sale did not threaten the insured); *Wainco Funding v. First American Title Ins. Co*., 219 A.D.2d 598, 631 N.Y.S.2d 81 (N.Y.A.D. 2 Dept. 1995) (insured prejudiced insurer by giving notice after tax lien proceeding extinguished insured mortgage); *Zev Cohen, LLC v. Fidelity Nat'l Title Ins. Co.*, 15 Misc.3d 798, 831 N.Y.S.2d 689 (N.Y.Sup. 2007) (late notice took away all "meaningful opportunity to investigate, litigate or defend" insured mortgage); (*CitiMortgage, Inc. v. Shapiro*, 2015 WL 412869 (D.Mass.) (unpublished) (lender that received notice of judgment execution sale that wiped out its mortgage, but neither redeemed nor made a claim before sale, entitled to claim payment of amount it would have cost to redeem from sale, but no more); *Emigrant Bank v. Commonwealth Land Title Ins. Co*., 2017 WL 4286335 (S.D.N.Y.) (unpublished) (insurer harmed because tardy claim notice prevented it from defending priority of insured mortgage or recovering from borrowers and others). However, in *Green Tree Servicing, LLC v. Chicago Title Ins. Co.*, 499 S.W.3d 771 (Mo.App.E.D. 2016), the court held that an insured lender's claim notice that was submitted only after a competing lender had held its non-judicial foreclosure sale was not tardy as a matter of law, and did not support a motion to dismiss the insured's suit on the policy. The court held that the insured lender was entitled to try to prove that it was excused from giving notice earlier because it reasonably assumed that the other lender held a junior lien that would not wipe out the insured's lien on foreclosure. The foreclosing lender had signed a subordination of its lien to the insured's mortgage, although the loan closer had failed to record the

before the lawsuit is completed, will negate the duties to defend and indemnify if the insurer is prejudiced.[31]

An insured also causes prejudice to the insurer if it vitiates the insurer's subrogation rights.[32] For example, when the insured delayed in presenting the claim for 18 months, thus precluding the insurer from recouping against perpetrators of a fraud, the prejudice of the insurer's subrogation rights negated coverage.[33] However, the insurer is not prejudiced by the insured's failure to preserve subrogation rights if no such right existed.[34]

The insurers is also prejudiced when the insured takes action concerning the title claim issue before it gives notice to the insurer, and the insured's actions frustrate or limit the insurer's ability to cure title. One common example of this type of prejudice is when the insured seeks to negotiate a cure to the title defect before giving notice to the insurer, which attempt is rejected by the adverse

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subordination. In *Lurie v. Commonwealth Land Title Co., LLC,* 558 S.W.3d 583 (Mo.App.E.D. 2018), the same court distinguished *Green Tree*, holding that the insured lost the right to make his insurer pay for a title lawsuit when he gave notice to the insurer years after the lawsuit was filed and dismissed. The *Lurie* court said the prejudice to the insurer was in the fact that "it was deprived of its specifically expressed contractual rights under the Policy to direct the litigation, pursue a settlement, and most importantly in this case, select the counsel of its choice."

[31] *Buquo v. Title Guaranty & Trust Co.*, 20 Tenn.App. 479, 100 S.W.2d 997 (1936); *Atlanta Title & Trust Co. v. Fulkalb, Inc.*, 56 Ga.App. 742, 193 S.E. 796 (1937); *IDC Properties, Inc. v. Chicago Title Ins. Co*., 974 F.Supp.2d 87 (D.R.I. 2013) (insurer required to prove prejudice caused by tender of defense after lawsuit was completed). The insured's obligation to make a tender of defense is discussed at §4.3. In *Gibbs v. Williams*, 2015 WL 5440628 (W.D.Wis. 2015) (unpublished), the court agreed that an attorney's failure to submit a tender of defense to the insurer would have caused harm to the insureds because they paid for their own defense, except that the court also ruled that the insurer had no duty to defend the insureds because coverage was excluded. However, in *Emigrant Mortgage Co. v. Commonwealth Land Title Ins. Co.*, 4 N.Y.S.3d 491, 126 A.D.3d 636, 2015 N.Y. Slip Op. 02684 (N.Y.A.D. 2015), a lender's claim notice that informed the insurer that the deed to its borrower might not have been signed by all of the owners was adequate notice of the dispute, although the lender did not inform the insurer of a judgment voiding the deed until after it was entered.

[32] In *Interbay Funding, LLC v. Lawyers Title Ins. Corp.*, 2003 WL 22939275 (E.D.Pa. 2003) (unpublished), the insured lender delayed submitting a notice of claim until after it had completed foreclosure and waived its right to a deficiency judgment against the borrowers. It then submitted its claim concerning liens omitted from the policy. The court found that the claim notice was not timely, but that fact "does not purport to authorize wholesale denial of a claim for a bare failure to notify promptly." Rather, the insurer had the burden of proving an amount to serve as a setoff against policy liability. In *Branch Banking & Trust Co. v. Chicago Title Ins. Co.*, 714 S.E.2d 514 (N.C.App. 2011), the court found that a notice of claim that was sent a year after the insured discovered the title problem did not prejudice the insurer's subrogation rights, because it still had eight days in which to decide to sue a law firm for malpractice and to file the action before the statute of limitation ran. The court justified the ruling by further holding that the insurer was "presumed to have had knowledge of" the title defect from the date of policy, since it was in the public records. In *Emigrant Bank v. Commonwealth Land Title Ins. Co*., 2017 WL 4286335 (S.D.N.Y. 2017) (unpublished), the insurer was harmed because the tardy claim notice prevented it from recovering from the borrowers and others.

[33] *Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 512 P.2d 667 (1973). See also *Hartman v. Shambaugh*, 96 N.M. 359, 630 P.2d 758 (1981), and *Attorneys' Title Ins. Fund v. Rogers*, 552 So.2d 329 (Fla.App. 1989).

[34] In *Atlanta Title & Trust Co. v. Allied Mortgage Co.*, 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940), the insurer was not harmed when the insured paid off real estate taxes and failed to get an assignment of rights to the insurer, because the seller was not personally liable for the tax debt.

party, and has the effect of negating or limiting the insurer's ability to negotiate a cure. An insurer is not obligated to pay a ransom price to cure title just because the insured has alienated the adverse party. See cases discussed at §3.2.3.1.2. To establish prejudice to its right to clear title, the insurer must establish that there was a good faith basis on which to seek to clear title or defend the insured's interest in the property.[35]

Similarly, an insurer is prejudiced if the insured sells the property before giving the insurer the ability to cure title. The insurer's prejudice is increased if the insured incurs new or additional liability in the course of the sale.[36]

The insurer suffers a form of automatic prejudice to its ability to resolve a covered claim when the first notice of the claim from the insured to the insurer is its filing of a suit for breach of policy. The insurer cannot breach a duty to indemnify the insured if it does not receive a claim notice and have the opportunity to respond in one of the numerous ways provided under the policy. For example, in *Commercial Credit Plan, Inc. v. Estate of Smith*,[37] the insured first submitted a claim notice, to the agent, five months after the insured became aware of the title dispute. The insured gave no notice to the insurer before it sued the company for breach of contract. The court found that a five-month delay did not constitute prompt notice. Further, it found that the expense of the litigation was itself prejudicial to the insurer:

> The issue then becomes whether the five-month delay in giving notice, or CCP's failure to provide written notice and proof of loss in accordance with the terms of the policy, prejudiced the rights of TRW. TRW asserts that it has incurred attorney fees in the instant litigation that it would not have otherwise incurred if it had received proper notice. It is undisputed that CCP did not comply with the policy provisions requiring written notice of the claim and written sworn proof of loss. It appears that such policy provisions are designed, at least in part, to provide the insurer an opportunity to assess its options without incurring litigation expenses. In this case, TRW did not have that opportunity and was prejudiced to the extent of the extra expense incurred.[38]

Therefore, the court ruled that the insurer was entitled to credit its expenses in the litigation against any judgment in favor of the insured establishing a compensable loss under the policy.

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[35] In *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co.*, 657 A.2d 890 (N.J. Super. 1995) because the insurer had not proven that it would have been able to cure title, the court found no "appreciable harm" in late notice. Both the insured mortgage and a prior, undisclosed mortgage were obtained by forgery. Even if the insurer had defeated the prior mortgage, the insured mortgage would still have been void.

[36] In *Stewart Title Guar. Co. v. Lunt Land Corp.*, 162 Tex. 435, 347 S.W.2d 584 (Tex. 1961), for example, an insurer was prejudiced when an insured sold the property and incurred warranty liability before permitting the insurer to remove the encumbrance on title.

[37] 1998 WL 312855 (Tenn.App.) (unpublished).

[38] Id. at 4.

When the insured submits a tender of defense, the insurer may be prejudiced for reasons other than tardiness causing the insurer to lose the ability to raise a meritorious defense. In *Security Union Title Ins. Co., v. Usnick,*[39] the insureds' tardy tender was found to negate any defense duty, because the insurer could have had the insureds defended by the same counsel who defended numerous other insureds. The prejudice was in the increased expense of a second set of lawyers. Also, an insured's attempt to cure title may cause policy coverage to terminate if the insured's self-help prejudices the insurer. For example, when the insured first tendered defense after judgment had been entered foreclosing the insured's lien and after the insured failed to bid at the sheriff's sale, it was found to have prejudiced the insurer and terminated policy coverage:

> The delay of plaintiff in giving defendant notice of this foreclosure action prejudiced defendant as a matter of law since defendant was improperly deprived under condition 2(b) of the policy, of its right to defend said foreclosure action, and of its right to prevent or reduce any loss. Under the circumstances, the defendant is relieved of any liability in the second cause of action.[40]

However, when the insurer is not prejudiced by the tardiness of the tender, the late notice does not erase the duty to defend.[41] In the *Usnick* decision discussed above, the court found no prejudice as to a second mortgage in foreclosure, despite a six-month delay in claim tender, because as to that mortgage there was still sufficient time to assert the insured lender's priority before the foreclosure sale. In another case, even though the tender was made after mediation, the court found no prejudice due to the tardy notice.[42] Also, when an insured settled the suit by agreeing to the

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[39] Dec. 15, 1998, case no's C97-1986L and C98-1445L, U.S.Dist.Ct. W.D.Wash. (unpublished). In that case, the United States filed suit against the State of Washington to assert Native American tribal rights to take shellfish from tidelands. The insureds were owners of tidelands property and members of an association known as UPOW formed to intervene in the suit. Non-UPOW insureds tendered to the title insurers, who retained a set of lawyers to intervene. The UPOW members hired different counsel. They did not tender their "defense" in the suit until after trial had been held and an appeal filed. The court ruled that this delay caused prejudice because the UPOW members could have been represented by counsel already retained by the insurers. "As it is, they are being asked to pay to defend the Shellfish Case twice." The court found as a matter of law that this was so prejudicial that it negated any duty to defend the insureds. Another court found, however, that the insurer had a duty to pay for the defense even though it was tendered after the suit was finished, because there was no showing that the late notice caused substantial prejudice. The *Usnick* decision on policy coverage is not published or available. One of the many decisions on the merits of the shellfish controversy is *United States v. State of Washington*, 157 F.3d 630 (9th Cir. (Wash.) 1998).

[40] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 595 N.Y.S.2d 302, 307 (Sup. Ct. 1993), holding affirmed on appeal, 641 N.Y.S.2d 13 (N.Y.A.D. 1 Dept. 1996).

[41] In *Dreibelbiss Title Co., Inc. v. MorEquity, Inc.*, 861 N.E.2d 1218 (Ind.App. 2007), the insurer was found to have known of the title defect, an unreleased mortgage, due to its own failure to close the loan account, and thus was not prejudiced by the insured's failure to tender defense until after a judgment had wiped out its lien.

[42] *TES Properties, LLC v. Ticor Title Ins. Co.*, 2008 WL 1767713 (S.D.Tex.) (unpublished). Nonetheless, the court held that the insured was barred from seeking its legal fees from the insurer because, at mediation, it signed a release that waived collection of attorneys' fees.

imposition of a judgment before tendering defense, and the insurer's only claimed prejudice was the loss of the ability to negotiate a more favorable settlement rather than to raise a meritorious defense, the court found no prejudice.[43]

Finally, the policy states that the insured shall promptly provide a proof of loss. An insured may prejudice its right to recovery by failing to provide a proof of loss, but under certain circumstances the insurer may be found to be estopped to assert that the failure to provide a proof of loss has an effect on coverage.[44]

2.3.4 Proof Of Policy Issuance

As part of a notice of claim or tender of defense, the claimant must produce evidence that he or she is an insured under a policy that remains in effect. This subject is also discussed in the context of the insurer's claim investigation, at §2.6.

Thus, typically, the insured must produce the policy in order to have a claim honored.[45] If the claimant is unable to establish the existence of a policy, the insurer is entitled to deny the claim.[46] The title insurer typically requires proof that the claimant has possession of the original policy. This proof is most often supplied by the claimant's delivery to the insurer of a copy of the policy. However, secondary evidence of the policy's existence may sometimes be admitted when the original has been lost.[47] Further, when no policy has been issued but all conditions to its issuance have been met, in most cases the insured makes a sufficient proof of insurance by establishing those

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[43] *New Jersey Dep't of Environmental Protection v. DiFlorio*, 2007 WL 4553046 (N.J.Super.A.D.) (unpublished).

[44] *Lagomarsino v. San Jose Abstract & Title Ins. Co*., 178 Cal.App.2d 455, 3 Cal.Rptr. 80 (1960) (insurer estopped to raise insured's failure to deliver prompt proof of loss as coverage defense); *U.S. Bank, N.A. v. First American Title Ins. Co*., 2012 WL 1080876 (M.D.Fla.) (unpublished) (insurer estopped to raise failure to submit proof of loss because law firm had submitted many other claim notices and insurer "had a practice of acting upon those claim letters … without subsequently requiring a separate proof of loss").

[45] An insurer was found not to be liable under a forged policy in *Flagstar Bank, FSB v. Ticor Title Ins. Co*., 660 Supp.2d 346 (D.Conn. 2009). In *Clair v. First American Title Ins. Co.*, 2007 WL 1063989, 2007-Ohio-1681 (Ohio App. 9 Dist.) (unpublished), when the plaintiff proved that he had paid a premium, but could not produce the title insurance policy, and the insurer produced affidavits showing that it had no record of having issued either a commitment or policy to the plaintiff, the insurer was found entitled to summary judgment declaring that the plaintiff had failed to prove that he was an insured.

[46] See *Johnson v. Law Office of Schwartz*, 145 A.D.3d 608, 46 N.Y.S.3d 1, 2016 N.Y. Slip Op. 08931 (N.Y.A.D. 1 Dept. 2016), in which the court dismissed an action against Stewart Title based on the insurer's evidence that the claimant received a policy from First American Title, and had never proven that he held a policy issued by Stewart Title or was owed such a policy.

[47] In *Van de Bovenkamp v. United Title Co.*, 2006 WL 3530473 (Cal.App. 2 Dist.) (unpublished), the court refused to grant a motion to dismiss a complaint for breach of contract based solely on the grounds that the insured was unable to locate the policy. It relied on a case which held that the contents of a lost insurance policy may be proved by secondary evidence, although the burden is on the insured to establish the substance of each policy provision essential to the claim of relief. It found this lesser standard allowed the complaint to survive a motion to dismiss. The insured alleged a contract on information and belief, which the court said "is sufficient to establish the existence of a contract for title insurance…" for purposes of such a motion.

facts. See §6.4 for a discussion of the title insurance commitment's conditions and requirements for issuance of a policy.

Insureds often do not understand why they must establish the existence of a title insurance policy, because insurers in other coverage lines have reliable databases of their current insureds. Title insurance is unique in that it provides almost exclusively retrospective coverage, the insured does not pay renewal premiums, and the policy permits successor insureds. Thus, a title insurer is not able to maintain such a database because it does not receive renewal premiums from its insureds and the policies have no fixed term but can remain in effect for many years. A title insurer has no regular communication with the insured and is not notified when the insured changes its address. Also, many policies are issued by title agencies, approved attorneys and other independent companies. In other lines of insurance, independent agents can issue binders of insurance but policies are always issued directly by the insurer. The insurer then makes the policy and the insured part of its master database of insureds. The title insurance agent has authority to issue policies largely because the title insurer does *not* keep a master database of its insureds. Thus, the insurer has no central repository of policies in effect. These are the reasons why the claimant must establish the existence of the policy as part of its notice of claim.

2.4 Claims In Which Insureds Are Adverse To Or Aligned With Each Other

When one insurer has issued policies to two or more parties who are adverse to each other in a dispute concerning title, the insurer has separate duties to each insured. It is often a prudent practice in such cases for the insurer to designate different claim administrators for each claim, to limit the possibility that the strategy of one insured could be transmitted to the other insured through the claim administrator. In some situations, it may even be advisable to instruct the two claim administrators not to discuss the claims with each other.

The insurer is sometimes in the unenviable position of paying to prosecute an action to clear title and in defending that action, on behalf of its two (or more) adverse insureds. However, in no sense does an insurer in such a situation have a "conflict of interest," as that concept applies to attorneys.[48] Also, when the insurer is able to establish that its decisions are in line with the coverage of the dueling policies, it is not liable for bad faith damages on the allegation that the insurer has chosen sides for one insured and against the other.[49] Also, the insurer is not estopped from denying coverage to one insured because it has accepted coverage as to its other insured that is adverse to the first, because each policy's coverage or lack thereof must be decided separately and on the basis of

[48] In *Fogg v. Fidelity Nat'l Title Ins. Co.*, 89 A.3d 510 (D.C.App. 2014), the insurer had issued policies to both parties who claimed to be the owner of the property, and the insurer was asked to defend the one insured in the suit brought by the other. The insured asserted that the insurer had a "conflict of interest" as a result. The court said that the insurer did not assume a fiduciary duty by entering into an insurance contract and that "there is no conflict of interest when an insurer issues title insurance to different buyers of the same property."

[49] In *Fekade v. First American Title Ins. Co.*, 2011 WL 4906818 (Cal.App. 6 Dist.) (unpublished), the court ruled that the insurer did not act in bad faith toward the plaintiff insured by providing a defense for its other insured, the defendant neighbor whom the insured sued, while refusing to prosecute the action because it did not invoke coverage.

the policy's terms.[50] Thus, the insurer may not be sued by one insured based on the allegation that the insurer has inflicted emotional distress on that party by prosecuting or defending a title clearance lawsuit on behalf of the other insured.[51]

In some cases, one insurer has issued policies to two or more insureds whose interests are aligned in title litigation. In such cases, it is common for the title insurer to appoint the same retained counsel to represent all of the insureds. It is also common for that retained counsel to be supervised by one claim administrator as to all insureds. The fact that the same insurer pays for the defense of several insureds and appoints the same retained counsel does not create a joint defense agreement, under which there is no attorney-client privilege as between the joint defendants.[52]

2.5 Claim Acknowledgment and Processing Deadlines

FORM 1, Appendix A
Acknowledgment of receipt of claim

FORM 58, Appendix A
Notice of claim sample

A title insurer is required to acknowledge receipt of a claim notice from an insured. The acknowledgment letter or notice often further provides the insured with the claim number and the claim administrator's name, address and telephone number.

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[50] In *631 North Broad Street, LP v. Commonwealth Land Title Ins. Co.*, 2018 WL 4051798 (E.D.Pa. 2018) (unpublished), aff'd 2019 WL 3383878, 778 Fed.Appx. 164 (3rd Cir. (Pa.) 2019) (unpublished), the insurer was not required to defend its insured in a lawsuit about ownership of a portion of a wall located adjacent to the insured parcel, because the policy did not insure the title to the wall or the land on which it rested. Further, the insurer was not estopped from denying coverage because it had agreed to defend the neighboring owner in the same lawsuit. The neighbor was also an insured. The wall at issue was located on that insured's parcel and that policy did not contain a survey exception. The appeals court stated that Commonwealth could not be backed into "defending" one insured, under the doctrine of quasi-estoppel, because it had paid for the other insured's defense, because the two decisions were not inconsistent coverage positions. Rather, the coverage was simply different under the two policies.

[51] In *Van de Bovenkamp v. United Title Co.*, 2006 WL 3530473 (Cal.App. 2 Dist.) (unpublished), the court dismissed a claim of intentional infliction of emotional distress brought by a person claiming to be an insured, which was based on the premise that the lawsuit against them had been financed by the title insurer on behalf of its other insured. The court said: "[A]ppellants' emotional distress claims focused on Chicago Title's actions in paying the Developer's litigation expenses for the Underlying Lawsuit and the mental anguish caused by being involved in that lawsuit. Appellants concede, however, that Chicago Title owed a contractual duty to the Developer, having issued it a title policy. A title insurer's decision to accept a duty to defend a party insured under a valid policy cannot be construed as extreme and outrageous conduct. Nor can the title insurer be held responsible for the actions of counsel in vigorously seeking to enforce their client's rights."

[52] See *Hall CA-NV, LLC v. Ladera Development, LLC*, ___ F.Supp.3d ___, 2019 WL 5448458 (D.Nev. 2019) (permanent citation not yet available), which held that the fact that a law firm was hired by the same title insurer to represent two lenders in mechanic's lien litigation did not mean that there was a joint representation entitling one insured to look at the law firm's confidential file for the other insured client.

Many states impose deadlines for the insurer's issuance of a notice acknowledging receipt of the claim notice.[53] Some state laws mandate that certain notices be incorporated in the claim acknowledgment letter.

The insurer may also use the claim acknowledgment letter to deliver a notice of claim form or proof of loss that the insured is instructed to complete and return to the insurer. A formal notice of claim form can be useful in assisting the claim administrator in analyzing the claim, particularly if the insured's first contact was not in writing or was not very descriptive of the claim issue.

California has established a series of deadlines by which different types of claim responses must be sent by the insurer.[54] All time periods are based on calendar days. The deadlines are as follows:

Response to notice of claim including any claim forms and initiation of investigation	15 days from receipt of notice of claim
Notice that additional 30 days required to accept or deny	40 days from receipt of proof of claim
Accept or deny liability Affirm or deny coverage	40 days from receipt of proof of claim unless time extended
Payment of loss or action to resolve title defect	30 days after affirmation of coverage and liability
Written report to insurance department inquiry	21 days from inquiry by department

When an insurer elects to clear title, the time for paying a covered claim is extended accordingly.[55] However, a Georgia court held that the time for claim payment was not extended while the insurer considered whether or not it would pursue the option of suing to clear title, and ultimately declined to do so.[56]

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[53] See, for example, California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.7 (15 day deadline in which to acknowledge receipt of claim).

[54] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.7.

[55] See *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994), which held that the time for payment of the claim began to run when the title insurer's lawsuit to clear title reached its final determination.

[56] *Atlantic Title Ins. Co. v. Aegis Funding Corp.*, 287 Ga.App. 392, 651 S.E.2d 507 (Ga.App. 2007).

2.6 Investigation Of Claim

The insurer conducts some form of review or investigation of each policy claim. There is not a standard type of claim investigation, because the investigation depends on the nature of the claim. When the investigation is completed, the insurer issues a coverage determination, as discussed at §2.13.

The ALTA policy forms do not contain any statement about an insurer's obligation to investigate a claim.[57] However, Texas policy forms do. Condition 3 of the Texas T-1 Owner's policy and T-2 Loan Policy state that, on receipt of a notice of claim, the insurer:

> ... shall promptly investigate the charge to determine whether the lien, encumbrance, adverse claim or defect is valid and not barred by law or statute. The Company shall notify the insured in writing, within a reasonable time, of its determination as to the validity or invalidity of the insured's claim or charge under the policy.

Condition 4(b) of the Texas T-1R Residential Owner's policy states, similarly:

> If you report to us that a covered title risk exists, we will promptly investigate to determine if that covered title risk is valid and not barred by law or statute.

Title insurance claims vary widely in their nature and complexity, so no benchmark exists as to the scope of the investigation that must be done on an "average" claim. The investigation performed by an insurer in response to a tender of defense is typically more limited than that conducted for a claim of indemnity. The method prescribed in most jurisdictions for determining the duty to defend is to compare the words in the pleading with the words in the policy. In many states, the insurer is precluded from considering other information. The investigation time is typically quite short. However, there are circumstances in which a more elaborate investigation is appropriate.[58]

State laws often impose a time period for the claim investigation. For example, Section 7 of the NAIC Model Regulations states that the insurer "shall complete investigation of a claim within thirty days after notification of claim, unless such investigation cannot reasonably be completed within such time." It is not uncommon for a title insurer to inform the insured that its claim investigation will take longer than the standard time period. In California, if the insurer needs more

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[57] One court found that the lack of a claim investigation provision in the ALTA policy gave the insurer "significant leeway for Stewart Title to evaluate and pay claims," putting the burden on the insurer to prove the reasonableness of its handling of the claim without providing a safe harbor for timeliness or diligence. *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished).

[58] See *Mulhearn v. Lawyers Title Ins. Corp.*, 2014 WL 213554 (Cal.App. 2 Dist.) (unpublished), rev.den. April 9, 2014, in which the court found that "[t]here was no unreasonable conduct or delay" when it "made a coverage determination within six weeks, and then reasonably reconsidered and provided coverage subject to a reservation of rights two-and-a-half weeks later." It said: "Lawyers Title was entitled to a reasonable amount of time to process and investigate Mulhearn's claim, which he made more difficult by tendering claims on behalf of himself as an individual and as trustee." The court further ameliorated the effect of the investigation period by ruling that the insurer was required to pay the defense costs incurred by the insured during the time from tender to the insurer's acceptance of the defense.

than 40 days to investigate after receiving a "proof of claim" from the insured (see the explanation for this statutorily-defined term in §2.7), the insurer must write to the insured to extend the time and to state why more time is needed. That letter extends the investigation period by 30 days. Any additional extensions must also be supported by such a letter.[59]

See the decision trees in Chapter 1 for an outline of the analysis performed by a claim administrator in investigating both claims of indemnity and tenders of defense.

The following is a discussion of at least some of the actions that an insurer may take to investigate a title insurance claim. The insurer will not take all of these actions on any one claim.

Typically, the first step of the claim investigation is to determine that a policy has been issued or is owed, to determine the type of policy issued or owed, and to establish that the claimant is the insured under that policy. See §2.3.4, concerning proof of the policy. Proof of a policy is also the first step listed in the decision trees at §1.1.2 (concerning tenders of defense) and §1.1.4 (concerning claims of indemnity).

The claimant must also establish that he or she is the insured under the policy. Every title insurance policy provides that certain parties may become successor insureds, on the happening of an event. The title insurer receives no notice that such an event has occurred. A person who claims to be a successor insured must establish that fact as part of his or her claim notice. See §7.2 for a complete discussion of successor insureds under owner's policies, and §7.4 for a discussion of successor insureds under loan policies.

Also, the claimant must establish that the policy has not already terminated. A title insurance policy does not have a stated and definite term, but rather terminates on the happening of an event. The claimant must establish that no such terminating event has occurred that would have caused policy coverage to lapse. See §§7.3 and 7.9 for a discussion of the termination of the owner's policy and the loan policy, respectively.

When a title insurance commitment has been issued but a policy has not, the title insurer must determine if a policy is owed and what the agreed-on terms of that policy are. See §§6.2 and 6.4 for a complete discussion of that subject.

The claim administrator may need to collect other relevant documents and locate relevant facts not yet known, and the names of the parties best able to provide those facts. On occasion, the insurer obtains crucial facts from more than one party, to verify their accuracy.

It can be very helpful to take photographs of the site so that details can be preserved, particularly if changes to the property are likely. In some circumstances, the claim administrator will elect to visit the property. Entry onto the insured parcel or neighboring land requires permission obtained in advance.

In cases involving questions of possession or water boundaries, aerial photographs can be extremely valuable. Google Earth is a favorite tool of the claim administrator. The Army Corps of Engineers often has aerial photos, surveys and maps for property under its jurisdiction. Counties and municipalities often have stocks of aerials dating back a considerable period of time, which are typically tied to the county GIS maps.

The claims handler may wish to interview or inquire of the adverse party directly, to get that

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[59] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.7(d).

party's statement of the facts and legal theory, if any. The claim administrator is careful to avoid any discussion of strategy with an adverse party.

If an agent or approved attorney issued the policy, that party may also be an important source of information. See §17.6 regarding the agent's duties in relation to a claim. The claims handler will seek the title agent's complete, original title and escrow file or files. Receipt of the original file allows the insurer to take possession of any original affidavits, waivers, letters or other documents affecting coverage, defenses to the adverse claim, and recoupment from third parties. It also prevents the insurer from making wrong assumptions as to the facts, which can happen if the insurer sees only what the agent or approved attorney believes is important. The claim administrator will typically suggest to the agent that it give notice to its errors and omissions carrier if he or she believes the claim may trigger coverage. Under claims-made-and-reported E & O policies, prompt notice is critical to preserving coverage. See §17.10 for a discussion of those policies.

A title agent that is affiliated with a real estate broker, lender, law firm or developer may have special issues concerning claim information. It is not unusual for a title dispute to also include a claim against the owner of the title agent (the broker, lender, attorney or developer), in which the plaintiff seeks all or some of the same damages from both related parties. If such a dual claim exists, it does not affect the title agent's contractual obligation to assist the insurer in its investigation of the claim. See §17.3 regarding attorney agents and §17.4 regarding other affiliated business arrangements.

A complete investigation of a claim can take considerable time. The passage of time can be a sensitive issue when the insured's building project or other land use is hampered or held in abeyance. An insurer may lose the right to clear title, or face a penalty in its exercise of that right, if it is deemed to have taken too long to make that decision, as discussed at §3.4.1. The claim administrator gives regular reports to the insured as to the status of the claim investigation.

When the insurer has completed its investigation, it will issue a coverage determination letter, as described at §2.13.

The statute of limitations for suit on the policy may be tolled during the time in which the insurer is investigating the claim. In California, if the statute of limitations for suit on the policy or a time limit in the insurance contract will expire, the insurer is required by regulations to notify the insured at least 60 days before the expiration date. That provision does not apply to claimants represented by counsel.[60] See §2.15 for a discussion of the statute of limitations for suit on the policy.

[60] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.7(f).

2.7 Proof Of Loss

FORM 62, Appendix A
Request for proof of loss

Most policies require the insured to furnish proof of the claimed loss.[61] A requirement to produce a proof of loss obligates the insured to provide information regarding the facts concerning the loss and to calculate the amount of the claimed loss. The insured may not refuse to provide information, or falsify or conceal information. The giving of false information may constitute fraud in the making of an insurance claim, which can void policy coverage and which is typically a criminal act.[62]

The 2006 ALTA policy requires the insured to submit a proof of loss only if the insurer requests that information. That policy states that, if the insurer "is unable to determine the amount of the loss or damage," the insurer may require, "as a condition of payment," that the insured "furnish a signed proof of loss." This change could be read to suggest that the insurer has the obligation to obtain and pay for its own appraisal or evaluation of the loss.

The 1992 and earlier ALTA policies also provided that the failure to submit a proof of loss within 90 days after the insured determines the facts giving rise to the claim terminated the insured's rights under the policy, to the extent that the tardy proof of loss harmed the insurer.[63] The 2006 ALTA policies also do not contain a provision for termination of policy coverage due to the insured's failure to provide a timely or adequate proof of loss.

The insurer is normally not permitted to assert the failure to voluntarily come forward with

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[61] Conditions & Stipulations 5 of the 1992 ALTA Owner's policy states in part: "In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage. …" A proof of loss is not synonymous with the "proof of claim" that an insured is to submit under California regulations. A "proof of claim" is defined as "written proof, such as claims forms, medical bills, or other reasonable evidence of the claim and any material and relevant documentation in the claimant's possession that supports the magnitude or the amount of the claimed loss, or the assertion of liability by a third party claimant if applicable." California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.2(u).

[62] See, for example, *Schultz Management v. The Title Guarantee Co./Ticor Title Ins. Co.*, 551 N.Y.S.2d 527 (A.D. 1990).

[63] The insured's failure to deliver a proof of loss (or notice of claim) for seventeen years after it had notice of the defect in title was found to bar recovery, in *Security Union Title Ins. Co. v. RC Acres, Inc.*, 269 Ga.App. 359, 604 S.E.2d 547 (Ga.App. 2004), recons.den. (Aug 31, 2004), cert.den. (Nov 22, 2004). The policy at issue in *RC Acres* was a 1970 form, which stated very plainly that " [f]ailure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage."

proof of loss or damage as a complete bar to recovery under the policy, however. Strictly technical defects in a proof of loss, such as the failure to have it sworn to, will not (without further defect) void coverage.[64] The requirement of a statement in writing may be satisfied by a letter rather than a form.[65] The State of Texas has promulgated a proof of loss form.

One extreme case found that sufficient "proof" of loss was provided by the allegations of a breach of contract complaint, even though the lawsuit against the insurer was the first notice of the claim.[66] The dissent correctly reasoned, however, that no cause of action for breach of the insurance contract may lie until the insurer has breached a duty. Unless the insurer is presented the claim and improperly rejects it, it has not breached a policy duty.

2.8 Insured's Cooperation And Examinations Under Oath

Once it has submitted a claim, the ALTA policy forms obligate the insured to give the insurer all reasonable aid in resolving the claim.[67] The claim administrator will sometimes interview the insured, take his or her written statement or conduct an examination under oath. The insurer has the right to demand the insured's records and files.[68] The insurer also has the right to conduct an

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[64] *First Carolinas Joint Stock Land Bank v. New York Title & Mortgage Co.*, 172 S.C. 435, 174 S.E. 402 (1934). In *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 43 P.3d 768 (Idaho 2002), the insureds submitted a proof of loss which claimed damages equal to their mortgage loan amount, in a claim based on an adverse claim of title to a portion of the property. The insurer argued that the insureds failed to submit an adequate proof of loss, because their measure of diminution was incorrect. The court ruled for the insureds, seizing on the phrase in Conditions & Stipulations 5 of the 1992 ALTA policy that says the proof of loss shall "state, *to the extent possible*, the basis of calculating the amount of the loss or damage: "[T]he Boels plainly provided Stewart Title with the basis for their claimed loss--the existence of the deed in favor of the federal government. Additionally, the letter provided, *to the extent possible,* the basis for calculating the amount of the claimed loss or damage--the Boels indicated a belief that the intrinsic value of the property to them, as well as their ability to sell the property, had been almost completely destroyed. ... This information was sufficient to give Stewart Title "an opportunity to investigate and determine its liability" relative to the Boels' claimed damages. ... Consequently, the Boels' letter provided the basis for calculating the amount of the claimed damages, and it was an adequate proof of loss under the policy." Similarly, in *Universal Holdings II Ltd. Partnership v. Overlake Christian Church*, 60 P.3d 1254, 115 Wash.App. 59 (Wash.App. Div. 1 2003), the insured's failure to send a proof of loss before suing the insurer on the policy did not make the lawsuit premature, according to a Washington court. The court excused the insured from providing a proof of loss for several reasons: the insured submitted a notice of claim, there was "no doubt whatsoever" that a loss in some amount existed, the policy was issued after the lawsuit was filed so that the insured was unable to review the policy's terms, and the court found no prejudice to the insurer by the failure to submit a proof of loss.

[65] *Zions First National Bank v. National American Title Ins. Co.*, 749 P.2d 651 (Utah 1988).

[66] *Hopkins v. Lawyers Title Ins. Corp.*, 514 So.2d 786 (Ala. 1986).

[67] See Condition 6(a), 2006 ALTA policies and Conditions & Stipulations 4(d) of the 1992 ALTA policies.

[68] An insured lender will often respond that it is prohibited from revealing its loan file or account records by the Bank Secrecy Act, the Annuzio-Wylie Anti-Money Laundering Act or some similar law. Except in the rarest of cases, such is not the case. A national bank is required to file a SAR when it detects certain kinds of suspicious activity. 31 U.S.C. § 5318(g)(1). The regulations say a bank is prohibited from disclosing a SAR, or "any information that would reveal the existence of a SAR," and that the bank should refuse a subpoena for such information. 12 C.F.R. § 21.11(k)(1)(i). The privilege is unqualified and cannot be waived. *Gregory v. Bank One, Ind., N.A.*, 200 F.Supp.2d 1000, 1002 (S.D.Ind. 2002). However, this prohibition does not include "[t]he underlying facts, transactions, and documents upon which a

examination under oath of the insured or its representatives.[69] An insured's refusal to aid the insurer's claim investigation, which includes agreeing to submit to examinations under oath, terminates policy liability.[70] An insured has a duty to both the insurer and the court to participate in good faith in a court-ordered mediation in a coverage lawsuit.[71]

The insured's duty to cooperate in the clearing of title is discussed at §3.4.1.2. The insured's duty to give reasonable aid in a lawsuit against the insured is addressed at §4.10.

SAR is based... ." 12 C.F.R. § 21.11(k)(1)(ii)(2). In *First American Title Ins. Co. v. Westbury Bank*, 2014 WL 4267450 (E.D.Wis. 2014) (unpublished), the insurer sued a bank that stood by idly as evidence mounted that a title company was stealing from its escrow account. The bank refused to turn over its account records and the bank's internal fraud investigation files, based on the above laws, because it had filed a suspicious activity report with the FBI about the transaction. First American made a discovery demand for documents about the fraud investigation, including documents on which the SAR was based, but not the SAR itself. The court granted a motion to compel. It said that the privileged documents are only the SAR itself and those that, on review, would cause the reader "to discern with effective certainty the existence of a SAR." The decision provides an excellent summary of the cases on this issue.

[69] Condition 6(b) of the 2006 ALTA Owner's policy states: "The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim."

[70] In *Chicago Title Ins. Co. v. Bristol Heights Associates, LLC*, 142 Conn.App. 390, 70 A.3d 74 (Conn.App. 2013), cert.den. 309 Conn. 909, 68 A.3d 662 (Conn. June 20, 2013), the court ruled that an insured lost its policy coverage for a real estate tax issue by paying the taxes after submitting a claim but without the insurer's written consent, and then refusing to turn over requested documents about that decision and refusing for seven months to allow its representatives to sit for examinations under oath. The court found that the insurer was within its rights to examine the insured's representatives about possible policy defenses, not just its claimed losses, and that the insured delaying the insurer in forming a conclusion as to coverage and adjusting the claim if covered. However, a Florida court refused to find that the failure to deliver documents negated coverage, based on an earlier decision in *Bristol Heights* that was reversed by the above decision. *Regions Bank v. Commonwealth Land Title Ins. Co.*, 977 F.Supp.2d 1237, 24 Fla. L. Weekly Fed. D 192 (S.D.Fla. 2013).

[71] In *U.S. Bank, N.A., as Trustee v. First American Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 6120493 (D. Maine 2019) (permanent citation not yet available), the court sanctioned the lender that filed the breach of contract action against the title insurer for its "dismissive" attitude toward a court-ordered mediation of the dispute. The insured failed to send a company representative to the mediation and made no effort to resolve the case at mediation.

2.9 Payment Of Loss

FORM 11, Appendix A
Payment of loss as determined by insurer

When the insurer has completed its investigation, it will issue a coverage determination letter, as described at §2.13. When the insurer has determined that a claim is covered and that loss is payable, the insurer will typically state in the coverage determination the amount that it is paying the insured or that it is willing to pay. Loss payment may be based on a proof of loss or damage submitted by the insured that the insurer considers to be accurate.[72] The loss payment amount may also be in an amount established by the insurer, based on an appraisal it obtains or other calculations made by the insurer.[73] The payment may also be in an amount reached by negotiation between the insurer and insured.[74] The loss amount may also be set by a court order or judgment in a coverage lawsuit or declaratory judgment action.[75]

The insurer pays the loss within the time allotted by the policy's terms and applicable state law.[76] The policy states that, "[w]hen liability and the extent of loss or damage have been definitely

[72] See §2.7 for a discussion of the proof of loss.

[73] See §3.2.3.6 for a description of how to value the loss of a small portion of the insured parcel. See §§3.2.3.7 and 3.2.3.8 concerning the method used by an appraiser to set the diminution in the value in the property caused by the covered matter. Section 3.2.3.1 and its subsections discuss loss caused by various types of title issues.

[74] See *Triangle Holdings, II, LLC v. Stewart Title Guar. Co.*, 266 Or.App. 531, 337 P.3d 1013 (Or.App. 2014), in which the insurer paid the insured for liens on the property after the court ruled that the insured had coverage for the liens. The insured then sought payment of its attorneys' fees, under a statute permitting a fee award when the plaintiff recovers more than the amount offered by the defendant in settlement. The court said the statute applies only when a judgment is entered against the defendant, not when it settles or pays before judgment is entered. An insurer typically has a rational basis for its offer of settlement. California regulation sets forth seven factors to be considered by the Commissioner of Insurance in evaluating whether or not a settlement offer "is unreasonably low." They are: "(1) the extent to which the insurer considered evidence submitted by the claimant to support the value of the claim; (2) the extent to which the insurer considered evidence otherwise made known to it and reasonably available; (3) the extent to which the insurer considered the advice of its claims adjustor as to the amount of damages; (4) the extent to which the insurer considered the advice of its counsel that there was a substantial likelihood of recovery in excess of policy limits; (5) the procedures used by the insurer in determining the dollar amount of property damage; (6) the extent to which the insurer considered the probable liability of the insured and the likely jury verdict; (7) any other credible evidence presented to the Commissioner that demonstrates that the final amount offered in settlement of the claim by the insurer is below the amount that a reasonable person with knowledge of the facts and circumstances would have offered in settlement of the claim." California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, §2695.7(g).

[75] See §4.14 for a discussion of coverage declaratory judgment actions.

[76] Condition 12 of the 2006 ALTA policies says: "When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days." The 1992 ALTA policies contained a nearly identical provision. California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, §2695.2(u) provides: "Every insurer shall tender payment immediately upon, but in no event more than thirty (30) calendar days after, the insurer's affirmation of coverage with respect to first party claimants and the insurer's affirmation of coverage and liability with respect to third party claimants, of the amount of the claim which has been determined and is not in dispute, and when necessary, the claimant has provided a property executed release. If settlement of the claim is

fixed in accordance with these Conditions, the payment shall be made within 30 days."[77] The "definitely fixed" phrase meshes with other policy provisions, including the final determination provision; therefore, it is too simplistic to assert that the 30 days begins running when the claim notice is delivered.[78] Once a loss is deemed to be in a "liquidated" or fixed amount, the insured may be entitled to recover interest on that amount from the date the loss became fixed.[79]

Sometimes, the parties agree that a loss is payable, but they cannot agree as to the amount. In other situations, the insured does not wish to resolve the claim by receiving a loss payment.

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negotiated, then the insurer shall tender payment of the negotiated amount immediately upon, but in no event more than thirty (30) calendar days after, receipt by the insurer of a properly executed release. In claims where multiple coverage is involved, payments which are not in dispute and where the payee is known shall be tendered immediately, but in no event in more than thirty (30) calendar days, if payment would terminate the insurer's known liability under that individual coverage, unless impairment of the insured's interest would result. This subsection shall not apply where the policy provides for a waiting period after affirmation of liability and coverage and before payment of benefits is to be made. Any insurer… (4) Issuing a title insurance policy shall either tender payment in accordance with the time limitations set forth in subsection 2695.7(h) or take actions to resolve the problem which gave rise to the claim immediately upon but in no event more than thirty days after its affirmation of coverage or liability." Chapter 542 of the Texas Insurance Code is that state's prompt claim payment statute. That law that sets deadlines for claim actions, such as acknowledgment of a claim within 30 days, issuance of a coverage determination "not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss," and payment of a claim "not later than the fifth business day after" the insurer gives notice that it will pay the claim. In *Hall CA-NV, LLC v. Old Republic Nat'l Title Ins. Co*., 2018 WL 2984867 (N.D.Tex. 2018) (unpublished), the court held that the law exempts title insurers from these deadlines, under § 542.053(a)(3).

[77] Condition 12 of the 2006 ALTA policies. A corresponding provision is found at Conditions & Stipulations 12(b) of the 1992 ALTA Owner's policy. In *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished), the court noted that Condition 12 says that loss is owed when the "extent of loss" is "definitely fixed." It said this provision made it clear "that liability and the amount of loss or damage must be clearly determined before the thirty-day period begins."

[78] In *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished), the court noted that Condition 12 says that loss is owed when the "extent of loss" is "definitely fixed." It said this provision made it clear "that liability and the amount of loss or damage must be clearly determined before the thirty-day period begins." The court said that neither a difference value appraisal nor the insured's claim notice had "fixed" the loss amount and caused the 30 days to begin running. The court also observed that the policy gives the insurer several means of resolving the claim other than by making a payment to the insured, and the final determination provision states that no loss is payable until there is a final resolution of a title clearance action.

[79] See *Gaviota Holdings, LLC v. Chicago Title Ins. Co*., 2014 WL 7334429 (Cal.App. 2 Dist.) (unpublished), in which the court agreed with Chicago Title that ten percent interest under California Civil Code section 3287 could run only from the date on which suit was filed, because a claim for diminution in value is unliquidated. The court quoted from *Overholtzer v. Northern Counties Title Ins. Co*., 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953) which held that "diminution of market value caused by the easement is not a fixed nor computable sum. The evidence in the instant case demonstrates how difficult the ascertainment of that item may be. For the reasons stated the demand is unliquidated within the meaning of the section [Civil Code section 3287]... ." In *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished), the court found that the amount of the loss had not become fixed by the insurer's payment of a difference value based on an appraisal it had obtained. However, the court also rejected the insured's assertion that his loss amount had become fixed and payable within 30 days merely by delivery of his claim notice and a demand in an amount not supported by facts or analysis.

Nonetheless, the policy states that the insurer may resolve a claim by a loss payment. The insurer will typically pay the insured the amount that the insurer believes is owed.[80] The insurer may obtain an appraisal to set the difference value payable to the insured.[81] See §3.2.3.7 for a discussion of such appraisals. The insurer may invite the insured to accept the payment without a release, putting the burden on the insured to prove a loss in any amount greater than the payment made.[82]

The insurer may condition its payment on the insured's agreement to release the insurer. Releases are discussed at §2.11.

An insurer is entitled to make a loss payment to the appointed counsel for the insured, in which case the insured and not the insurer bears the risk of the attorney's embezzlement of the money.[83]

2.10 Arbitration

Under most title insurance policies, disputes may be arbitrated in lieu of litigation. The right to arbitrate is determined by the policy's terms and applicable law, either state or federal. In the arbitration, the law of the state that is the situs of the insured property applies to all substantive issues.[84]

When the parties elect to arbitrate the claim dispute, the authority of the courts to review the arbitration is limited. State law controls on questions about the authority of a court to review an

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[80] See *Ruger v. Commonwealth Land Title Ins. Co.*, 1996 WL 769793 (Del.Super.) (unpublished), in which the insurer tendered policy limits with no strings attached, after the insured refused to give a full release as a condition to receipt of the money.

[81] See *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished), in which the insurer made a payment of a difference value based on an appraisal it had obtained.

[82] In *Millies v. LandAmerica Transnation Title Ins. Co*., 185 Wash.2d 302, 372 P.3d 111 (Wash. 2016), the insurer issued a check to the insured based on the diminution in value ascribed by an appraisal report, and did not demand a release in exchange for the payment. Nonetheless, the insured rejected the payment as inadequate, and returned the check. There was a jury trial. The jury heard testimony that the insurer had delivered payment. Because of the way in which the special verdict was formulated, the jury was precluded from finding a loss equal to the amount tendered but rejected. The result was that the insurer obtained a judgment of zero liability despite its offer to pay diminution. *Millies* illustrates the risks that an insured incurs by rejecting a payment that it considers to be insufficient, when acceptance of the payment would not waive the insured's right to claim additional loss.

[83] See *GMAC Mortgage Corp. of Pa. v. Weisman*, 1998 WL 132791 (S.D.N.Y.) (unpublished), in which the title insurer issued a policy at the "New York style" table closing. However, the purchaser presented NSF checks at closing, including the funds to be used to pay the title insurance premium. The entire transaction was unwound for failure of consideration. The lender's counsel then stole his client's loan proceeds when returned to him by the title insurer. The court found that the attorney had actual authority to receive the funds on his client's behalf, having represented the lender in court as the transaction was unwound. Therefore, the lender bore the risk of its attorney-agent's theft. Although the *GMAC* case involves return of proceeds from a sale, rather than direct payment of a policy claim, the same root principles of agency law apply to either situation.

[84] Article 7 of the ALTA Title Insurance Arbitration Rules provides: "[t]he law and rules of equity of the situs of the land shall apply to every arbitration under the Title Insurance Arbitration Rules" Those rules may be reviewed at http://www.alta.org.

arbitration award or to overturn the findings of the arbitrator.[85]

2.10.1 Policy Terms

The 2006 and 1992 ALTA policies permit either party to elect to seek to resolve a claim or dispute by arbitration.[86] The parties may arbitrate the issue of coverage, or of damages, or both. Insurer and insured each have the right to seek arbitration. Arbitration is mandatory if demanded by either party, on policies having a face amount of $1 million or less. On policies in excess of that amount, both parties must agree to arbitration. The 2006 ALTA policies increase the mandatory arbitration cap to $2 million. The ALTA Residential owner's policy also contains an arbitration provision at Condition 8. The 2010 ALTA Homeowner's policy has a similar arbitration provision at Condition 11. The Texas promulgated form of commitment to insure contains a rider entitling the proposed insured to request the deletion of the arbitration provision. The Texas form of residential owner policy does not include an arbitration provision.

The 1992 and earlier ALTA policy forms stated that arbitrations were to be conducted through the American Arbitration Association, according to its Title Insurance Arbitration Rules.[87] The 2006 policy removes the reference to the American Arbitration Association. In 2006, ALTA replaced the AAA with the National Arbitration Forum as administrator.[88] The new policies do not

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[85] The Federal Arbitration Act says that a court can overturn an arbitration award obtained by fraud, corruption, partiality of the arbitrator, or similar nefarious conduct, or is in "manifest disregard of the law." In *Conestoga Title Ins. Co. v. Acoustic Home Loans, LLC*, 2007 WL 1058228 (S.D.Ind.) (unpublished), the court felt constrained to let stand an arbitrator's decision to conduct the hearing in Los Angeles, where the insured was located, although the property was located in Indiana and the arbitration provision calls for arbitrations to be conducted where the property lies. The court emphasized that it has very limited powers concerning arbitration disputes. The California Code of Civil Procedure section 1286.2(a)(3) and (a)(5) states: "(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following: ... (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. ... (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." This section was interpreted as "a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case," in *Burlage v. Superior Court*, 178 Cal.App.4th 524, 100 Cal.Rptr.3d 531 (Cal.App. 2 Dist. 2009). However, the courts rarely exercise the right to overturn an award. See *Shirk v. Chicago Title Ins. Co.*, 2010 WL 5300799 (Cal.App. 2 Dist.) (unpublished) (arbitrator's award not overturned because no evidence of fraud by arbitrator); *First American Title Ins. Co. v. Ordin*, 2011 WL 4062208 (Cal.App. 2 Dist.) (unpublished) (refusal to overturn arbitrator's ruling that policy was not terminated, despite its plain language).

[86] See Condition 14 of the 2006 and 1992 ALTA Owner's policy and Condition 13 of the 2006 and 1992 ALTA Loan policy.

[87] The AAA Title Insurance Arbitration Rules were modified as of January 1, 2000 to incorporate the AAA Commercial Arbitration Rules by reference. The text of those rules may be found at http://www.adr.org. Those rules were discussed in Marietta M. Maxfield, *Preview of the New Title Insurance Arbitration Rules*, 14 Property & Probate Number 1, January February 2000, p. 44. The article gives a simple chart comparing the 1987 rules, the Commercial Arbitration Rules and the title insurance Supplemental Rules.

[88] See Christopher Gibson and Sheldon Hochberg, *ALTA Introduces Updated Arbitration Rules and Procedures*, 85 Title News Number1 (January/February 2006), discussing the changes to arbitration procedures effective January 1, 2006, including the change of administrator.

name the arbitration administrator, saying only that the ALTA Title Insurance Arbitration Rules will be used.

Arbitrators are chosen from a panel of people who have agreed to so serve with the administrator. In some locales, there is a dearth of panel members with any significant knowledge of title insurance or real estate issues.

2.10.2 Effect Of Federal And State Law

A key question as to the enforcement of the arbitration provision is the applicable arbitration law. Some state laws prohibit the use of arbitration clauses in insurance contracts; others regulate the form of arbitration clauses that may be used.[89] The 1992 policy arbitration clause states that it applies "[u]nless prohibited by applicable law... ." As to transactions in states whose laws prohibit or limit arbitration clauses in insurance contracts, this phrase has been read as an acknowledgment that state law may negate the arbitration provision.[90] For example, in *Stewart Title Guar. Co. v. Mack*,[91] a Texas court held that state law controlled because the transaction did not cross state lines. Texas law prohibits enforcement of arbitration clauses on contracts for which the total "consideration" paid is $50,000 or less.[92] The court found that "consideration" refers to the premium paid, not the amount of insurance or value of the property. It declared that the phrase "unless prohibited by applicable law" in the arbitration provision is an acknowledgment that state laws prohibiting arbitration may cancel the arbitration provision as to intrastate transactions.

The Federal Arbitration Act (the FAA)[93] contains an explicit preemption of state arbitration law as to transactions involving interstate commerce. The Act permits a party to compel arbitration. In transactions involving interstate commerce, these preemption provisions permit either the insurer or insured to compel arbitration.[94] Federal courts have embraced arbitration as a desired means of

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[89] For example, arbitration clauses in insurance contracts are prohibited or restricted per Ark.Stat.Ann. § 34-511; Ga.Code Ann. § 9-9-2(c); Kan.Stat.Ann. § 5,401; Mo.Rev. Stat. § 535.350; § 27-5-114 (2)(c) MCA (Montana); Okla.Stat.Ann. Title 15, § 802A; and Tex.Civ.Prac. & Rem. Code Ann. § 171.001 (Vernon Supp. 1996). See also Kirschenbaum, *Prosecuting and Defending Title Claims*, in *Current Developments in Title Insurance 1992*, Practicing Law Institute N-384 1992, at 168-75.

[90] Montana law says that contracts containing arbitration provisions are valid and enforceable except "any agreement concerning or relating to insurance policies... ." § 27-5-114 (2)(c), MCA. In *Young v. Security Union Title Ins. Co.*, 1998 MT 335, 292 Mont. 310, 971 P.2d 1233 (1998), the insurer argued that title insurance is not included in this statute because title insurance is excluded in various other statutes pertaining to insurance. The court disagreed, since no such exemption appears in the arbitration statute. It held that the law "pertains to title insurance policies, as well as other types of insurance coverage." Therefore, it denied the insurer's arbitration demand.

[91] 945 S.W.2d 330 (Tex.App.-Houston [1st Dist.] 1997).

[92] The Act is found at Tex.Civ.Prac. & Rem. Code Ann. § 171.001 (Vernon Supp. 1996).

[93] 9 U.S.C. § 1 *et seq.* (1982). The Federal Arbitration Act and state acts are discussed in Kravitz and Dunham, *Compelling Arbitration*, ABA Litigation, Vol. 23, No. 1 (Fall 1996).

[94] In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the U.S. Supreme Court held that the Federal Arbitration Act, which makes compulsory arbitration clauses valid, applies to contracts between people in two different states.

resolving disputes.[95]

The United States Supreme Court struck down California decisions barring the use of arbitration provisions in consumer contracts, holding that such state rules are preempted by the FAA.[96] That ruling likely overturns all prior rulings by state courts that would bar the enforcement of the arbitration provision in the ALTA policy forms.[97] Georgia had rejected the FAA preemption, on the grounds that the McCarran-Ferguson Act leaves the regulation of insurance to the states and Georgia law prohibits enforcement of arbitration provisions in insurance policies.[98] Also, a Montana court had quashed the insurer's demand for arbitration based on state law without even addressing the federal preemption argument.[99] Both rulings are likely overturned by the United States Supreme Court decision.

Other courts had already ruled that the title insurance arbitration provision was enforceable, based on FAA preemption.[100] Alabama, for example, eventually concluded that the FAA preempts

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[95] The mechanics of enforcing arbitration provisions, particularly under the Federal Arbitration Act, are thoroughly reviewed in Kravitz and Dunham, *Compelling Arbitration*, ABA Litigation, Vol. 23, No. 1 (Fall 1996).

[96] *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (U.S. 2011).

[97] The *Concepcion* ruling was found to permit title insurers to enforce the arbitration provision in the title insurance policies, in *Chassen v. Fidelity Nat'l Financial, Inc*., 836 F.3d 291 (3rd Cir. (N.J.) 2016).

[98] In *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854 (11th Cir. (Ga.) 2004), the federal court noted that prior Georgia state court decisions have construed state law as prohibiting the enforcement of arbitration provisions in insurance contracts. The court found that the FAA both validated arbitration provisions and asserted preemption over state law. However, the McCarran-Ferguson Act leaves the regulation of insurance to the states. That law says: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance ..." The court said that the tension between the two laws is reconciled as follows: "If the state has an anti-arbitration law enacted for the purpose of regulating the business of insurance, and if enforcing, pursuant to the Federal Arbitration Act, an arbitration clause would invalidate, impair, or supersede that state law, a court should refuse to enforce the arbitration clause." Chicago Title had already admitted that the Federal Arbitration Act's preemption of the Georgia law would "invalidate, impair, or supersede" it. Therefore, the court said, the only question was whether the Georgia Arbitration Code was "a law enacted" by Georgia "for the purpose of regulating the business of insurance." The court ruled it was, observing that a prohibition on arbitration has a significant effect on the insurance contract: "Based on these definitions of laws regulating the business of insurance, we conclude, like the only other two federal courts of appeals to address this question have concluded, that a provision in a state's arbitration code excepting insurance contracts is a law regulating the business of insurance."

[99] *Young v. Security Union Title Ins. Co.*, 1998 MT 335, 292 Mont. 310, 971 P.2d 1233 (1998).

[100] A federal court, construing Utah law, so held in *Imperial Savings Ass'n v. Lewis*, 730 F.Supp. 1068 (D. Utah 1990). A Mississippi court also relied on FAA preemption to enforce the arbitration provision, in *Mississippi Valley Title Ins. Co. v. Lewis*, 2006 WL 3694603 (S.D.Miss.) (unpublished). That court rejected the argument that a state insurance department policy statement frowning on arbitration provisions was a legislative act which would counter the FAA preemption. It also held that the insured's acceptance of the policy without complaint estopped the insured from later seeking to be relieved of this term of the contract. In *Perdue Properties, LLC v. United States*, 2016 WL 2858889 (S.D.Miss. 2016) (unpublished), the court held that a title insurer was entitled to compel the insured to arbitrate a dispute over policy coverage involving property in Mississippi in which the policy amount was less than $2 million. The federal district court also said that it was obligated to follow the Federal Arbitration Act if the case involved interstate commerce, which it so found. The court further noted that both the United States Supreme Court and Fifth Circuit Court

state law, and makes the title insurance policy arbitration provision enforceable in that state. In 1997, the Alabama Supreme Court issued an opinion denying federal preemption, in *Fidelity Nat'l Title Ins. Co. v. Jericho Management, Inc*.[101] In January, 1998, the same court affirmed a trial court decision denying arbitration of claims against a title agent, without comment on the preemption issue.[102] Then, in April of 1998, the Alabama court withdrew its earlier opinion in *Jericho Management* and issued a new one.[103] In the later opinion, the court found the federal act preemption valid. In its first opinion in *Jericho*, the Alabama court had declared that, by the phrase "[u]nless prohibited by applicable law," the policy "incorporates laws that prohibit arbitration agreements but that might otherwise be preempted by the FAA." Thus, because Alabama law would preclude compulsory arbitration, the court held that the arbitration clause could not be enforced in Alabama even as to interstate transactions. In its April opinion, however, the Alabama court found that the phrase applied only to intrastate transactions. The court then held that the policy, issued by a Tennessee insurer and protecting an Alabama corporation's mortgage, "sufficiently affects interstate commerce to invoke the FAA."

2.10.3 Advance Notice Of Arbitration Provision

An insured may assert that the arbitration provision is not binding because the insured did not receive advance notice that the policy would contain such a provision. The argument was rejected in *Imperial Savings Ass'n v. Lewis*,[104] because the insured lender was shown to have accepted other policies that contained the arbitration provision prior to the transaction at issue. Further, the insured did not object to the clause until about a year after receiving the policy. The court held that Utah follows the principle that:

> ... receipt and retention of the policy without objection, by one who has had an opportunity to examine it for a reasonable time, is regarded as an acceptance of its terms.[105]

The court also considered whether or not the policy violated a Utah administrative rule promulgating arbitration clause disclosure language to be used in a commitment to insure. The rule had been promulgated after the policy was issued, and was thus inapplicable. Finally, the court found that the

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of Appeals "have instructed the District Courts to find in favor of arbitration if there are any doubts concerning any issues of whether or not a claim is arbitrable," and that "Mississippi law is consistent with the federal standard."

[101] *Fidelity Nat'l Title Ins. Co. v. Jericho Management, Inc*., 1997 WL 564473 (Ala.) (unpublished), withdrawn and superseded by 722 So.2d 740 (Ala. 1998).

[102] *Stewart Title of Mobile, Inc. v. Montalvo*, 709 So.2d 1194 (Ala. 1998).

[103] 722 So.2d 740 (Ala. 1998).

[104] 730 F.Supp. 1068 (D. Utah 1990).

[105] 730 F.Supp. 1068, 1072, note 4, citing *Western Farm Bureau Mut. Ins. Co. v. Barela*, 79 N.M. 149, 441 P.2d 47 (1968) at 49.

clause was enforceable under the Utah regulations even though it makes arbitration compulsory under some policies. Mississippi adopted the same principle, citing *Lewis* with favor.[106] Another Mississippi court also held that the insured became bound by the arbitration provision by accepting the policy without objection.[107]

Similarly, Alabama has held that the arbitration clause is enforceable even though the commitment does not specifically give notice that the policy will contain such a provision. The court noted that the commitment incorporates all of the terms of the policy by reference.

> The arbitration provision in the Silvernells' policy appears to be standard in form. The commitment issued during the closing clearly apprised the Silvernells that the commitment was subject to the conditions and stipulations in the policy that would later be issued and that once that policy was issued it would then govern the rights and liabilities of the parties. Contrary to the Silvernells' contentions, First American did not materially alter its insuring agreement by issuing a title policy. [FN3] The commitment required First American to issue the policy, provided certain conditions were met. Because the conditions and stipulations set out in the policy, which included the arbitration provision, were expressly incorporated by reference into the commitment, the Silvernells' obligation to arbitrate was a part of the insuring agreement from the effective date of the commitment.
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> > FN3. The Silvernells do not argue that all of the terms in the title policy that are not also specifically referenced in the commitment are unenforceable; they argue only that the arbitration provision is unenforceable. However, the Silvernells cannot single out the arbitration provision for a challenge of this kind. Doctor's Associates, Inc. v. Casarotto, supra. To be consistent, they must take the position that all of the terms in the title policy that were not specifically referenced in the commitment are outside the scope of the insuring agreement.[108]

In California, the insurer has a duty under the Insurance Department regulations to disclose to the insured "all benefits, coverages, time limits or other provisions of any insurance policy ... that may apply to the claim presented ... ."[109] In *Wolschlager v. Fidelity Nat'l Title Ins. Co.*,[110] a California court ruled that an insurer was not precluded from enforcing the arbitration clause because it was not recited in the preliminary report of title, because of incorporation by reference language:

[106] *Mississippi Valley Title Ins. Co. v. Lewis*, 2006 WL 3694603 (S.D.Miss.) (unpublished).

[107] *Perdue Properties, LLC v. United States,* 2016 WL 2858889 (S.D.Miss. 2016) (unpublished).

[108] *McDougle v. Silvernell*, 1999 WL 195765 (unpublished); later decision 744 So.2d 883 (Ala. 1999).

[109] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.4(a).

[110] 111 Cal.App.4th 784, 4 Cal.Rptr.3d 179 (Cal.App. 6 Dist. 2003).

> [T]he Preliminary Report specifically identifies the document incorporated as the policy, lists the form which is contemplated and tells the recipient where they can find the policy. This incorporation was both clear and unequivocal. ... There is no authority requiring the defendant to specify that the incorporated document contains an arbitration clause in order to make the incorporation valid. All that is required is that the incorporation be clear and unequivocal and that the plaintiff can easily locate it.

Similarly, in a Connecticut case, an insured was not entitled to prevent arbitration on the argument that the insurer failed to warn of that clause in advance, when the insured held the policy for a decade and received its benefits while the insurer defended protracted litigation with a third party.[111] A Montana law requiring arbitration provisions to be found on the first page of a contract was struck down by the United States Supreme Court (in a case not involving title insurance).[112]

Other states, however, take the view that an arbitration clause is not enforceable unless the insured is advised in advance of closing that such a provision will be part of the policy. In *Kleveland v. Chicago Title Ins. Co.*,[113] a California court found that, notwithstanding the *Wolschlager* decision discussed above, a statement in the preliminary title report advising the insured that he or she could review the terms of the policy at the insurer's office, without any mention of the arbitration provision, was not enough notice that the policy would contain an arbitration clause. In *Kleveland*, the policy issued to the insured was not the same form as the one referenced in the preliminary report.[114] A North Carolina court also found that the arbitration provision was not enforceable because no title insurance commitment was issued in advance, and thus the insured obtained no warning, rendering the provision unenforceable under then-existing state arbitration law.[115]

[111] *Bird Peak Corp. v. Lawyers Title Ins. Corp.*, 107 Fed.Appx. 240, 2004 WL 1770538 (2nd Cir. (Conn.) 2004) (unpublished).

[112] *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 683, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

[113] 141 Cal.App.4th 761, 46 Cal.Rptr.3d 314 (Cal.App. 2 Dist. 2006).

[114] In *Kleveland*, the preliminary title report said that a Homeowner's policy would be issued, but the company issued a CLTA policy instead. The court stated: "Chicago Title argues that the preliminary report incorporated the ALTA policy and its arbitration clause by reference because it mentioned that policy by name. But the ALTA policy never went into effect. The only arbitration clause that could conceivably be enforced in this case is the one that is a part of the CLTA policy that was actually issued, a policy that was not clearly and unequivocally referred to in the contract. This case is thus distinguishable from *Wolschlager*… ."

[115] *King v. Owen*, 601 S.E.2d 326 (N.C.App. 2004). The insurer urged the court to adopt the reasoning in *McDougle* that the title commitment incorporated the policy terms by reference, which the court refused to do because: "There was no commitment for title insurance issued in this case prior to or at closing. The first time an arbitration clause appeared was in the final title policy which was issued over three months after closing." The *King* decision may not be applicable to later disputes, however. The court stated: "This case is governed by the now repealed Uniform Arbitration Act, N.C. Gen.Stat. Chapter 1, Article 45A." The law was repealed by Session Laws 2003-345, s. 1, effective January 1, 2004, which is "applicable to agreements to arbitrate made on or after that date." N.C. Gen.Stat. Chapter 1, Article 45A (2004).

Similarly, the Ohio Supreme Court found that the failure to deliver the policy before closing, including its arbitration clause, precluded the insurer from enforcing the provision.[116] The court also rejected the incorporation by reference argument, because the 1970 ALTA policy is still used on demand in Ohio and thus not every policy form contains an arbitration provision. Also, in a Montana decision, the insurer argued that the insured accepted the arbitration provision by failing to object to that clause when the policy was received. The insured countered that the insurer failed to give notice of the provision because it was not referred to on the first page of the contract. The court did not reach the incorporation by reference argument, deciding the case solely on Montana's statute which prohibits insurance contracts from requiring arbitration.[117]

The advance notice argument is mooted by the use of the 2006 ALTA form of title insurance commitment, which contains both a notice and a reference to the location of the arbitration rules on ALTA's website:

> 5. The policy to be issued contains an arbitration clause. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured as the exclusive remedy of the parties. You may review a copy of the arbitration rules at http://www.alta.org/.

2.10.4 Timely Demand For Arbitration

Most states follow the rule that a party loses the right to compel arbitration by bringing suit or becoming fully engaged in the litigation process before making the arbitration demand.[118] Colorado provides one set of factors considered in determining whether or not a party has waived the arbitration right:

> (1) whether the party has actually participated in the lawsuit or has taken other action inconsistent with his rights; (2) whether litigation has substantially progressed by the time the intention to arbitrate was communicated by the party moving to dismiss; (3) whether there has been a long delay in seeking a stay and whether the defendant filed counterclaims without asking for a stay; (4) whether a request to compel arbitration was initiated close to trial; (5) whether the party seeking arbitration has taken unfair

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[116] *Henderson v. Lawyers Title Ins. Corp.*, 108 Ohio St.3d 265, 843 N.E.2d 152, 2006 Ohio 906 (2006). The Ohio Supreme Court the Ohio Supreme Court held that the arbitration provision is not enforceable, because the commitment does not warn of this term. Also, because not all available policy forms contain arbitration clauses, the insurer did not prove that the "usual and customary" policy contains such a provision. The earlier appeals court decision in *Henderson* which was affirmed by the Supreme Court provided at least some of the impetus for the ALTA's modification of the 2006 title insurance commitment form to provide explicit warning that the policy will contain an arbitration provision.

[117] *Young v. Security Union Title Ins. Co.*, 1998 MT 335, 292 Mont. 310, 971 P.2d 1233 (1998).

[118] *Pitkin v. Fidelity Nat'l Title Ins. Co.*, 2002 WL 462506 (Cal.App. 2 Dist.) (unpublished) (right to enforce arbitration provision waived by participation in litigation process); *Wolschlager v. Fidelity Nat'l Title Ins. Co.*, 111 Cal.App.4th 784, 4 Cal.Rptr.3d 179 (Cal.App. 6 Dist. 2003) (right not waived, despite some delay in asserting arbitration). See discussion in Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 9.30 and 9:31, Thomson Reuters.

> advantage of discovery proceedings which would not have been available in arbitration; and (6) whether the other party was affected, misled, or prejudiced by the delay.[119]

The insurer should provide prompt notice of a demand for arbitration in order to avoid a finding that the insured would be prejudiced by that demand.

The subjectivity of the waiver standard is evident in the inconsistent results in the reported decisions. In *Imperial Savings Ass'n v. Lewis*,[120] the court found that the insurer had not waived its rights, noting that it reserved the coverage issue within six months of accepting the defense, and demanded arbitration two months after making the reservation of rights. An Alabama court found that an insurer was found not to have waived arbitration by the following actions taken over a seven-month period: filing an answer, responding to several motions and discovery requests by the insured plaintiff, making its own discovery requests and filing a summary judgment motion.[121] In *Waldman v. Old Republic Nat'l Title Ins. Co.*,[122] by contrast, the insurer was found to have waived the right to arbitrate by waiting six months after suit was brought, and by engaging in discovery.

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[119] 2000 WL 328780 (Colo.App.) (unpublished) at *1.

[120] 730 F.Supp. 1068 (D. Utah 1990).

[121] In *Jericho Management, Inc. v. Fidelity Nat'l Title Ins. Co.*, 811 So.2d 514 (Ala. 2001), the court said: "Whether a party's participation in an action amounts to an enforceable waiver of its right to arbitrate depends on whether the participation bespeaks an intention to abandon the right in favor of the judicial process and, if so, whether the opposing party would be prejudiced by a subsequent order requiring it to submit to arbitration."

[122] 2000 WL 328780 (Colo.App.) (unpublished).

2.10.5 Scope Of Arbitrable Matters

The scope of the arbitration provision is not limited to policy claim disputes. Rather, the policy states that arbitrable matters include "any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy."[123] The reference to "any service" in connection with issuance of the policy is broad enough to encompass escrow, recording and other services by the insurer that are incident to the insured transaction, as well as disputes about the charges made by the title insurer for such services.[124]

Accordingly, the arbitration clause has been held to include a dispute regarding a closing protection letter issued in connection with the policy.[125] See §14.5 regarding this subject. Also, a claim of estoppel to deny coverage, based on a claimed breach of the duty to defend, was found to be arbitrable in *Imperial Savings Ass'n v. Lewis*.[126] Alabama allowed a title insurance agent to invoke the clause when both it and the underwriter were sued for a title defect.[127] However, an earlier Alabama decision denied arbitration to an agent without opinion, when the agent alone was sued for its role in producing an inaccurate commitment to insure.[128] Claims by sellers that they should have received premium discounts on policies that they purchased for their buyers were found not to be within the scope of the arbitration provision, because the plaintiff sellers were not the insureds under the policies.[129] Although the insurer and insured agreed at an arbitration hearing that the arbitrator would decide only the duty to defend, their earlier agreement to arbitrate "the matters at issue in this lawsuit" was deemed broad enough to support the arbitrator's assertion that he would conduct a

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[123] Condition 14 of the 2006 and 1992 ALTA Owner's policies and Condition 13 of the 2006 and 1992 ALTA Loan policies.

[124] In *Chassen v. Fidelity Nat'l Financial, Inc*., 836 F.3d 291 (3rd Cir. (N.J.) 2016), the Third Circuit Court of Appeals ruled that a title insurer was entitled to demand separate arbitration of the claims brought by class plaintiffs asserting that the insurer marked up recording fees, effectively killing the class action suit. The court upheld this right based on the United States Supreme Court decision of *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). The appeals court said further that the insurer had not waived the right to arbitrate by not asserting it sooner, since no such right existed until the Supreme Court decision was issued. The *Chassen* court also held that the arbitration provision of the policy was broad enough to encompass the plaintiffs' claims based on the New Jersey Consumer Fraud Act.

[125] *Fleet Mortgage Corp. v. Lynts*, 885 F.Supp. 1187 (E.D.Wis. 1995).

[126] 730 F.Supp. 1068 (D. Utah 1990).

[127] *First American Title Ins. Co. v. Silvernell*, 744 So.2d 883 (Ala. 1999).

[128] *Stewart Title of Mobile, Inc. v. Montalvo*, 709 So.2d 1194 (Ala. 1998). After *Montalvo*, the Alabama Supreme Court withdrew its decision in *Fidelity Nat'l Title Ins. Co. v. Jericho Management, Inc.* at 1997 WL 564473, and reversed course on the issue of federal preemption (see discussion above).

[129] *Simon v. Commonwealth Land Title Ins. Co.*, 2005 WL 563816, 2005-Ohio-1007 (Ohio App. 8 Dist.) (unpublished).

second arbitration on the duty to indemnify after ruling for the insureds on defense.[130]

The broad "any controversy or claim" scope of the provision is not always sufficient to force arbitration of all claims in a lawsuit that involves parties other than the insurer and insured, however.[131] Arbitration of all claims may result in judicial economy, and is appropriate when the claims are closely related. However, one court denied a real estate broker's request to join the arbitration. The court said the issues regarding joinder are "the extent to which the claims against the signatories [to the arbitrable contract] and the nonsignatories are intertwined and ... the nature of the relationship between the parties."[132] Concomitantly, an insured may oppose arbitration due to the concern that inconsistent rulings by the arbitrator and judge could leave the insured with no coverage and also no remedy against the other party. This argument was accepted by a California court as a valid basis for denying the insurer's arbitration demand.[133]

2.11 Releases In Claim Settlements

FORM 59, Appendix A
Release of insurer
FORM 60, Appendix A
Release of insurer with express subrogation rights

A well-drafted release executed by the insured causes the insured to give up all of his or her claims and rights in relation to the subject matter of the release, including the right to be defended in litigation filed later on the subject of the claim and release.[134] In most jurisdictions, it is common

[130] *Shirk v. Chicago Title Ins. Co.*, 2010 WL 5300799 (Cal.App. 2 Dist.) (unpublished).

[131] For example, in *Hamilton v. Mortgage Information Services, Inc*., 2012 WL 6590718 (N.C.App.) (unpublished), the court found that claims by a borrower that a title insurer and its agent overcharged for closing services and did not grant a reissue credit on a loan policy were not subject to the policy's arbitration provision, because the borrower's claims were not based on, nor did she get a "direct benefit" from, the policy, which is a requirement in North Carolina for enforcement of an arbitration clause against a person who is not a party to the contract.

[132] *First American Title Ins. Co. v. Silvernell*, 744 So.2d 883 (Ala. 1999).

[133] *MRA Funding Corp. v. United Title Ins. Co.*, 2002 WL 31045492 (Cal.App. 4 Dist.) (unpublished).

[134] In *HSBC Bank USA, Nat'l Ass'n v. Resh*, 2013 WL 6230670 (S.D.W.Va.) (unpublished), the court said it would require testimony about whether or not a release given by an insured in litigation in one state was intended to cover related claims by the same insured brought in a different state. See also *Williams v. North American Title Ins. Co.*, 2012 WL 2705027 (Cal.App. 1 Dist.) (unpublished), which found that a release concerning a sewer pipe claim signed by the insured before he was sued by the pipe owner negated the insurer's duty to defend and barred the insured's claims for loss and bad faith, despite the insured's argument that the later dispute was not identical to the earlier, released claim. California Civil Code § 1542 says that a general release "does not extend to claims which the creditor does not know or suspect to exist" at the time he signs the release. The court found that the release signed by the insured was not a general release and was properly limited to the subject of the sewer pipe. It also rejected the insured's attempt to modify the release by parol evidence. In *Chorches v. Stewart Title Guar. Co.*, 48 F.Supp.3d 151 (D.Conn. 2014), the court held that a release was binding because it was precise, broad and not ambiguous; therefore, the insured's testimony that he did not understand the release when he signed it was not compelling.

practice for an insurer to obtain a release from the insured on payment of a claim of loss or when a claim is otherwise resolved. When an insurer conditions a claim payment on the insured's execution of a release, the insured's acceptance of the claim payment signifies his or her acceptance of the terms of the release, even when the insured refuses to sign and return the release.[135]

The insurer may also elect to make a "no-strings" loss payment, in which acceptance by the insured of the loss payment is expressly not conditioned on the execution of a release, as discussed at §2.9. However, even when an insurer might otherwise pay a claim of loss without a release, it will typically require a release when it is paying more than the amount of the policy benefit owed, or some portion of the payment is being made in exchange for a release of extra-contractual claims such as a claim of bad faith or violation of an unfair claim practices act.

The insurer should consider several factors as to the scope of the release. The following checklist should help the claims handler review or draft a release:

RELEASE CHECKLIST

1. **Scope of Release**
   Disputed matter fully described in clear language
   All claim issues covered by release
   If attorney retained for insured, duty to pay attorneys' fees terminated

2. **Parties to be Released**
   Insurer
   Insurer's officers, directors and employees
   Agent or approved attorney, and that party's agents, officers, directors and employees[136]
   Other parties in the chain of title or escrow production: abstractor, escrow agent
   Coinsurers and reinsurers

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[135] In *Higbie v. Stewart Title Guar. Co.*, 2015 WL 7270751 (Conn.Super.) (unpublished), an insurer delivered a settlement check to its insureds, to be deposited by them only when they had signed and delivered the settlement agreement and release prepared by the insurer. The insureds wanted to amend the release to limit its scope, but deposited the money before the insurer agreed to change the agreement. The court found that the insureds lost the right to modify the settlement terms by depositing the check and refusing to return the money to the insurer. The court dismissed the insureds' suit for breach of policy. In *Camp Horne Self Storage LLC v. Lawyers Title Ins. Corp*., 2016 PA Super 252, 150 A.3d 999 (Penn.Super. 2016), the court held that the insured deprived the court of jurisdiction to rule on a motion to enforce a settlement agreement with the title insurer by its dismissal of the action before the settlement was consummated.

[136] This provision should prevent a subsequent action for abstractor or escrow negligence based on the same operative facts.

3. **Parties to Give Release**
Insured(s)
Party injured by insured[137]
Plaintiff in suit against insured

4. **Rights or Duties That Survive Release**
Assignment of causes of action, subrogation rights, rights in collateral
Duty to cooperate in ongoing or contemplated subrogation or other recoupment efforts

The insured should not release third parties without the insurer's consent, in order not to prejudice the insurer's rights of subrogation. See §2.3.3 regarding prejudice caused by the waiver or release of rights which the insurer would take by subrogation. When the insured lender released a borrower from liability for "[l]oans and the foreclosures thereof," but not specifically the note, the insurer was permitted to pursue the borrower on the note.[138] For its part, the insurer should carefully consider the effect of obtaining releases, if it intends to seek reimbursement by subrogation. The insurer may lose its right of subrogation by taking away subrogation rights of others in a release.[139]

2.12 Surrender Of Policy Or Endorsement Thereto

When the insurer pays policy limits to the insured, and in certain other circumstances in which policy cancellation is appropriate, the insurer is entitled to require the insured to surrender the policy for cancellation in exchange for payment.[140] The insurer typically marks the original policy "cancelled" and keeps the original policy in the claim file.

When a claim is resolved by payment to the insured of less than policy limits, it is customary for the insurer is to deliver an endorsement to the insured reducing the amount of the policy by the claim payment amount and adding an exception to Schedule B of the policy for a recorded instrument if such was the source of the claim.[141] If the title insurer does not issue such an

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[137] For example, if the state permits direct action against insurers by injured parties, the insurer may wish to get a release from a third party who could claim to have been injured by the insured.

[138] The court held that the insurer's status as subrogee or assignee of the note was not determinative because, even standing the insured's own shoes, the insurer had a right to sue on the note. *Belvedere Builders, Inc. v. First American Title Ins. Co.*, 164 Ga.App. 535, 296 S.E.2d 245 (1982).

[139] *Chemical Bank of N.J. v. Bailey*, 687 A.2d 316 (N.J.Super.A.D. 1997) (release of borrower canceled right of insurer to recoup from closing attorney who was negligent in paying off borrower's loan).

[140] See §3.5 regarding payment of policy limits to the insured.

[141] See *Chorches v. Stewart Title Guar. Co*., 48 F.Supp.3d 151 (D.Conn. 2014) (when insured was paid for a loss, signed a release and consented to an endorsement adding an exception to his policy was foreclosed from suing insurer despite argument that he did not understand effect of claim settlement). Condition 10 of the 2006 ALTA policies provides: "All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment." The 1992 and earlier versions of the ALTA policies contain the same provision and, in addition, the following, at Conditions & Stipulations 12(a): "No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company."

endorsement, the policy amount is nonetheless automatically reduced by the amount of the payment. Still, for the sake of good record keeping for both insured and insurer, many title insurers issue such endorsements, particularly because it is not extraordinary to pay more than one unrelated claim on a policy. When both loan and owner's policies have been issued, either simultaneously or at separate times, the insurer is well advised to endorse both policies to reflect the loss paid. See §3.2.2 concerning payment of loss when the insurer has issued both an owner's and a loan policy.

2.13 Coverage Determination And Claim Denial

FORM 17, Appendix A
Coverage determination

FORM 18, Appendix A
Follow-up after denial of claim of loss

When the insurer has completed its claim investigation, it issues a coverage determination. The coverage determination is typically communicated to the insured by letter. Some state insurance codes require that a coverage determination be delivered in writing.

There are a number of responses by the insurer that qualify as a coverage determination. The insurer may accept or reject a tender of defense, as discussed in Chapter 4. The insurer may accept a claim of loss by agreeing to take one of the seven options available under an owner's policy, or one of the nine options provided under a loan policy, as described in §3.0. The administrator may also determine that there is no coverage, in which case he or she will issue a denial letter or preliminary analysis of no coverage. See the discussion in this section of the difference between a denial and a preliminary analysis. In this book, the term denial shall apply to both types of responses.

Many states impose deadlines for the issuance of a coverage determination, whether an acceptance or denial, as is further discussed at §2.5.[142] All or most such statutes or regulations say

[142] The California regulations state that the insurer is to send a denial within 40 days of the insurer's receipt of the insured's proof of claim. California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.7(b). A proof of claim is not a proof of loss as defined in the title insurance policy. Rather, it is any evidence or documentation in the possession of the insurer, whether submitted by the claimant or obtained by the insurer in the course of its investigation, showing any evidence of the claim and reasonably supporting the magnitude or amount of the claimed loss. Regs., § 2695.2, subd. (s). Similarly, the Texas Basic Manual of Title Insurance, at Section VII, Claims, Part III, states that the insurer must issue the coverage determination within 30 days following its receipt of information requested from the insured as part of the claim investigation. If the insurer is unable to issue the coverage determination within that time, it must notify the insured and explain the delay: "After the Insurer receives all of the requested information, the Insurer shall notify the Claimant of the acceptance, denial or conditional acceptance of the Claim. This notice shall be sent to the Claimant within 30 days of receipt of such information… ." Georgia's insurance law, OCGA § 33-4-6(a), provides that, if the insurer fails to make payment within 60 days of the demand and in bad faith, it is liable for an additional penalty of 50% of the claim amount plus reasonable attorney's fees in the action against the insurer. In addition, "[t]he action for bad faith shall not be abated by payment after the 60 day period...." and "[t]he amount of any reasonable attorney's fees shall be determined by the trial jury...." However, in *Atlantic Title Ins. Co. v. Aegis Funding Corp.*, 287 Ga.App. 392, 651 S.E.2d 507 (Ga.App. 2007), the court held that the 60-day time period was not tolled while the insurer investigated whether or not to pursue the option of suing to clear title, and ultimately declined to do so. The court also affirmed a punitive damage award.

that the time period for response begins when the insurer has completed its investigation.[143] However, the law or regulation may also require the insurer to notify the insured that it needs more than the statutorily-permitted time to issue the coverage determination.[144]

A claim denial should explain to the insured, with reasonable clarity, the terms of the policy that cause the claim not to be covered.[145] If the claim is for something beyond the scope of policy coverage, the denial typically explains why none of the Covered Risks are invoked by the claim. A denial may also be based on an exclusion or exception.[146] The denial may also be based on one or more of the policy's Conditions, such as the provision that explains that the policy terminates on the happening of an event. In the denial letter, the insurer seeks to explain how the policy terms apply to the facts of the claim. Thus, the insurer often recites the facts on which the denial is based.

The insurer may, and sometimes does, change its classification of the claim after having issued the coverage determination letter. The insurer may deny a claim that its first letter stated was covered, or accept a claim that it first denied.[147]

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[143] See, for example, the Texas Basic Manual of Title Insurance, at Section VII, Claims, Part III, quoted above.

[144] The California code states that, if an insurer requires more than 40 days to make a claim determination, the insurer must provide the claimant with written notice that additional time is required to make a determination. The insurer's notice must specify what further information is required in order for the insurer to reach a decision and state the continuing reasons for the insurer's inability to make a determination. California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, § 2695.7(c)(1). If the insurer's inability to make a determination continues, the continuing reasons for the inability to resolve the claim must be communicated in writing to the claimant. This notice must be provided every 30 days thereafter until either a resolution is accomplished or notice of legal action is served. In the event a claims determination is contingent upon some future event, compliance is met by an insurer’s notice to the claimant of the existence of this fact as well as an estimate of when the matter will resolve. The insurer need not disclose information that would inform a claimant that his or her claim is being investigated for suspected fraud. § 2695.7(c)(2). Similarly, the Texas Basic Manual of Title Insurance, at Section VII, Claims, Part III, states that, "should the Insurer be unable to determine whether to accept or deny or conditionally accept the Claim within the time specified in this regulation [30 days from receipt of information requested from the insured], the Insurer may notify the Claimant of the Insurer's inability to accept, deny or conditionally accept the Claim. The notice shall provide the reason(s) for the inability to accept, deny or conditionally accept the Claim."

[145] For example, the Texas Basic Manual of Title Insurance states, at Section VII, Claims, Part II(C) Denial of Claims: "Any denial of the policy coverage of a Claim shall set forth in writing the reasons for such denial. The notice of denial of a Claim must fully inform the Claimant of his/her right to contest the denial by stating (1) any time deadlines to contest the denial of the Claim under the policy or applicable law, and (2) that the Claimant may litigate (or arbitrate to the extent provided in the policy) the Insurer's denial, if the Claimant elects."

[146] Although it is traditional in the title insurance business to refer to "exceptions" as shown on Schedule B of the policy, an exception is actually an exclusion. Further, a special exception is an exclusion for a matter that is specific to the parcel. It can be helpful to the insured in understanding this fact if a denial letter based on an exception explains that exceptions are general exclusions or parcel-specific exclusions.

[147] The Texas Basic Manual of Title Insurance states, at Section VII, Claims, Part III(E), Limitation of Claim Reclassification, states: "Any reclassification shall be made within 30 days of the Insurer's receipt of New Information supporting a change. The Insurer shall provide notice to the Claimant within 15 days of any reclassification. The notice must state the reasons for the reclassification. The notice must fully inform the Claimant of his/her right to contest the reclassification by stating (1) any time deadlines to contest the reclassification of the Claim under the policy or applicable law, and (2) that the claimant may litigate (or arbitrate to the extent provided in the policy) the Insurer's

The administrator may issue a supplemental denial letter explaining the further reason or reasons why there is no coverage for the claim.[148] The claim administrator may augment the coverage determination based on facts that he or she learned after the initial coverage analysis was issued that invoke other policy terms negating coverage. A supplemental coverage determination letter may also be based on further evaluation of the facts known at the time the denial letter was issued.

In all or most jurisdictions, however, an insurer's failure to raise every applicable policy exclusion or term in a coverage denial is not a waiver of the right to assert such other policy terms in policy litigation.[149] An insurer result should not be deemed to have waived the right to assert a policy provision simply because it did not base its claim denial on such provision. A finding of waiver would alter the policy's terms and provide the insured with better coverage than that for which it had bargained. Some title insurers include anti-waiver statements in their claim denials, to explicitly state their intention not to relinquish any available defense to policy liability.[150]

Further, all or most states apply the same principles of waiver and estoppel in finding that an insurer may change its coverage determination and accept a claim after having denied it, or deny a claim after having stated that the claim is covered.[151]

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reclassification, if the Claimant elects." In *RP Family, Inc. v. Commonwealth Land Title Ins. Co*., 2014 WL 1330932 (E.D.N.Y. 2014) (unpublished), the court found that an insurer was not barred from denying a claim after having stated in its coverage determination letter that it considered the matter to be covered by the policy. The insured had argued that the insurer was so barred by the doctrine of equitable estoppel.

[148] See *Pasha v. Commonwealth Land Title Ins. Co*., 2014 WL 5510931 (Ky.App.) (unpublished), which affirmed a judgment declaring that the policy did not cover the claim based on an exception that the insurer first asserted after the insured sued the insurer, because the insurer had reserved the right to supplement the bases for its coverage denial.

[149] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 6:33 and 6:34 (claims of coverage by estoppel) and §6:35 (claims of coverage by waiver), Thomson Reuters.

[150] In *Pasha v. Commonwealth Land Title Ins. Co*., 2014 WL 5510931 (Ky.App.) (unpublished), the denial letter stated: "[p]lease note that, although the provisions of the Policy cited herein provide a sufficient basis for [Commonwealth] to deny coverage for this claim, additional terms and conditions of the Policy may be applicable based upon the facts as presented. Reference to any particular provision of the Policy in this letter, therefore, shall not be construed as a waiver of any other term or provision...." The insured later argued that the insurer had waived the right to assert an exception as a coverage defense because it based its denial solely on an exclusion. The court observed that waiver is established by a course of conduct in which a party voluntarily and intentionally surrenders or relinquishes a known right, and the no-waiver statements in the claim denials "indicate Commonwealth had no intention to relinquish any of its rights at any time… ." Similarly, in *Geo Finance, LLC v. University Square 2751, LLC*, 2014 WL 7369940 (E.D.Mich. 2014) (unpublished), recons.den. 2015 WL 403620 (Jan. 22, 2015), the court rejected the insured's argument that the insurer had waived an exception by failing to rely on it as a basis for denial in the initial coverage determination letter. The court noted that Michigan follows the majority rule that, if an insurer fails to raise a policy term as a basis for a denial, "waiver and estoppel are unavailable to broaden coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded." Further, it said that First American's intent *not* to waive coverage defenses was established by the statement in its letter that the company "expressly 'reserves the right to establish additional grounds for denial should a further review of the file becomes necessary.'"

[151] In *RP Family, Inc. v. Commonwealth Land Title Ins. Co*., 2014 WL 1330932 (E.D.N.Y. 2014) (unpublished), the court held that a title insurer was not equitably estopped from denying coverage after initially stating that the claim was covered by the policy. The court emphasized the statement in the coverage determination letter that the insurer's

Some of the sample letters in Appendix A to this book offer a preliminary analysis of the claim, rather than a final denial. A preliminary analysis letter explains that the coverage determination is based on the facts known to the insurer, which typically are recited in some detail. If the insured disagrees with the basis for the coverage determination or the assumed facts recited by the insurer, he or she is invited to reply with new information or evidence for an interpretation of the policy's terms that would favor coverage. This approach seeks to avoid the possibility that the insurer will deny a claim based on incomplete information, when facts not known to the insurer might cause it to accept rather than deny the claim. One court viewed a preliminary analysis letter as a denial of coverage tempered by the expression of the insurer's "willingness ... to reevaluate the denial of coverage in the event the [insured] provide[s] additional information establishing coverage under the terms of the insurance contract."[152] When the insurer issues a preliminary analysis, the burden shifts to the insured to contest the insurer's coverage position and the facts on which it is based.

If the insured does not respond to a preliminary analysis, the insurer will normally assume that the insured does not disagree with the facts on which the denial was made. The insurer may then elect to issue a second letter formalizing the denial. See the Forms Appendix for a template preliminary analysis letter, various text inserts that may be used with the letter, and a sample final denial letter.

In most cases, the insurer may respond to a tender of defense in litigation either by accepting the tendered defense or by declining to defend the insured. One court found that, when the insurer declined to defend the insured but also said it was willing to discuss the basis for its decision, the letter should be interpreted as a denial.[153]

In at least some jurisdictions and under certain circumstances, an insurer's failure to assert a particular policy defense in a reservation of rights letter precludes the insurer from relying on additional policy defenses as the basis for a refusal to pay a judgment adverse to the insured that is rendered in the litigation in which the insurer provides the defense. See §4.9 on reservation of rights letters.

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investigation was ongoing, and that it was not waiving policy terms even as it stated its opinion that the matter was covered. The letter said: "Commonwealth is currently investigating all available remedies under the policy, and Commonwealth will take appropriate action in accordance with and pursuant to the terms and conditions of the policy... . Please note that reference to any particular provision of the policy in this letter shall not be construed as a waiver of any other term or provision. Commonwealth retains the right to supplement this letter."

[152] *Karl v. Commonwealth Land Title Ins. Co.*, 70 Cal.Rptr.2d 374 (1997). The letter in *Karl* concluded: "... if you have any other information or authority which you believe would establish the claim as a covered matter under the policy, please contact the undersigned as soon as possible so that this office may re-evaluate its position on coverage." The second letter similarly stated: "... if you still feel that you have additional information or authority which would establish this claim as a covered matter under the policy, you are still welcome to submit it to this office for review so that we may re-evaluate our position on coverage."

[153] *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F.Supp.2d 110 (D.Mass. 1999).

2.14 Voluntary Settlement By Insured

The ALTA title insurance policies state that no claim shall arise or be maintainable if the insured voluntarily settles the claim without the insurer's prior, written consent. Condition 9(c) of the 2006 ALTA policies states:

> The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

The language of Conditions & Stipulations 9(c) of the 1992 ALTA policies is identical.

When an insured settles a claim before giving notice to the insurer, or after notice but without the insurer's consent, the insurer may be absolved of any obligation to reimburse the insured for the amount that it voluntarily paid in the settlement.[154]

The policy has been interpreted to implicitly state that the insurer may not withhold consent to a settlement arbitrarily or unreasonably.[155] The voluntary settlement provision may be deemed waived if the insured settles after the insurer denies the claim or if the insured notifies the insurer of its intent to settle and the insurer does not adequately respond.[156] The insurer may properly withhold

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[154] In *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc*., 347 S.W.3d 582 (Mo.App.S.D. 2011), the insured lender settled with the borrower on the debt and released its deed of trust without the insurer's consent, and was found to have terminated the policy and its claim for an undisclosed prior lien. In *Republic First Bank v. First American Title Ins. Co.*, 2010 WL 5315979 (D.N.J.) (unpublished), the court found that a lender negated its policy coverage by taking a new mortgage to solve the possible infirmity of the insured mortgage a week after submitting a claim notice, then settling with the bankruptcy trustee who attacked the later mortgage as a preference, all without the written consent of the title insurer and without waiting for it to solve the title defect. In *Chicago Title Ins. Co. v. Bristol Heights Associates, LLC*, 142 Conn.App. 390, 70 A.3d 74 (Conn.App. 2013), cert.den. 309 Conn. 909, 68 A.3d 662 (Conn. June 20, 2013), the insured's payment of real estate taxes that were debatable as to both validity and amount, without notice to the insurer, voided policy coverage. In *Wilmington Savings Fund Society, FSB v. Stewart Title Guar. Co.*, 2012 WL 5450830 (Del.Super.) (unpublished), the title insurer was found not to be obligated to reimburse an insured lender that elected to buy a competing lien without the insurer's consent while the insurer was defending the insured's lien priority. In *Umpqua Bank v. First American Title Ins. Co*., 542 Fed.Appx. 635, 2013 WL 5665013 (9th Cir. (Cal.)) (unpublished), an insured that defended itself in litigation for 14 months before tendering to its insurer, and then settled the case two weeks after tender, voided its policy coverage. In *Fidelity Nat'l Title Ins. Co. v. Centerpoint Mechanic Lien Claims, LLC*, 238 Ariz. 135, 357 P.3d 170, 720 Ariz. Adv. Rep. 7 (Ariz.App. 1 Div. 2015), the insureds formed an entity to purchase the mechanics' lien claims that were the subject of the claim. They then demanded that the insurer pay more to release the liens than the insureds had paid to buy them. The court held that the insureds vitiated policy coverage by making the settlements, and that the arrangement was a collusive settlement that did not fit within an Arizona rule that allows an insured to settle a lawsuit without the insurer's consent when it is being defended under a reservation of rights.

[155] *Franklin v. Oklahoma City Abst. & Title Co.*, 584 F.2d 964 (Okla. 1978).

[156] In *Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC*, 2009 WL 1258274 (E.D.Ark.) (unpublished), the insurer had denied the claim before a mediation, but the insured advised the insurer of every settlement offer made at mediation, and the insured settled the case. The court ruled that the insurer had waived the voluntary settlement defense for two reasons: by failing to invoke the defense at the time the insured was communicating with the company about the possible settlement, and also by its denial of what the court later determined to be a covered matter. In *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc*., 2012 WL 4856391 (D.Utah) (unpublished), the court found that the insurer

consent to a settlement when the insurer is taking action to clear title, which is its right.[157]

The voluntary settlement provision is often construed as if it contains a condition that the insurer be prejudiced by the terms of the settlement.[158] Two primary factors considered by those courts are whether or not substantial rights have been irretrievably lost, and the likelihood of success if the insurer had been given the ability to defend the lawsuit. In *New Jersey Dep't of Environmental Protection v. DiFlorio*,[159] the insured tendered its defense after having settled the lawsuit. The court found it "significant" that the insured, Thompson, failed to notify the insurer, First American, of its intention to settle the case, and recognized that the policy includes the voluntary settlement provision. Thus, it said, "Thompson did not comply with the policy requirement that it notify the insurance carrier before it agreed to a settlement." However, the court went on to say that New Jersey case law adds the judicial gloss to all insurance policies that, to avoid payment based on the breach of a notice provision, the insurer must prove that it has suffered "appreciable prejudice" as a result. The court did not find "appreciable prejudice" in the terms of the settlement reached by the insured.

A collusive settlement by the insured is a bad faith act and negates liability.[160] See §16.1.7

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had waived the voluntary settlement defense when, after receiving notice from the insured that it intended to make a settlement, it wrote back that "[w]e understand generally that the insured expects to dismiss the appeal at the end of the year, that it has made a decision to vacate the subject premises and is in the process of negotiating remediation or contamination agreements with the Tribe." The court also said Commonwealth was estopped from asserting the voluntary settlement provision by its failure to object to the settlement plan, and that it was not harmed by the settlement. However, the court rejected the insured's argument that the settlement was not voluntary but forced, because it was being strong armed by the Bureau of Indian Affairs, which had signed a lease and then reneged on it at the request of the tribe. In *Wells Fargo Bank, N.A. v. Stewart Title Guar. Co.*, 2016 WL 4455070 (D.S.C. 2016) (unpublished), the insured lender settled with its borrower by accepting less than the full debt amount after the insurer denied the claim as being premature. The court denied the insurer's motion to dismiss the policy breach lawsuit based on the voluntary settlement provision, finding that the settlement was less than voluntary following the denial of the claim.

[157] *Diversified Mortgage Investors v. U.S. Life Title Ins. Co.*, 544 F.2d 571 (2d Cir. 1976) (insured not entitled to order commanding insurer to pay off lien when insurer had already elected to clear title instead); *Wilmington Savings Fund Society, FSB v. Stewart Title Guar. Co.*, 2012 WL 5450830 (Del.Super.) (unpublished) (title insurer not required to reimburse lender that elected to buy competing lien without insurer's consent while insurer was defending the insured's lien priority).

[158] Prejudice caused by tardy notice of claim is discussed at §2.3.3. In *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc*., 2012 WL 4856391 (D.Utah) (unpublished), the insurer argued that it was prejudiced by the insured's settlement because that deprived the insurer of the right to pursue the pending action against the BIA to a final determination. The court said that the insurer did not have an unfettered right "to have the dispute fully litigated," and "the strength of the BIA's litigation stance suggests that pursuing the appeal to a final conclusion would have been futile." In *Millennium Bcpbank, N.A. v. First American Title Ins. Co*., 2011 WL 6412128 (N.J.Super.A.D.) (unpublished), a lender made title claims asserting that two mortgages from the same borrowers were defective, but settled with the borrowers by taking a money judgment against them. The court said that the insurer was required to show prejudice in order to assert the voluntary settlement defense, and a prime question about prejudice was whether or not the borrowers were collectible.

[159] 2007 WL 4553046 (N.J.Super.A.D.) (unpublished).

[160] In *Fidelity Nat'l Title Ins. Co. v. Centerpoint Mechanic Lien Claims, LLC*, 238 Ariz. 135, 357 P.3d 170, 720 Ariz. Adv. Rep. 7 (Ariz.App. 1 Div. 2015), the insureds formed an entity to purchase the mechanics' lien claims that were the

for a discussion of collusive settlements and the defense of comparative bad faith.

2.14.1 Consent By Implication, Waiver Or Estoppel

A court may find that the insurer has consented to a settlement if its employee gives assent by some communication less than in writing.[161] The insurer's consent may be implied or imputed based on the actions of the attorney hired by the insurer to represent the insured or to investigate the claim.[162] The insurer's offer to contribute to a settlement may be found to be a waiver of the consent clause.[163]

2.14.2 Voluntary Payment Of Lien

The voluntary payment of a lien that *is* subject to a valid defense, without the insurer's written consent, prejudices the insurer and negates coverage.[164] However, the voluntary consent provision is sometimes not enforced, most often when the court determines that there is no evidence that the lien was subject to valid defenses.[165]

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subject of the claim. They then demanded that the insurer pay more to release the liens than the insureds had paid to buy them. The court held that the insureds vitiated policy coverage by making the settlements, and that the arrangement was a collusive settlement that did not fit within an Arizona rule that allows an insured to settle a lawsuit without the insurer's consent when it is being defended under a reservation of rights.

[161] Oral consent to a settlement provided by an employee of the insurer was found to be adequate in *Black v. Pioneer Nat'l Title Ins. Co.,* 138 Ga.App. 138, 225 S.E.2d 689 (1976).

[162] In *Arizona Title Ins. & Trust Co. v. Pace,* 8 Ariz.App. 269, 445 P.2d 471 (1968), the insurer was not notified and gave no consent. Nonetheless, the court imputed knowledge and consent from the fact that the lawyer who advised the insured to settle had been hired by the insurer. In *Security Title & Guar. Co. v. MGIC Mortgage Corp.*, 160 Ga.App. 421, 287 S.E.2d 352 (Ga.App. 1981), the court found that the insurer had waived its right to advance written consent because the counsel it retained to investigate the claim settled the title dispute.

[163] In *Clinton David, Inc. v. Lawyers Title Ins. Corp.*, 1999 WL 125721 (4th Cir. (S.C.)) (unpublished), the insurer's agreement to pay part of the cost of settling the lawsuit was found to be either consent or estoppel to raise the voluntary settlement defense, particularly because the insurer's attorney also commented that he believed the matter should be "terminated" (which the court read to mean "settled").

[164] The insured's failure to obtain the insurer's consent to the payoff of liens was found to extinguish the insured's claim in *Blessing v. American Title & Ins. Co*., 121 So.2d 455 (Fla.App. 1960). The insured's failure to obtain the insurer's written consent before payment of a lien was also found to preclude recovery by the insured in *Mary Ellen Sandlie Trust v. Pioneer Nat'l Title Ins. Co.*, 648 S.W.2d 761 (Tex.App. 1983). In *Columbia Community Credit Union v. Chicago Title Ins. Co.*, 2010 WL 546923 (W.D.Wash.) (unpublished), voluntary dismissal denied, 2010 WL 1992225, an insured lender was denied summary judgment in its claim that the insurer was obligated to reimburse it for large construction liens paid by the lender, to allow the insurer to prove that it was prejudiced by the lender's failure to assert priority based on equitable subrogation. The court remanded for a determination as to whether or not the lien was valid, as a predicate to a finding on the settlement defense, in *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co.*, 950 F.2d 139 (4th Cir. 1991).

[165] *Blessing* was distinguished in *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (1979), which involved a restriction rather than a lien, and in which the court did not enforce the voluntary consent provision. See also, *Shada v. Title & Trust Co. of Fla.*, 457 So.2d 553 (Fla.App. 1984); and *Holinda v. Title & Trust Co. of Florida*, 438 So.2d 56 (Fla.App. 5 Dist. 1983), pet.rev.den., 449 So.2d 265. The *Holinda* court stated the rule thus: "the satisfaction of an

A voluntary payment to the lien holder prevents the insurer from seeking to clear title and obtaining a final determination that the lien is not valid or prior, at which point the insurer has no further duty to the insured, as further discussed at §3.4 and particularly §3.4.5 on the final determination clause. Thus, courts have found it particularly appropriate to find that the insured has negated policy coverage by settling a lawsuit with a lien claimant when the last order in the action was in the insured's favor.[166]

Unlike an owner, a lender must show more than just that a lien was valid in order to have the settlement defense waived. For a lender, the mere existence of a superior lien does not result in "actual loss." A lender voids policy coverage by paying a lien when it is unable to prove that the lien had impaired its security or threatened the insured lien.[167]

When the policy contains an affirmative indemnification against a final judgment or order enforcing the covered matter, coverage is not triggered until there is such a final determination or order. This precludes the insured from settling the matter and then seeking to be indemnified. In *BancOhio Nat'l Bank, N.A. v. Security Union Title Ins. Co.*,[168] the policy excepted an existing lawsuit affecting the property, but contained an affirmative assurance against a "final order of a court of competent jurisdiction" in the lawsuit. The court found that the insurer had a duty to defend. However, the insurer was not responsible for reimbursing the insured for its voluntary settlement of the case while on appeal from a summary judgment in the insured's favor.

> BancOhio did not resolve the claims in Katz by reason of a "final order of a court of competent jurisdiction." In fact, all final court orders rendered to that point were in BancOhio's favor. Upon appeal to the Ohio Supreme Court, BancOhio voluntarily settled the case rather than continue the prolonged and ongoing litigation. BancOhio made this decision with full knowledge of the terms and coverage provided by the title insurance policy. Nonetheless, it chose to settle rather than proceed to final judgment. As such, the settlement amount paid by BancOhio falls outside the scope of the policy's coverage... .[169]

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outstanding judgment which is a valid, enforceable lien on the real property does not constitute a 'voluntary satisfaction.'" To the same effect is *Atlanta Title & Trust Co. v. Allied Mortgage Co.*, 60 Ga.App. 114, 3 S.E.2d 127 (1939), aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940).

[166] *Gibraltar Savings v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203 (8th Cir. 1990).

[167] *Ring v. Home Title Guar. Co.*, 168 So.2d 580 (Fla.App. 1964); however, an earlier case is contra: *Atlanta Title & Trust Co. v. Allied Mortgage Co.*, 60 Ga.App. 114, 3 S.E.2d 127 (1939), aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940).

[168] 1993 WL 524890 (Ohio App. 10 Dist.) (unpublished).

[169] Id. at 3.

2.14.3 "Emergency" Settlements

Several older decisions found that the insureds were excused from obtaining the insurer's prior written consent to the settlement of liens when the insured had to act immediately in order to close on the sale of the property.[170] The usual argument is that the settlement of a title problem that permits a sale of the property to close is a mitigation of the insured's damages for which the insured should not be penalized. However, if a claim has already been submitted to the insurer about the matter, the insured is well aware that it needs guidance and consent from the insurer in order to sell the property and resolve the purchaser's concerns about the ongoing title issue. The insurer has the right to offer to insure over the lien for a purchaser, to give a letter of indemnity to another insurer, or take other mitigating action, as further discussed at §3.4.4.

2.14.4 Settlement After Wrongful Denial Or Rejection Of Defense

The insured is not required to obtain the insurer's consent to a settlement of the claim matter after the insurer has wrongly denied the claim or a tendered defense.[171] This rule comes from the general insurance principle that the insured's duties under the policy cease when the insurer materially breaches its duty.[172] The court will presume that the insured settled the lawsuit because

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[170] *Holinda v. Title & Trust Co. of Florida*, 438 So.2d 56 (Fla.App. 1983); *Jefferson Fed. Savings & Loan Ass'n v. Berks Title Ins. Co.*, 472 A.2d 893 (D.C.App. 1984).

[171] See *Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC*, 2009 WL 1258274 (E.D.Ark.) (unpublished), in which the insurer denied the claim several times before a mediation was conducted, the insured nonetheless advised the insurer of every settlement offer made at mediation, and the insured settled the case. The court ruled that the insurer had waived the voluntary settlement defense for two reasons: by failing to invoke the defense at the time the insured was communicating with the company about the possible settlement, and also by its rejection of the insured's defense in the litigation and denial of what the court later determined to be a covered matter. In *Ticor Title Ins. Co. v. University Creek, Inc.*, 767 F.Supp. 1127 (Fla. 1991), the court found that the insurer had denied the claim by failing to promptly clear title. The insured eventually settled the case. The court found that the insurer, by its inaction, had lost the right to raise the voluntary settlement defense.

[172] *Bluff Ventures Ltd. Partnership v. Chicago Title Ins. Co.*, 950 F.2d 139 (4th Cir. 1991); *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307 (8th Cir. (Virgin Islands) 1991); *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (Fla.App. 1979); *Broser v. Royal Abst. Corp.*, 46 Misc.2d 717, 260 N.Y.S.2d 487 (City Ct. 1965), modified, 49 Misc.2d 882, 268 N.Y.S.2d 594 (N.Y.A.D. 1966); *Franklin v. Oklahoma City Abstract & Title Co.*, 584 F.2d 964 (Okla. 1978); *Northwestern Title Security Co. v. Flack*, 6 Cal.App.3d 134, 85 Cal.Rptr. 693 (Cal.App. 1 Dist. 1970); *Shada v. Title & Trust Co. of Fla.*, 457 So.2d 553 (Fla.App. 1984); *Hansen v. Western Title Ins. Co.*, 220 Cal.App.2d 531, 33 Cal.Rptr. 668, 98 A.L.R.2d 520 (1963); *Nautilus, Inc. v. Transamerica Title Ins. Co.*, 13 Wash.App. 345, 534 P.2d 1388 (1975); *Jones v. Southern Surety Co.*, 210 Iowa 61, 230 N.W. 381 (1930); *Allpress v. Lawyers Title Ins. Corp.*, 218 Tenn. 673, 405 S.W.2d 572 (1966); *Sisco v. Nations Title Ins. Co.*, 278 A.D.2d 479, 718 N.Y.S.2d 82, 2000 N.Y. Slip Op. 11841 (N.Y.A.D. 2 Dept. 2000) (possible collusive settlement after premature retender of defense). In *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F.Supp.2d 110 (D.Mass. 1999), the insurer accepted defense with a reservation, then retendered. The insured settled the lawsuit after retender. The court called the insurer's retender letter a rejection of the defense, even though it is "cloaked in the language of a query and purports to seek a response." The court then ruled the rejection wrongful. As a result, the insured did not violate the voluntary settlement provision of the policy. The court said: "Under the circumstances, ...Premier was entitled to settle the claim on its own and to obtain reasonable indemnity. 'An insurer who unjustifiably refuses or fails to defend its insured, even in good faith, assumes the consequential risks of that breach of its insurance contract, including liability for the expense of a reasonable settlement of the underlying claim as well as the cost of the defense to that time.'" In *Banner Bank v. First American Title Ins. Co*., 916 F.3d 1323 (10th Cir.

the insurer refused to pay for the defense. In some states, once the insurer has wrongly rejected a defense, it may not deny liability based on the voluntary settlement provision, because the insured has no further duty to give notices to an insurer that has already breached its duties.[173] Also, the insurer may not insist on apportionment of the settlement amount between covered and non-covered causes after it wrongfully rejects the insured's defense.[174]

2.15 Statute Of Limitations For Suit On Policy

States vary widely as to the applicable limitations period for the filing of an action for breach of a title insurance contract, and as to the event that causes that time period to begin running. The limitations period may begin to run on the policy date, if the claim was discoverable at that time.[175] The time period may begin to run on the date on which the insured discovered or should have discovered the covered issue.[176] The limitations period may also begin to run on the date on which

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(Utah) 2019), the court held the insurer had no duty to defend the insured, and therefore it was not liable for the amount paid by the insured to settle the lawsuit, reversing a district court ruling that the insurer was obligated to pay the settlement amount because it should have defended the insured.

[173] *Nautilus, Inc. v. Transamerica Title Ins. Co*., 13 Wash.App. 345, 534 P.2d 1388 (Wash.App. 1975); *Allpress v. Lawyers Title Ins. Corp.*, 218 Tenn. 673, 405 S.W.2d 572 (1966). Also see Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 3:10, Thomson Reuters.

[174] *Nautilus, Inc. v. Transamerica Title Ins. Co*., 13 Wash.App. 345, 534 P.2d 1388 (Wash.App. 1975).

[175] *Bodine v. Wayne Title & Trust Co.*, 33 Pa.Super. 68 (1907). In *U.S. Bank, N.A. v. HLC Escrow Inc*., 919 F.3d 17 (1st Cir. (Me.) 2019), the court held that the time for suit on a claim that the policy insured the wrong parcel began running as of the closing date, and the action was thus barred by Maine's six-year statute of limitations.

[176] See *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 645 So.2d 295 (Ala. 1992); *3Z Corp. v. Stewart Title Guar. Co.*, 851 S.W.2d 933 (Tex.App. -Beaumont 1993); *Simkins Industries, Inc. v. Lawyers Title Ins. Corp.*, 696 So.2d 384 (Fla.App. 3 Dist. 1997) (date of discovery found to be date on which endorsement was issued adding the title defect as exception to commitment); *Berthiaume v. Ticor Ins. Services, Inc.*, 2010 WL 3238318 (D.N.H.) (unpublished) (statute of limitations runs from date of insured's discovery of title defect); *Celestin v. Simpson*, 153 A.D.3d 656, 59 N.Y.S.3d 773, 2017 N.Y. Slip Op. 06153 (N.Y.A.D. 2 Dept. 2017) (lawsuit barred because plaintiff sued insurer more than six years after alleged forgery fraud took place and more than two years after he discovered fraud); *Hirschberg v. Fidelity Nat'l Title Ins. Co*., 2018 WL 792238 (N.J.A.D.) (unpublished) (applicable limitations period in New Jersey is general six-year contract statute, N.J.S.A. 2A:14–1, which begins to run "when the property owner knows or has reason to know of the defect to title"); *21st Mortgage Corp. v. Chicago Title Ins. Co*., ___ F.Supp.3d ___, 2018 WL 6716081 (D.N.J. 2018) (permanent citation not yet available) (declaratory judgment action by lender dismissed when filed more than six years after insurer informed lender it would deny any claim based on subject of dispute, which letter was deemed discovery of claim); *Cole-Parker v. Fidelity Nat'l Title Ins. Co.*, 2018 WL 3340474 (N.J.A.D.) (unpublished) (insured's lawsuit based on lien for her own debt barred by New Jersey statute because insured did not file suit within six years of learning that lien attached to her title); *Dent Road General Partnership v. Synovus Bank*, 2018 WL 6173406 (Tenn.App.) (unpublished) (limitations period for policy suit began on date of closing because title defect was disclosed to insured at closing). California has a two-year statute of limitations for suit under a title insurance policy, California Civil Procedure Code § 339(1), which incorporates a discovery rule. The cases interpreting that law are discussed below, this section. See, for example, *Fletcher Ranch Road Properties, LLC v. Chicago Title Ins. Co.*, 2018 WL 3135402 (Cal.App. 1 Dist.) (unpublished) (time limit begins running as to access issue on date insured discovers that property lacks access, not when access dispute erupts).

the insured sustains an ascertainable loss,[177] the date on which the claim is denied,[178] or the date on which the insured's rights in the property are extinguished.[179] South Carolina has stated that a title insurance policy that contains a corporate seal is a "sealed instrument," which extends the statute of

[177] A Missouri statute says accrual for purposes of the limitations period begins when the damage resulting from the alleged breach of contract or duty is sustained and can be ascertained. R.S.Mo. § 516.100. The loss may be ascertained when "a reasonable person would have been put on notice that an injury and substantial damages may have occurred." *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 585 (Mo. 2006). Missouri has held that a reasonable lender is put on notice when the borrower defaults. *Title Ins. Co. of Minn. v. Construction Escrow Service, Inc.*, 675 S.W.2d 881 (Mo.App. 1984); *Federal Deposit Ins. Corp. v. St. Louis Title, LLC*, 2014 WL 200368 (E.D.Mo.) (unpublished).

[178] *Stewart Title Guar. Co. v. West*, 676 A.2d 953 (Md.App. 1996) (in Maryland, cause of action for breach of insurance contract "accrues only after a claim is tendered to the insurer and the insurer fails to comply with its obligations under the agreement"); *Bourne v. Stewart Title Guar. Co*., 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished) (New Hampshire's three-year contract statute of limitations for the insured's claims for "defense" in litigation began running on the day he received the insurer's letter denying those claims); *Estates of Haselwood v. Chicago Title Ins. Co.*, 2011 WL 2881852 (W.D.Wash.) (unpublished) (Washington state statute of limitations begins when insurer denies claim, not when insured discovers title defect, even when insured sent claim notice four years after it learned of title defect); *Barker v. Jantzen Beach Village Condominium Ass'n*, 2013 WL 244474 (D.Or.) (unpublished) (lawsuit for breach of policy was premature because it was filed before insurer accepted or denied claim); *Bank of America, N.A. v. Dakota Homestead Title Ins. Co*., 553 Fed.Appx. 764, 2013 WL 6801066 (10th Cir. (Colo.) 2013) (unpublished) (statute begins to run on date of claim denial); *Wells Fargo Bank, N.A. v. First American Title Ins. Co.*, 2016 WL 1366078 (D.Md. 2016) (unpublished) (Maryland statute of limitations for action on title insurance policy begins when claim is denied, not when claim is submitted or the insured discovers the title defect, even when insured submitted a tardy claim notice, relying on *Stewart Title Guar. Co. v. West*); *Stewart Title Guar. Co. v. Hadnot*, 101 S.W.3d 642 (Tex.App.-Houston 2003) (cause of action for breach of policy accrued when insurer denied coverage, not when insured sustained out of pocket expenses; insurer not estopped to assert statute of limitations due to statement made in denial letter). In *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc*., 2012 WL 4856391 (D.Utah) (unpublished), the court rejected the insurer's argument that the policy claim was barred by Utah's insurance contract statute of limitations, which says that an action must be brought within three years "after the inception of the loss." Utah Code Ann. § 31 A-21-313 (1). Commonwealth argued that the date the BIA declared the insured lease void was the inception of loss date. The court said the loss did not occur until Commonwealth filed a declaratory judgment action, on the premise that the insurer "was still considering whether it had the obligation to indemnify" until it filed suit. In *Spalding v. Stewart Title Guar. Co*., 463 S.W.3d 770 (Mo. 2015), the court held that the statute began to run on the date the insurer offered payment to the insured, which the court deemed to be a breach because the amount offered was too low.

[179] In *U.S. Bank, N.A. v. First American Title Ins. Co*., 570 Fed.Appx. 209 (3rd Cir.) (unpublished), affirming 944 F.Supp.2d 386 (E.D.Pa. 2013), the court held that the statute of limitations began running on the discovery of the title defect, the date on which the insured submitted the claim or on the date on which the insured mortgage was wiped out by the foreclosure of a senior lien. It did not decide the question of which date was controlling, because the lender did not bring suit against the insurer even by the last of the three possible dates. The court said that the running of the statute was not suspended until the insurer breached the policy. The insured had argued that the insurer did not breach the policy although it did not protect the insured lien. In *Park v. First American Title Ins. Co.*, 743 Fed.Appx. 902 (10th Cir. (Utah) 2018) (unpublished), the Tenth Circuit construed Utah Code §31A-21-313(1)(a), which says that a lawsuit against an insurer about an insurance policy must be brought within three years after the "inception of the loss." The court held that the "inception" was the date on which judgment was entered in a quiet title action, extinguishing the insured's rights. The court said this was "consistent with" the policy's final determination clause. It reversed the trial court's ruling that the limitations period began when the suit was filed, because the insured was not seeking the cost of defending that action.

limitations from three years to twenty.[180] When the policy states the time limit within which the insured must bring suit to enforce the contract, the policy provision controls.[181]

Some circumstances may toll the running of the applicable statute of limitations. The statute may be equitably tolled while the insurer is investigating the claim. In *Forman v. Chicago Title Ins. Co.*,[182] the insured submitted the claim to the insurer within the limitations period. The insurer spent 16 months investigating, eventually rejecting the claim. The insured filed suit, but after the two-year limitations period had expired. The appellate court remanded for a determination as to whether or not the statute of limitations should be considered equitably tolled by the insurer's investigation, saying:

> Under the terms of the insurance company's own contract, Forman was *required* to submit his claim against the title company to a lengthy evaluation process. ... Under respondent's view, Forman had only an eight-month window in which he could file a lawsuit against Chicago Title. ... In our view, the law does not allow insurers to so foreshorten the insured's statutory period for deciding whether to file suit.[183]

When the insured sues for breach of a duty to defend, the limitations period may begin on the date on which the insurer declined to defend the insured, although the time period may also be tolled until the underlying action is concluded.[184] When the insurer takes action to clear title and is unsuccessful, the statute begins to run when the action is concluded.[185] However, the limitations period is not tolled during the time in which the insured seeks to clear title without giving notice of the claim to the insurer.[186]

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[180] *Lyons v. Fidelity Nat'l Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (S.C.App. 2015); *Loflin v. BMP Development, LP*, 427 S.C. 580, 832 S.E.2d 294 (S.C.App. 2019).

[181] *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.Civ.App. 1962); *Central Bank v. Transamerica Title Ins. Co.*, 85 Cal.App.3d 859, 149 Cal.Rptr. 822 (1978).

[182] 32 Cal.App.4th 998, 38 Cal.Rptr.2d 790 (Cal.App. 2 Dist. 1995).

[183] 38 Cal.Rptr.2d at 795.

[184] In *Lambert v. Commonwealth Land Title Ins. Co.*, 282 Cal.Rptr 445, 811 P.2d 737 (1991), the court held that a cause of action for breach of a duty to defend accrues on the day the insurer rejects the defense, but that the statute of limitations is equitably tolled until there is a final judgment in the action. The court rested this holding on the theory that a lawsuit can take two years to complete, and it would be "untenable" to "allow expiration of the statute of limitations on a lawsuit to vindicate the duty to defend even before the duty itself expires." In *Feduniak v. Old Republic Nat'l Title Ins. Co.*, 2015 WL 632324 (N.D.Cal.) (unpublished), the court relied on *Lambert* in finding that the statute of limitations period began running when the lawsuit was over, not when the insured tendered its defense.

[185] *Ghaly v. First American Title Ins. Co. of New York*, 644 N.Y.S.2d 770 (1996).

[186] In *Hopmeier v. First American Title Ins. Co.*, 856 S.W.2d 387 (Mo.App. 1993), the insured spent more than five years attempting to cure his own title, and submitted the claim only after his efforts failed. The court found that the statute had already run, and rejected the insured's argument that no claim existed until he had exhausted his unsuccessful attempt to clear title.

The insurer and insured may enter into a tolling agreement by which the insurer waives the defense of a statute of limitations that expires during an agreed-on time period. In *Stuckey v. McCalla, Raymer, Padrick, Cobb & Nichols*,[187] involving an escrow, the agreement created a tolling "window." The insurer waived the right to assert the statute of limitations as to contract claims which expired during a certain 15-month period. The escrow principal eventually sued the insurer on a claim of breach of fiduciary duty. He claimed a ten-year statute of limitations. Because he missed even the ten-year limit, he argued that the tolling agreement added 15 months to that time period. The court rejected the argument, holding that the agreement applied only to contract claims that expired during the tolling window, and was not a general extension of all statutes of limitation.

California has a specific title insurance limitations period of two years, which begins to run from the insured's discovery of the title issue.[188] This statute has spawned a number of decisions interpreting the law. "Discovery" of the loss typically occurs when the insured learns that title is defective.[189] However, the California statute has been held to begin running when the insurer denies the claim.[190] When the insured discovered a title defect even before the title insurance policy was issued, the limitations period was found to begin on the date on which the policy was received by the insured.[191] The time period is tolled while the insurer is pursuing litigation to clear or establish

[187] 241 Ga.App. 527, 527 S.E.2d 219 (Ga.App. 1999).

[188] "[A]n action founded upon a contract, obligation or liability, evidenced by a[n] ... abstract or guaranty of title of real property, or by a policy of title insurance" has a two-year statute of limitations, and such a cause of action "shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." Code of Civil Procedure § 339(1). In *Faghi v. National Title Ins. of New York, Inc.*, 2019 WL 4182632 (Cal.App. 3 Dist.) (unpublished), the title insurer was dismissed from the coverage suit filed by its insured because the insurer was not served with the complaint until three years after the suit was filed. The insured sued the insurer using the wrong name and attempted service of the complaint on the wrong parties.

[189] *Tabachnick v. Ticor Title Ins. Co.*, 24 Cal.App.4th 70, 29 Cal.Rptr.2d 59 (Cal.App. 2 Dist. 1994); *Fletcher Ranch Road Properties, LLC v. Chicago Title Ins. Co.*, 2018 WL 3135402 (Cal.App. 1 Dist.) (unpublished) (California two-year statute of limitations for suit under title insurance policy begins running as to access issue on date insured discovers that property lacks access, not when access dispute erupts); *Han Realty Corp. v. Bank of America, N.A.*, 2019 WL 1594020 (Cal.App. 2 Dist.) (unpublished) (discovery rule did not extend time to sue for breach of title insurance policy when claim concerned lender's failure to release deed of trust after escrow closed, because deed of trust was recorded and imparted constructive notice, and insured could have discovered its continued existence of record at any time).

[190] In *Park v. First American Title Ins. Co.*, 2011 WL 1991651 (Cal.App. 4 Dist.) (unpublished), the court ruled that the statute began running when the insurer denied the claim, not when the insured discovered the defect in the insured deed of trust that led to the claim. It cited *Forman v. Chicago Title Ins. Co.*, 32 Cal.App.4th 998, 38 Cal.Rptr.2d 790 (Cal.App. 2 Dist. 1995), discussed this section, which found that the statute was tolled while the insurer evaluated the claim, and a treatise that says: "The statute of limitations on a breach of contract action begins to run when the breach occurs. In an action to recover policy benefits, the statute starts to run upon the insurer's unconditional denial of the insured's claim."

[191] In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, a lawsuit was pending on the policy date that contained a claim for which the court found a duty to defend. The covered claim was excised from the amended complaint filed after the policy date. The court held that the limitations period began to run on the policy date, since it could not begin running until the policy was issued and could not start on the filing of the amended complaint that withdrew the covered claim. In *Smeaton v. Fidelity Nat'l Title Ins. Co.*, 72 Cal.App.4th 1000, 85 Cal.Rptr.2d 591

title.[192] However, when the insurer takes action to clear title and is unsuccessful, the statute begins to run when the action is concluded.[193] The California statute is not equitably tolled while an insured attempts to negotiate a resolution of the title issue, because if there was tolling the insured could extend the limitations period by dragging out the negotiations.[194] The California statutory time period also is not tolled during the time in which the insured has potential warranty liability, but without any demand having been made on those title warranties.[195] However, when the policy states the time limit within which the insured must bring suit to enforce the contract, the policy provision controls.[196] The insurance regulations adopted by California in 1992 state that the insurer must notify the insured at least 60 days before the statute of limitations for suit on the policy expires. This provision does not apply to an insured represented by counsel on the claim matter.[197]

The Federal Deposit Insurance Company asserts that the federal Financial Institutions Reform, Recovery, and Enforcement Act permits it to bring a contract lawsuit within the *later* of six years from the date the claim accrued or the state limitations period, and that negligence claims

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(Cal.App. 3 Dist. 1999), the court focused on the language in the statute that the action is "founded on" the title policy, and held as follows: "A claim 'founded upon' a title policy is one which relies upon the language within a written instrument or contract. Accordingly, a claim founded upon a title policy does not accrue until the title policy is issued. Fidelity protests that because the policy provided coverage effective as of the date of recording, any delay in typing and delivering the policy is immaterial. Fidelity also notes it cannot issue the title policy until after the deed is recorded, and asserts delays in issuing such policies is customary. We find Fidelity's protestations unpersuasive. The statutory language requires issuance of the policy as a prerequisite to the action. Any delay in typing and delivering a policy is attributable solely to, and within the control solely of, the insurer. It seems likely that most discoveries of loss or damage occur after issuance of the policy. In circumstances such as those presented here, where the discovery occurred before issuance of the policy, we find no persuasive reason to grant the benefit of the additional time to the insurer, who had exclusive control over the delay in typing and delivering the policy. Moreover, because a claim founded upon a title policy relies upon the policy's language, an insured could not institute a lawsuit prior to reviewing the policy. Although the insured may have discovered facts leading the insured to believe a claim existed, the insured could not be certain of the viability of the claim before reviewing the actual language contained in the policy."

[192] In *Grill v. Ticor Title Ins. Co.*, 2017 WL 344326 (Cal.App. 3 Dist.) (unpublished), the court held that the time limit for suit on the policy was tolled during the years in which the insurer was seeking to establish access for the insured, and began running on the day the insurer announced that it had completed the title clearance action. The insured said that the access obtained was not as insured. The insured's suit was barred because it was filed more than two years after the announcement date.

[193] In *Grill v. Ticor Title Ins. Co.*, 2017 WL 344326 (Cal.App. 3 Dist.) (unpublished), the court held that the time limit for suit on the policy began on the day the insurer announced that it had completed the title clearance action, which the insured said had not delivered title as insured. The insured's suit was barred because it was filed more than two years after the announcement date.

[194] *65 Butterfield, a California Limited Partnership v. Chicago Title Ins. Co.*,70 Cal.App. 4th 1047, 83 Cal.Rptr.2d 40 (Ct.App. 4 Dist. 1999).

[195] *Grill v. Ticor Title Ins. Co.*, 2017 WL 344326 (Cal.App. 3 Dist.) (unpublished).

[196] *Central Bank v. Transamerica Title Ins. Co.*, 85 Cal.App.3d 859, 149 Cal.Rptr. 822 (1978).

[197] California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, §2695.7(f).

brought by the FDIC get a similar extended limitations period.[198]

The insured may also lose the right to sue the insurer based on doctrines intended to bring finality to litigation.[199] The insurer's right to bring a declaratory judgment action as to policy coverage, and the numerous bases for such an action, are discussed at §4.14.

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[198] See *Federal Deposit Ins. Corp. v. St. Louis Title, LLC*, 2014 WL 200368 (E.D.Mo.) (unpublished), which held that, under FIRREA, contract claims may be brought by the FDIC by the *later* of six years after the claim accrued or the last date provided by state law (12 U.S.C. § 1821(d)(14)(A)(i)) and negligence actions within the *later* of three years after the date the claim accrued or the applicable state law deadline. 12 U.S .C. § 1821(d)(14)(A)(ii). The court said that the FDIC's claims "accrued" on the day on which it became the receiver for the failed institution.

[199] For example, in *Mocco v. Frumento*, 710 Fed.Appx. 535, 2017 WL 4231556 (3rd Cir. (N.J.)) (unpublished), the court employed the "entire controversy" doctrine to bar the insured from adding the title insurer to longstanding litigation over title on the eve of trial. New Jersey's entire controversy doctrine dictates that "a party cannot withhold part of a controversy for separate later litigation even when the withheld component is a separate and independently cognizable cause of action." The doctrine "applies in federal courts when there was a previous state-court action involving the same transaction." The purposes of the rule are to avoid piecemeal decisions about the same controversy, to promote fairness to all parties in the dispute and to avoid waste and delay. The court noted that the insurer had been harmed by being named years into the litigation in part because all claims that it might have brought against others were already time-barred.

3 Resolving Covered Claims

3.0 Insurer's Options In Resolving A Covered Claim

This chapter addresses the issues raised in the handling of covered claims. To determine whether or not a claim is covered, use the decision trees in Chapter 1 as a framework for analyzing the covered risks, exclusions, exceptions and other applicable policy terms.

Each parcel of real estate is unique. Thus, unlike other lines of insurance, in which losses are paid based on the cost of replacing the insured property or reconstructing it, the title insurer cannot replace the insured land with duplicate property. However, sometimes the insurer is able to remove the title defect by litigation or negotiation with a third party, or cure the title to the property.

The title insurance policy is written to give the insurer the necessary flexibility in resolving each covered claim in the most effective manner. The most commonly used forms of owner's policies give the insurer at least the following seven options for resolving a covered claim.[1] The insurer may:

1. Pay the insured his or her actual loss [Conditions 7(b)(ii) of the 2006 ALTA Owner's policy]. See §3.2 regarding payment of loss to the insured owner.

2. Defend an insured who has been sued [Conditions 5(a), 2006 ALTA Owner's policy].

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[1] The ALTA Residential policy sets out six options in one list:

"4. <u>OUR CHOICES WHEN YOU NOTIFY US OF A CLAIM</u>

After we receive your claim notice or in any other way learn of a matter for which we are liable, we can do one or more of the following:

a. Pay the claim against your title.
b. Negotiate a settlement.
c. Prosecute or defend a court case related to the claim.
d. Pay you the amount required by this Policy.
e. Take other action which will protect you.
f. Cancel this policy by paying the Policy Amount, then in force, and only those costs, attorneys' fees and expenses incurred up to that time which we are obligated to pay."

See §3.3 and Chapter 4 regarding defense of an insured in litigation.

3. Prosecute an action on behalf of the insured to establish or clear title [Conditions 5(b) and 9(a), 2006 ALTA Owner's policy]. See §3.4 regarding clearing of title.

4. Pay the insured policy limits [Conditions 7(a), 2006 ALTA Owner's policy]. See §3.5 regarding payment of policy limits.

5. Pay the party adverse to the insured to remove the title defect [Conditions 5(b) and 7(b)(i), 2006 ALTA Owner's policy]. See §3.6 regarding payments to third parties.

6. Cure the insured's title by obtaining a deed, easement, release or other instrument [Conditions 5(b) and 7(b)(i), 2006 ALTA Owner's policy]. See §3.7 regarding this option.

7. Conduct watchful waiting, also known as meaningful monitoring. See §3.1.

In handing a claim under a loan policy, the insurer has two additional options:

8. Tender title to the property to the insured lender. See §3.4.6.1.

9. Purchase the Indebtedness from the insured lender. See §3.8.

In handling most claims, the insurer will have one or several of these options, but rarely if ever will all apply. When there is more than one option, the insurer has the right to choose which one it will exercise. Further, once the insurer has elected to solve the title issue in a particular fashion and has so notified the insured, it is entitled to pursue that option until completed. See the discussion of the final determination provision at §3.4.5. For example, a lender may argue that the insurer should pay off the holder of a junior lien rather than litigate to establish that the lien is defective or junior to the insured mortgage, but the insurer is entitled to complete the title clearance action and to indemnify the insured or remove the lien only if unsuccessful. See §3.4.6 for a discussion of title clearance for a lender.

3.1 Watchful Waiting

FORM 63, Appendix A
No present challenge to title

In some cases, the title insurer has the right, at its option, to respond to a covered claim by what the industry has termed "watchful waiting" or "meaningful monitoring." This option is not directly described in most forms of title insurance policies, but is at least implicitly recognized in the

ALTA Homeowner's Policy.[2] Watchful waiting is the appropriate response when there is the potential for a loss but the policy coverage does not require the insurer to act until the happening of some further event.

The insurer may take the posture of watchful waiting when the insured's title is not being attacked, or is without defect as a matter of law.[3] In such cases, the insurer is not obligated to take affirmative action to confirm the insured's title merely because the insured seeks reassurance about or confirmation of its rights.

The insurer will often adopt watchful waiting in response to a claim under a loan policy when the claim concerns a matter affecting title, and not the validity, priority or enforceability of the insured mortgage, and the lender insured has not yet taken title to the property. For example, the existence of an easement on the property that is not excepted in the policy does not cause the lender a loss payable under the policy unless and until the lender becomes the owner of the property. See §3.2.4 and later sections for a complete discussion of the events that must occur before an insurer will take action on a claim made under a loan policy. Also see §7.9, which discusses how the loan policy continues in effect if the lender takes title to the property.

It is common for a title insurer to invoke watchful waiting in regard to a lien that will expire, or a right that will be extinguished on the passage of sufficient time.[4] For example, if a judgment will cease to be a lien against the property in a matter of months or years unless the judgment creditor locates the insured parcel and executes on it, the title insurer will commonly inform the insured that the insurer will wait to see if the creditor takes any action, and that the insured should give prompt notice if the creditor does take action. A common objection to the watchful waiting approach in this type of case is that the insured wishes to sell or mortgage the property and wants the lien issue resolved. The insurer will often agree to insure the title or to issue a letter of indemnity to another title insurer to assist the insured in closing that transaction. See §3.4.4 for a complete discussion of that issue.

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[2] Condition 4(a) of the ALTA Homeowner's Policy lists the insurer's eight options for resolving a covered claim. Option 8 is to "[t]ake other appropriate action," which should be deemed to include watchful waiting.

[3] In *First Bank Texas, SSB v. W.D. Welch, P.C.*, 2017 WL 2443132 (Tex.App.-Dallas) (unpublished), the court held as a matter of law that the insured deed of trust had priority over an intervening state tax lien by equitable subrogation. It said the insured could suffer no loss payable under the policy, and the insurer was not required to reimburse the lender for money it paid to buy a confirming subordination of the lien. In *Haines v. Old Republic Nat'l Title Ins. Co*., 2008 WY 31, 178 P.3d 1086 (Wyo. 2008), the Wyoming Supreme Court ruled that an insurer was not required to obtain a recorded easement for the insured to give her a better access right than the property had ever enjoyed. Access was via a long-established road and the insured had not been precluded from using the road to travel to her property. In *Commonwealth Land Title Ins. Co. v. Nelson*, 889 S.W.2d 312 (Tex.App.-Houston 1994), the court held that the insurer owed no duty to act or to indemnify the insureds, because they held a valid first lien as insured. In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court said the insurer had no duty to take affirmative action when a fence encroached into the insured parcel, because there was no evidence that the neighbor installed the fence or claimed ownership of any of the insured parcel based on the fence.

[4] For example, in *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins. Co*., 128 So.3d 107 (Fla.App. 3 Dist. 2013), the insurer was found to have no duty to remove or indemnify against an easement that had become unenforceable by passage of time under the Florida Marketable Record Title to Real Property Act.

Another type of claim in which the insurer will commonly elect to conduct watchful waiting is a claimed defect in title that does not clearly benefit an identified party, or that will be cured by passage of time under a curative or marketable title law.[5] One court observed that, in its opinion, a title insurer may resolve a covered claim in one of three ways: by paying loss to the insured, clearing title, or by "show[ing] that the alleged unmarketability or other title problems do not really exist, and thus there is no way in which the insured could sustain any loss."[6] Members of the land title industry have worked hard for decades to have marketable title laws adopted in order to free title of ancient defects. Some laws bar claims in the manner of statutes of limitation. Other statutes are framed as marketable title laws, which protect a marketable title from adverse claims, even legitimate property rights, after an unbroken chain of a certain duration. A common example of this type of title defect is a deficiency in the conveyance to the insured, such as a defective or incomplete acknowledgment.[7] The insurer will typically write to the insured to explain why the claimed defect in title is not a true title defect, or why it has been or will be erased by a curative or marketable title law. When the claimed title defect has already been cured by law, or is not a legitimate defect, the insurer should refrain from issuing a letter of indemnity to another title insurer to "paper over" the issue, since the other insurer does not need an indemnity in order to make the decision not to raise the defect.

Another common situation in which title insurers employ watchful waiting is when the passage of time will cause the insured's rights to ripen into a valid and defensible interest in land, such as adverse possession or a prescriptive easement. In such cases, the assertion of a right before it has ripened will typically be self-defeating, or cause the right not to ripen. For example, an insured may be concerned that a recent survey has disclosed that the insured's house encroaches onto the neighboring parcel. If that issue is covered by the policy, the insurer might inform the insured that it will not take action at present because the insured will likely establish adverse possession if the encroachment continues for some further period of time.

Watchful waiting is often appropriate when the coverage invoked by the claim indemnifies against the forced removal of a structure. The insurer is entitled to respond to the claim by informing

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[5] In *Osprey Landing, LLC v. First American Title Ins. Co.*, 157 A.3d 247, 2017 ME 46 (Maine 2017), the court held that a title insurer was not required to take action to protect its insured from an affidavit by a former owner of the property, recorded after the policy date, that asserted that members of the public might have a prescriptive easement over the property based on their historical use of a path. The insurer correctly responded to the claim by watchful waiting. The court said that the insured did not identify a person or group who could assert the prescriptive easement threatened by the affidavit, rendering the title issue "merely hypothetical, as is any loss or damage due to the hypothetical encumbrance." 157 A.3d at 251. In *Chesapeake Land Development Company LLC v. Chicago Title Ins. Co.*, 2017 WL 5930295 (W.D.Okla.) (unpublished), the court held that, if the insurer could prove that a use restriction had outlawed under the marketable record title act, it would not be an encumbrance on title that invoked policy coverage. In a later decision, the same court held that the use restriction had not lapsed under the Oklahoma Marketable Record Title Act. *Chesapeake Land Development Company LLC v. Chicago Title Ins. Co.*, 2018 WL 2269939 (W.D.Okla. 2018) (unpublished).

[6] *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953, 961 (1996) (citing 15A Couch on Insurance § 57:177).

[7] See §3.4.7.3 concerning equitable subrogation, §3.4.7.6 regarding liens that fail to impart notice, §3.4.7 for various lien-versus-lien defenses, and §11.4.3 regarding purely technical or "flyspeck" title defects. See Basye, *Clearing Land Titles*, 3rd Edition, West Publishing Company, for a detailed analysis of title curative laws in all 50 states.

the insured that it will conduct watchful waiting until the other party takes action to force the removal of the structure.[8] In the seminal decision, *Manneck v. Lawyers Title Ins. Corp.*,[9] the policy protected against a final judgment enforcing removal of "structures" located on the property. No such order had been entered when the insured submitted a claim notice to the insurer. The court held that the insurer was not obligated to take affirmative action to clear or defend title but was, rather, entitled to wait to indemnify the insured only if and when an order was entered forcing the removal of the structures.

Watchful waiting is also an appropriate response concerning the insured's structures that encroach onto adjoining land and as to which there is no ongoing dispute.[10] Most such encroachments do not rise to the level of encumbrances on title, and most forms of title insurance policies do not provide affirmative protection against encroachments by the insured onto neighboring land (the Homeowner's policy being the primary exception). Absent such affirmative coverage, the insurer has no duty to cure or legitimize the encroachment or to pay the insured, because he or she has not suffered a loss.[11] In *Fee v. Stahley*,[12] although the insureds' septic cleanout, fence and part of their driveway were likely on their neighbor's land, the court held that the insurer

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[8] In *Trinder v. Connecticut Attorneys Title Ins. Co.*, 2011 VT 46, 22 A.3d 493 (Vt. 2011), the court cited *Manneck* in finding that letters from a neighbor saying that structures encroaching onto its property were there by permission, which could be revoked, were not "forced removal" triggering a duty to act under the forced removal coverage of the Residential owner's policy. The court said: "We conclude that the language of the clause is unambiguous and by its terms applies only to situations where an insured is 'forced to remove' structures that encroach on the property of another. To require coverage in situations where a structure is on neighboring land, but the neighbor has not affirmatively sought its removal, would extend the policy beyond its terms. … The clause is inapplicable here because the museum took no action to force homeowners to remove their septic system. The museum did not revoke permission to have the septic system on its property, nor did it demand removal by letter or through court action. That homeowners wished to resolve the uncertainty before the situation reached that level is understandable, but does not result in coverage that is beyond the terms of the policy. We need not reach homeowners' argument that potential imminent damage is synonymous with forced removal and could trigger coverage because under the facts found by the trial court there was no such impending demolition of homeowner's septic system in this case." In *Johnston v. Connecticut Attorneys Title Ins. Co*., 2014 WL 1494016 (D.Vt. 2014) (unpublished), the court found that the insurer was entitled to conduct watchful waiting as a response to the neighbor's demand that the insured remove his encroaching structures. The court also held that the insurer's warning to the insureds not to invite a lawsuit was not a bad faith act. In In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court said the insurer had no duty to take affirmative action due to the encroachment of the insured's garage onto neighboring land, because the sole coverage for that issue was Covered Risk 18 of the Homeowner's policy, which protects against forced removal of a structure, relying on *Manneck*.

[9] 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771 (1994).

[10] *Trinder v. Connecticut Attorneys Title Ins. Co.*, 2011 VT 46, 22 A.3d 493 (Vt. 2011) (neighbor sent permission letter as to encroaching structures but did not require their removal; forced removal coverage not triggered).

[11] In *Ky v. GOB Construction, Inc*., 136 So.3d 1020 (Table), 2014 WL 1717454 (La.App. 3 Cir.) (unpublished), the court found that the fact that the insured's house encroached slightly into a setback line imposed by private restrictions and the zoning code had not caused him to suffer a loss, and dismissed his lawsuit demanding that the insurer indemnify him. The court noted: "Ky testified in his deposition that he hasn't suffered any loss at this time, but his fear is that he will suffer a loss in the future. This fear is not evidence of an actual loss."

[12] 2008 WL 4849844 (Minn.App.) (unpublished).

had no duty to take affirmative action because "nobody has demanded that appellants remove any structures." Further, it said, "because appellants have suffered no loss, their claim is currently either improper or premature."

Similarly, watchful waiting is also an appropriate response concerning a neighbor's structures encroaching onto the insured's property as to which there is no ongoing dispute. In *Eliopoulos v. Nations Title Ins. of New York*,[13] the insured learned that there were encroachments onto the insured property by improvements belonging to adjoining owners. The insured demanded that the insurer clear and defend title. The insurer refused, because no action to assert the alleged encroachments had been taken by any adverse party. The court affirmed summary judgment in the insurer's favor. It held that the encroachments amounted to mere "perceived" encumbrances, and that the insurer had no "affirmative duty to clear title" in such a situation.[14] The court also noted that no action or proceeding had been begun against the insured which required a defense.

However, the lack of a pending or open dispute does not always suggest that watchful waiting is the best strategy for protecting the insured's rights. For example, if the claim involves a neighbor's use of a driveway crossing the insured property, and that matter is covered by the policy, it might be a mistake to allow that use to continue until it ripens into a prescriptive easement. In such a case, the insurer might instead elect to take the appropriate action to prevent that use from ripening into an enforceable easement. Also, when the title defect could be resolved in pending litigation, and that opportunity will be lost or waived if the issue is not joined, the title insurer will typically elect to clear title through the lawsuit rather than to conduct watchful waiting.[15]

3.2 Payment Of Loss To Insured

One of the insurer's options for resolving a covered claim is to pay a loss to the insured. The more mechanical aspects of loss payment are discussed at §2.9. This section discusses how the insurer evaluates payment of loss and calculates the amount payable. Loss is payable within 30 days after the amount of loss has become definite and fixed, as further discussed in §2.9.

The 1970 ALTA policy forms stated that the insurer indemnified the insured for "actual loss," but did not define the term. The 1992 and later ALTA policies inserted the explanation that loss is measured as the lesser of policy limits or "the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or

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[13] 912 F.Supp. 28 (N.D.N.Y. 1996).

[14] *Eliopolous* was distinguished in *Busch v. Fidelity Nat'l Title Ins. Co.*, 84 A.D.3d 1561, 923 N.Y.S.2d 280 (A.D. 3 Dept. 2011), in which the court held the insurer was not entitled to conduct watchful waiting. In *Busch*, the insured faced an imminent threat by neighbors to construct a roadway on the insured's property, which the insured felt compelled to prevent by suing for an injunction, and the neighbors responded with counterclaims attacking title. The court said that no such imminent threat had existed in *Eliopolous*.

[15] For example, a lender might be able to extinguish a competing lien in a judicial foreclosure by equitable subrogation, but would waive that ability by not joining the lender and raising the issue in the present action. In such a case, watchful waiting or a letter of indemnity might frustrate the insurer's ability to clear title. See §3.4.7.3 concerning equitable subrogation.

encumbrance insured against by this policy."[16] The loan policy adds the condition that the loss payable may not exceed the amount of the debt owed to the insured lender.[17]

The sections below discuss the measure of loss under a leasehold policy or endorsement (§3.2.1), the owner's policy provision stating that a loss paid under a loan policy or to extinguish a mortgage loan incurred by the insured reduces the amount of the owner's policy (§3.2.2), loss payable under an owner's policy (§3.2.3), and loss payable under a loan policy (§3.2.4).

3.2.1 Leasehold Policy Damages

A leasehold estate is the right to possess property for a stated term. When that right of possession is lost, its value is determined differently from that of a fee simple interest. When a fee title to land is lost, the measure of loss is the value of the land. The value of a leasehold estate, by contrast, is measured as the margin between fair market rental cost and the actual rental fixed in the lost lease, over the lease term. In addition, the tenant will incur moving and related expenses in moving from the current space to an alternate site.

The American Land Title Association promulgated separate leasehold owner's and loan policies in 1975, which were amended from time to time, with the last revision in 1992. In October, 2001, the American Land Title Association adopted the ALTA 13 Leasehold Owner's Endorsement and ALTA 13.1 Leasehold Loan Endorsement. ALTA withdrew the 1992 ALTA Leasehold and Leasehold Loan policies at that time.[18] The ALTA 13 endorsements have been modified several times since 2001. The most recent versions are known as the ALTA 13-06, for owner's policies, and the 13.1-06, for loan policies, both of which were adopted on April 2, 2012.[19]

The most important change from the former policies to the endorsements concerns the measure of loss. The main criticism of the leasehold policies was that the primary element of loss found in Conditions and Stipulations 14 of the policies was the difference between fair market rent and the rent payable under the insured lease. If the insured lease was at market rate, that element of damage would have a zero value. See the discussion of the leasehold policies below.

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[16] Conditions & Stipulations 7(a)(ii), 1992 ALTA Owner's and Loan policies. The 2006 ALTA Owner's and Loan policies use a nearly identical statement in Conditions 8(a): "the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy." The ALTA Homeowner's Policy, however, uses language similar to the 1970 policy form, saying only that the insurer will pay "Your actual loss… ." Conditions 6(a)(i). Similarly, the ALTA Residential Policy says "[w]e will pay up to your actual loss or the Policy Amount in force when the claim is made -- whichever is less." Conditions 6(a). "Actual loss" is not a defined term in either of those policies.

[17] Conditions & Stipulations 7(a)(ii) of the 1992 ALTA Loan policy describes this third measure of loss as: "the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon ... ." Conditions 8(a)(ii) of the 2006 ALTA Loan policy uses the much shorter description that loss is limited to "the Indebtedness," but "Indebtedness" is a defined term in the 2006 policy. See the discussion of that definition at §3.8.

[18] See John C. Murray, *The 2001 Leasehold Endorsements For Owner's and Lender's Policies*, 22 The Practical Real Estate Lawyer No. 3 (May 2006), p. 53 (providing comprehensive explanation of the new forms).

[19] The endorsements are found in Appendix B.

The measure of loss under the leasehold endorsements is different. Under the endorsements, if the lessee is evicted,[20] the value of the leasehold estate is measured as the remaining lease term plus any Tenant Leasehold Improvements[21] on the date of the eviction, less any "salvage value" and excluding rent "no longer required to be paid for the Remaining Lease Term." The endorsement does not describe the method to be used to value the tenant improvements or "salvage value." However, the leasehold estate and tenant improvements can be valued independently. "In short, the methods for valuing a loss and its deductions under this new endorsement are left to negotiation between the insured and title insurer when adjusting a claim."[22]

The ALTA 13 endorsement also provides for payment of other elements of loss. Perhaps the most significant is soft costs incurred in eviction and in locating replacement space. The list of additional elements of loss is found in paragraph 4 of the endorsement, which roughly corresponds to paragraph 15 of the 1992 ALTA policy, as discussed below.[23]

The ALTA 13 endorsement does not replace the policy measure of loss (Conditions & Stipulations 7(a) of the 1992 ALTA policies; Conditions 8(a) of the 2006 ALTA policies). Thus,

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[20] "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case, as a result of a matter covered by this policy. Paragraph 1(a).

[21] "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the land by the Lease that have been built at the insured's expense or in which the insured has an interest greater than the right to possession during the Lease Term.

[22] Comments of Robert Bozarth, a member of ALTA's Title Insurance Forms Committee, as posted on the ALTA website's official comments about the endorsement forms. See http://www.alta.org/publications/titlenews/02/05_04.cfm.

[23] "4. Additional items of loss covered by this endorsement: If the insured is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the insured, but not to the extent that the same are included in the valuation of the estates or interests insured by this policy. a. The reasonable cost of removing and relocating any Personal Property that the insured has the right to remove and relocate, situated on the land at the time of eviction, the cost of transportation of that Personal Property for the initial 100 miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation. b. Rent or damages for use and occupancy of the land prior to the eviction which the insured as owner of the Leasehold Estate is obligated to pay to any person having paramount title to that of the lessor in the Lease. c. The amount of rent that, by the terms of the Lease, the insured must continue to pay to the lessor after eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the insured has been Evicted. d. The fair market value, at the time of the eviction, of the estate or interest of the insured in any lease or sublease made by the insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements. e. Damages that the insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease made by the insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements caused by the eviction. f. Reasonable costs incurred by the insured to secure a replacement leasehold equivalent to the Leasehold Estate. g. If Tenant Leasehold Improvements are not substantially completed at the time of eviction, the actual cost incurred by the insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, landscaping costs and fees, costs and interest on loans for the acquisition and construction."

> Section 7(a) still applies if it is not inconsistent with the ALTA 13. Section 7(a)(ii) imposes a standard for indemnification for actual loss, but does not go so far as to impose a method of valuing the estate or interest. Indeed, it is the more flexible standard that many leasehold title insurance customers sought by ordering an owner's policy instead of the leasehold policy.[24]

The 2001 ALTA endorsement, which was drafted to become part of the 1992 ALTA policy, eliminated one aspect of the coinsurance provision in the 1992 ALTA Owner's policy, found in Conditions & Stipulations 7(a). It did not remove the coinsurance provision found in Conditions 7(b), however.[25] The coinsurance provision is not found in the 2006 ALTA policies, and therefore the reference to that provision has since been eliminated from the endorsement.

As was stated above, the primary measure of loss under the now-withdrawn ALTA leasehold owner's and loan policies was the difference between the fair market rental value of the leased space and rent actually paid under the insured lease.[26] The policy provided a method for the valuation of the leasehold estate.[27] In order to sustain a loss as to the lease rate, the lessee was required to

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[24] Comments of Robert Bozarth on behalf of the ALTA Title Insurance Forms Committee as posted on the ALTA website's official comments about the endorsement forms. See http://www.alta.org/publications/titlenews/02/05_04.cfm.

[25] Mr. Bozarth writes: "However, Section 2 of the ALTA 13 may mislead the incautious insured. It does provide that the coinsurance limitations on coverage contained in Section 7(b) of the policy do not apply to the Leasehold Estate but does not make Section 7(b) inapplicable to Tenant Leasehold Improvements. If Leasehold Estates and Tenant Leasehold improvements are independent, primary items of loss, then Section 7(b) still must apply to the Tenant Leasehold Improvements. This shouldn't be too alarming. If the insured owns or builds Tenant Leasehold Improvements at the outset of the leasehold estate, it should have an investment or purchase value for those assets. It has not bargained to rent them for the term of the leasehold estate. I think the coinsurance limitations are a lot more benign than their reputation suggests. Section 7(b) does not limit the title company's duty to defend if Section 7(b) applies, and the insured is not obligated to share in the costs of its defense. That duty of the title insurer is not as clear when the coinsurance provisions are missing. Indeed, there is an argument that a title insurer could deny a claim if there is no coinsurance provision in the policy by claiming that information material to the risk (the value of the property sets the magnitude of the risk) was withheld from it when the policy was issued. The title insurer cannot do that under Section 7(b). The worst that can happen under Section 7(b) is that a loss may be prorated if the title insurer is liable to pay a loss, or the title insurer may seek a contribution toward settlement of a claim. If the insured worked a savings on its title insurance premium at the outset by undervaluing its exposure, it seems fair to prorate its recovery under the policy if a claim arises." Id.

[26] The measure of damages under the 1992 leasehold policy was discussed and criticized in Matthew J. Cholewa, *Leasehold Policies: Title Insurance's Neglected Child*, American Land Title Association Title News, March/April 1999; Eugene A. DiPrinzio, *Leasehold Financing and Mortgagee Protections*, Probate & Property, July/August 2000, p. 47; Jack Haiges, *Leasehold Owner's Policies: Curing Insomnia, or How Much Title Insurance Will Allow the Lessee to Sleep at Night*, Title Issues September/October 1999 (published by Chicago Title Insurance Company in Illinois); and Harris Ominsky, *Title Insurance Doesn't Work*, American College of Real Estate Lawyers Newsletter, Summer 2000, p. 3.

[27] "14. VALUATION OF ESTATE OR INTEREST INSURED. If, in computing loss or damage incurred by the insured, it becomes necessary to determine the value of the estate or interest insured by this policy, the value shall consist of the then present worth of the excess, if any, of the fair market rental value of the estate or interest, undiminished by any matters for which claim is made, for that part of the term stated in Schedule A then remaining plus any renewal or extended term for which a valid option to renew or extend is contained in the Lease, over the value of the rent and other consideration required to be paid under the Lease for the same period."

establish that the present value of the rental expense over the life of the insured lease would be less than the present value of the cost to rent comparable space. If the lease was exactly at market rate for the entire life of the lease, the owner would have no "equity" in the lease and would not incur any additional rental expense under a new lease for other space.

The second type of loss described under the policy was moving and related expenses. The leasehold policy provided:

> 15. MISCELLANEOUS ITEMS OF LOSS.
>
> In the event the insured is evicted from possession of all or a part of the land by reason of any matters insured against by this policy, the following, if applicable, shall be included in computing loss or damage incurred by the insured, but not to the extent that the same are included in the valuation of the estate or interest insured by this policy.
>
> (a) The reasonable cost of removing and relocating any personal property which the insured has the right to remove and relocate, situated on the land at the time of eviction, the cost of transportation of that personal property for the initial twenty-five miles incurred in connection with the relocation, and the reasonable cost of repairing the personal property damaged by reason of the removal and relocation. The costs referred to above shall not exceed in the aggregate the value of the personal property prior to its removal and relocation.
>
> "Personal property," above referred to, shall mean chattels and property which because of its character and manner of affixation to the land, can be severed therefrom without causing appreciable damage to the property severed or to the land to which the property is affixed.
>
> (b) Rent or damages for use and occupancy of the land prior to the eviction which the insured as owner of the leasehold estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.
>
> (c) The amount of rent which, by the terms of the Lease, the insured must continue to pay to the lessor after eviction for the land, or part thereof, from which the insured has been evicted.
>
> (d) The fair market value, at the time of the eviction, of the estate or interest of the insured in any sublease of all or part of the land existing at the date of the eviction.
>
> (e) Damages which the insured may be obligated to pay to any sublessee on account of the breach of any sublease of all or part of the land caused by the eviction.

These expenses are similar to those found in the ALTA 13 endorsements.

Paragraph (a) covers some moving expenses. The primary limitations are that the expense payable is for no more than a 25-mile move, and the amount payable is not more than the value of the property being moved.

Items (b) and (c) cover rentals. These items apply when the source of the claim is that the lessor is not the true owner of the fee simple. In that event, rent paid to the true owner (not under the lease) before eviction is covered by item (b). Rent paid to the lessor under the insured lease after eviction (that is, after the benefit of possession has been relinquished) is payable under item (c).

The last two elements of damage involve subleases. Under item (d), the insurer is liable for the fair market value of any sublease estate. Fair market value is not defined but, by reference to paragraph 14, will ordinarily be the excess in value between the cost of renting the space and the income received under the sublease. This value should be determined over the remaining term of the sublease, discounted to present value. The second element of loss as to a sublease is any payment that the insured must make to the sublessee for its eviction resulting from the title defect.[28]

3.2.2 Owner's And Loan Policies Noncumulative

The ALTA Owner's policies provide that the amount of insurance is reduced by the amount of any payment made by the insurer to the holder of a mortgage "to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy."[29] This has been termed the "liability noncumulative" provision of the owner's policy. This provision acknowledges that a payment by the insurer that pays a debt owed by the insured owner, or that removes a lien on the property that the insured assumed or to which it took subject, confers a benefit on the owner in the amount of the debt or lien.

The noncumulative provision also serves a purpose similar to a lender loss payee endorsement on a homeowner's insurance policy. Such a loss payee endorsement confers on the lender the right to be paid if a loss is incurred under the policy. With title insurance policies, the lender has the right to obtain its own policy. Thus, owner's and loan policies are distinct, and the loan policy is not merely a rider to the owner's.[30] However, if title to the property fails, the owner and lender each suffer loss only to the extent of their respective interests, and the insurer is not required to pay, in total, more than the value of the property or the amount of the larger of the outstanding policies. Therefore, the owner's policies declare that a payment to an insured lender, or the holder of a lien on the insured property, reduces the amount of insurance to the owner by the amount of the payment and that payment is deemed a payment to the owner. Courts have enforced

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[28] In *Morris Builders, L.P. v. Fidelity Nat'l Title Ins. Co.*, 2017 WL 5032996 (S.D.N.Y.) (unpublished), the court held preliminarily that the coverage for sublease termination fees might cover a $250,000 "break-up fee" that the insured paid to a subtenant when it terminated the sublease, allegedly due to a covered title issue.

[29] Condition 11, 2006 ALTA Owner's policy.

[30] The exception to this rule is created by the ALTA 16 Mezzanine endorsement, in which the owner insured specifically assigns to the mezzanine lender the right to receive any claim payable to the owner, subject to the terms of the endorsement. The court construed an ALTA 16 endorsement in *16th & K Hotel, LP v. Commonwealth Land Title Ins. Co.*, 276 F.R.D. 8 (D.D.C. 2011), and characterized the mezzanine lender as a loss payee under the owner's policy.

this provision by reducing the owner's policy amount by the sum paid by the title insurer to a lender.[31]

The loan policy is not similarly reduced by any payment that the insurer makes to the owner. In fact, one court found that an insured lender was not a necessary party to the coverage suit brought by the insured owner, because any payment to the owner in that suit would not reduce the insurer's liability to the lender.[32] Nonetheless, once a loss is found to be payable to an owner, the owner's policy permits the insurer to make that payment, or part of it, to a lender insured or holder of a mortgage on the property.

When the insurer will pay off a mortgage holder or make a payment to an insured lender, the insurer will typically tell the owner in advance of its intent to pay off the lien or debt, and to explain what amount, if any, the insurer will pay to the insured owner. The insurer will ordinarily expect to receive a release from both insureds on payment of the loss.

When loss payments are made to both owner and lender insureds, the loan policy is reduced by the amount paid to the lender. The owner's policy is reduced by the amounts paid to both insureds, because the payment to the lender eliminates or reduces a debt owed by the owner. For example, assume that the property value, in its state as insured, is $100,000, and the owner's policy is in that amount also. The covered matter, however, reduces the value of the property to $65,000. The insurer pays the diminution in value of $35,000. Further assume that $15,000 is paid to an insured lender in full satisfaction of its debt, and the balance of $20,000 is paid to the owner. The loan policy is extinguished by the payment in full of the debt. The owner receives $20,000 as a diminution payment. The payment to the lender gives the owner 100% of the equity in the property. The owner is deemed to have received a payment of $35,000. He or she now holds unencumbered title to property worth $65,000, which is also the reduced policy amount.

Conditions & Stipulations 10 of the 1992 ALTA Loan policy stated that, if the insured acquired title to the property, "payment by the insurer to a lender holding a lien on the property senior to" the mortgage insured reduced the policy amount by the amount of the payment to the senior lien holder. The premise of this provision was that any loss payment to the senior lender

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[31] In *Marchetti v. Chicago Title Ins. Co*., 829 F.3d 498 (7th Cir. (Ill.) 2016), the insurer paid the insured lender an amount at least equal to the value of the real estate, and obtained a release of the borrower-insureds' liability under the note, which the court found fully satisfied the insurer's duty under the owner's policy. The court also held that the insurer had made the insured owners whole, and was entitled to their rights by subrogation. The noncumulative provision was discussed in *L. Smirlock Realty Corp. Title Guar. Co.*, 418 N.E.2d 650 (N.Y. 1981), subs.app. 469 N.Y.S.2d 415 (N.Y.A.D. 1983), in which the insurer was permitted to credit payment to the lender against liability to the owner, but not allowed to seek further setoff as to the owner for additional beneficial effects from the removal of the mortgage. In *Gray v. Commonwealth Land Title Ins. Co.*, 27 A.3d 852 (N.H. 2011), the insurer paid a lender in full when title failed, but did not pay the insured owner. The court did not discuss the noncumulative provision directly, but did hold that the insured owner had not proven a loss.

[32] *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953, 967 (1996). In *West*, the court found that the noncumulative provision did not make the lender a necessary party in a suit regarding the owner's coverage: "This provision does not reduce the amount of coverage on Margaretten's lender's policy by the amount paid to the Wests under their Policy. Instead, it only reduces the amount of coverage on the Wests' Policy by any amount paid to a mortgagee, such as Margaretten, under a lender's policy." Nonetheless, an insurer should have the right to add the lender to a coverage action so that the suit determines the lender's right, if any, to policy proceeds.

would increase the equity in the property to which the insured junior lien would attach. However, it is common for a first lien debt to be more than the amount of a second lien debt. Thus, a payment to the senior lender is sometimes more than the amount of a junior mortgage policy. This policy provision thus frequently meant that a payment to the senior lender extinguished the policy issued to the junior lender. Conditions & Stipulations 10 was excised from the 2006 ALTA Loan policy. ALTA's explanation for the 2006 change was that a lender "could totally lose coverage without having benefited from any payment made under the policy… ."[33] The elimination of the noncumulative provision from the loan policy can affect the calculation made in the handling of certain claims. When the insurer has received claims from both a senior and junior lender, and the junior lender holds a 2006 ALTA policy, even full payment to the senior lender will not resolve the claim brought by the junior lender. Thus, if the cost to cure the title defect is more than the indebtedness under the senior lender's policy but less than the aggregate of the two insureds' debt, the claim administrator will often elect to cure the defect rather than pay the insureds.

3.2.3 Determining Amount Of Loss On An Owner's Policy

An owner's policy indemnifies the insured against actual monetary loss or damage the owner incurs as a result of a defect, lien, encumbrance or other matter covered by the policy. The policy is one of indemnity, not guaranty. See §9.1.2 on that subject. The policy also does not insure the value of the property.[34] Generally, there is no loss payable unless there is both a covered title issue and a resulting diminution in the value of the insured property.[35] However, when an owner was pursuing a claim of loss after having been foreclosed out of the property, it was held proper to consider whether or not the owner had any equity in the property which would have been lost by paying off a judgment not shown on the policy.[36] Insureds who recovered against their sellers in an arbitration over a claimed title defect were precluded by the doctrine of collateral estoppel from suing the insurer for the same damages.[37]

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[33] Comparison of the 1992 American Land Title Association Loan Policy with the 2006 American Land Title Association Loan Policy, found at http://www.alta.org/forms/, p. 30.

[34] *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*, 19 F.3d 528 (10th Cir. 1994); *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. (Wis.) 1990). See also the cases collected at §3.2.3.4 (owner's policy date of loss) and §3.2.4.2 (loan policy date of loss).

[35] There is no duty to indemnify an insured when there is no evidence that the defect lessens the value of the property. For example, in *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash.App.Div. 1) (unpublished), the policy mistakenly included some land which the seller did not own and which the insurer argued the insured had not intended to purchase. The trial court found that the insured had failed to submit credible evidence of the value of the land. The appellate court affirmed, finding that the insurer did not owe anything because the insured had failed to establish a value for the parcel mistakenly insured. In *Zeiger v. Shons*, 2001 WL 470175 (Ohio App. 8 Dist.) (unpublished), the court said the insured had not suffered a loss due to the fact that the insured parcel was smaller than the insured had thought, when his own appraiser put the value of the property actually owned by the insured at more than policy limits. The "no loss" exclusion, 3(c), states in the negative that there is no coverage if the insured does not suffer a loss in the value of the property. That exclusion is analyzed at §11.4.

[36] *Mississippi Valley Title Ins. Co. v. Odom*, 624 So.2d 1012, 1014-5 (Ala. 1993).

[37] *Meisel v. Lawyers Title Ins. Corp.*, 2010 WL 5071294 (Minn.App.) (unpublished).

3.2.3.1 Partial Loss Under An Owner's Policy

There are several types of losses that may be considered to be a partial loss of title. There are also different means of measuring such a loss, depending on the title issue. See §3.2.3.1.3 for a general discussion of the two primary methods for valuing a loss, which are the difference in value with and without the defect or encumbrance and the cost to cure the defect. The following sections will discuss the resolution of owner policy claims other than for a complete failure of title, arranged by the nature of the claim issue.

3.2.3.1.1 Lesser Estate Than As Insured

When the insured does not hold the estate or interest in the land as insured by the policy, the measure of loss is either the difference in value between the estate insured and the one actually possessed by the insured, or the cost of obtaining the insured estate.[38] When the policy insures fee simple title but the insured holds a leasehold estate only, loss is measured as the difference in value between the fee simple estate and the leasehold estate.[39] When the policy insures ownership of the mineral estate, but the insured does not have that estate, loss is measured as the value of the mineral estate, including such leases and other income rights that attach to it on the date of loss.[40] The subject of the insured's estate in the land is fully discussed at §8.1.

When the covered matter is the failure of title to an undivided interest in the fee simple title, such as a half interest of a tenant in common, or the failure of the insured mortgage to encumber such an undivided interest in the property, loss is measured as the percentage or fractional share to which title has failed in relation to the full value of the property on the date of loss.[41] The fact that the insured does not have title to the complete estate does not render the interest it does hold

[38] See *Bar-K, Inc. v. Security Title Corp.,* 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished), in which the insurer purchased the insured estate for the benefit of the insured, and the court determined that no further loss was payable by the insurer.

[39] *Rancher's Life Ins. Co. v. Banker's Fire & Marine Ins. Co.*, 190 So.2d 897 (Miss. 1966). In *Gauler v. Solicitors' Loan & Trust Co.,* 9 Pa. County Ct. 634 (1891), involving a policy with terms quite different from a modern ALTA policy, the insured paid for a ground lease, but failed to get title to the ground which was leased. The court awarded as loss the full cumulative lost income from the lease.

[40] In *May v. Ticor Title Ins. Co.*, 422 S.W.3d 93 (Tex.App.-Houston (14 Dist.) 2014), the several insureds owned residential lots that had been subdivided from one large parcel that had been leased for oil, gas, and other minerals. The lot owners were insured as owning the full mineral estate, but in fact only held a half interest in the minerals. The court approved an award of the lease signing bonus and the value of the lease royalty, per net mineral acre, divided in half because the insureds owned half of the minerals, and then divided between the insureds based on the net mineral acres that they each owned.

[41] See *May v. Ticor Title Ins. Co.*, 422 S.W.3d 93 (Tex.App.-Houston (14 Dist.) 2014), in which the court valued the entire mineral interest as insured, then divided that value in two because the insureds owned a half interest in the minerals only. However, in *In re D'Anna*, 548 B.R. 155 (Bkcy.E.D.La. 2016), the court ruled that the insured owner was entitled to collect policy limits from her title insurer for the loss of a one-sixth interest in the property, based on a convoluted analysis bolstered by a misinterpretation of a quote from a title insurance book. The court simply refused to acknowledge that the one-sixth interest was anything less than a complete failure of title.

worthless, because the insured may sell the property, either under an agreement with the other owner or at the direction of a court order for a partition sale. The market value of the property is not affected by the fact that title is held by tenants in common, only one of which is the insured. Therefore, if the insured obtained good title to a half interest only, loss equals one-half of the value of the property on the date of loss. It is incorrect and unnecessary to seek with-and-without valuations, as is done when the covered matter is an encumbrance on title, or title to a portion of the land is lost in full.[42] In some circumstances, the insurer may offer to pay the cost of obtaining a court order commanding the non-insured undivided interest owner to cooperate in a partition sale.

3.2.3.1.2 Loss Of Title To Portion Of Land

When title to a part of the insured land is not held by the insured, the measure of loss is typically the difference in value between the entire parcel as insured and the parcel actually owned by the insured.[43] However, when the parcel whose title is lost is a separate parcel, it is commonly appropriate to measure loss as the value of the lost land as a separate parcel.[44]

The insurer has the alternative, in some cases, of acquiring title to the lost land for the insured. See §3.4 for a complete discussion of title clearance, and §3.7 concerning the insurer's right to buy land for the insured. The insurer is not required to pay a price for the lost property that far exceeds the land's true value. Nor is the insured entitled to purchase the land at whatever price the seller demands, and then be fully reimbursed by the insurer, as discussed at §3.7. Rather, loss is always measured as the true value of the lost parcel. The insurer will typically either pay the true diminution value to the insured as loss, or to the property owner to acquire the land, in which latter case no loss is payable to the insured.

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[42] In *Commercial Credit Plan, Inc. v. Estate of Smith*, 1998 WL 312855 (Tenn.App.) (unpublished), the insured lender held a mortgage on a one-half interest rather than the full fee title. The insured's appraiser opined that the mortgaged estate was worthless because it could not be sold, but later admitted that he was unaware that a tenancy in common may be partitioned. Therefore, the appellate court remanded to require the insured to establish the true value of the mortgaged estate.

[43] *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975); *Hartman v. Shambaugh*, 96 N.M. 359, 630 P.2d 758 (1981); *Yonkers City Post No. 1666 v. Josanth Realty*, 67 N.Y.2d 1029, 494 N.E.2d 452 (1986); *L. Smirlock Realty Corp. v. Title Guar. Co.*, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983); and *U.S. Life Title Ins. Co. v. Hutsell*, 164 Ga.App. 443, 296 S.E.2d 760 (1982).

[44] *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734 (Tex.App. 1977) (valuation as separate parcel not appropriate); *Jiminez v. Chicago Title Ins. Co.*, 712 S.E.2d 531 (Ga.App. 2011) (court accepted valuation of only the parcel whose title failed, when policy insured another contiguous parcel but each was a separate buildable parcel). In *Hartman v. Shambaugh*, 96 N.M. 359, 630 P.2d 758 (1981), the court said: "The value of the real estate has been determined in other jurisdictions in two primary manners. Annot., 60 A.L.R.2d 972 (1958). One is simply to determine the value of the property to which title failed. *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (1927). This solution may apply where the value of the entire tract is not diminished, except by the percentage loss, such as with open ranchland. It is not proper where the value of the entire tract may be disproportionately diminished, such as with urban property." In *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the insured owned five parcels. There was a record overlap affecting one parcel. The court rejected the insured's assertion that he could recover for a claimed loss to the other parcels, on the theory that the aggregate value of the lots was lower due to the covered overlap. The court said that only the diminution in value to the affected lot would be considered at trial.

Also, when the insured purchases the lost land before tendering a claim to the insurer, or without the insurer's written consent given in advance, the voluntary settlement provision will ordinarily apply, meaning that the insurer is not required to reimburse the insured. The voluntary settlement provision is discussed at §2.14.

3.2.3.1.3 Encumbrances

All title insurance policies indemnify the insured against encumbrances on title. See §9.6 for a discussion of the scope of the covered risk concerning encumbrances, such as easement and restrictions. An encumbrance may sometimes be defeated or declared unenforceable because it does not impart constructive notice, is recorded outside the chain of title, is deficient under the Statute of Frauds, has expired or may not be enforced due to a statute of limitations.[45] See §3.4.7.6, which discusses instruments that do not impart constructive notice. Restrictions based on race, color or creed are unconstitutional and unenforceable as a matter of law.[46]

When title is subject to an unexcepted encumbrance, the most common statement is that actual loss equals the difference in the value of the estate as insured (i.e., without the encumbrance) and with the encumbrance.[47] When the title defect is an easement, the loss is equal to the value of the entire parcel as if the easement did not exist versus the value of the entire parcel subject to the easement. The appraiser should not value only the area encumbered by the easement, or value the easement area in fee simple, as if the insured had lost title to it altogether.[48]

An alternate means of resolving a claim concerning an encumbrance is to obtain its release.[49]

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[45] For example, in *McGee v. Commonwealth Land Title Ins. Co.*, 2012 WL 263000 (M.D.Fla.) (unpublished), the court held that the minor errors in a condominium declaration that were asserted by the insured unit owners as defects in their titles were moot, because the suit was brought after any defect had been cured by passage of time, as provided by a curative statute. The insurer was not required to take any action regarding the claimed drafting errors.

[46] On May 3, 1948, the United State Supreme Court prohibited a court from enforcing such restrictions in *Shelley v. Kraemer*, 334 U.S. 1 (1948). Congress codified and expanded on *Shelley* by passing the Fair Housing Act in 1968, which is found at 42 U.S.C. §§ 3601–3631. Some states have adopted similar laws. The net effect is that unconstitutional restrictions have been expunged as a matter of law. See the informative discussion of such restrictions in *Mason v. Adams County Recorder*, 901 F.3d 753 (6th Cir. (Ohio) 2018).

[47] *Lawyers Title Ins. Corp. v. Frieder*, 147 Colo. 44, 362 P.2d 555 (1961); *Sullivan v. Transamerica Title Ins. Co.*, 35 Colo.App. 312, 532 P.2d 356 (1975); *Beaullieu v. Atlanta Title & Trust Co*., 60 Ga.App. 400, 4 S.E.2d 78 (1939); *Happy Canyon Investment Co. v. Title Ins. Co. of Minnesota*, 38 Colo.App. 385, 560 P.2d 839 (1976); *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734 (Tex.App. 1977); *Stanley v. Atlantic Title Ins. Co*., 377 S.C. 405, 661 S.E.2d 62 (S.C. 2008); and *Borowski v. Stewart Title Guar. Co*., 2013 WL 6818152 (Wis.App.) (unpublished) (finding that insurer breached policy by paying the amount it had determined was the diminution in value, which sum was less than what the jury determined to be the insured's damages).

[48] In *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 661 S.E.2d 62 (S.C. 2008), a drainage easement affected a third of an acre of the insured land. The court said: "the measure of damages ought to be the difference in value of his whole property (including the useless portion), and the value of the property if the defect did not exist. For this reason, it appears that the master erred in awarding damages based on the total deprivation of the value of the third of an acre affected by the drain field. Such an award treats the third of an acre as if it has been taken."

[49] *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953); *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45 (Fla.App. 1984); *Arizona Title Ins. & Trust Co. v. Smith*, 21 Ariz.App. 371, 519

The loss is the lesser of the diminution in value or the cost to cure.[50] As one court explained:

> [I]f the property owner can be made whole by curing the defect, and this cost is less than the diminished value, the cure approach should be used. Using a higher measure would result in unjust enrichment, for the property owner could spend part of the award curing the defect and retain the rest of the award.[51]

If the insured removes the defect without the insurer's written consent, the claim may be barred by the voluntary settlement provision, which is fully discussed at §2.14. However, when the insured asks the insurer to remove the encumbrance and it wrongly denies the claim, after which the insured removes it, some courts have held that loss is not limited to the cost incurred by the insured to remove the encumbrance.[52] The principle underlying those decisions is that an insurer should not be encouraged to cause the insured to advance the money needed to clear title and then merely reimburse that cost.

The ALTA policies permit the insurer to take action to clear title "to prevent or reduce loss or damage to the Insured."[53] The insurer may elect to take a title clearance action that limits the effect of an encumbrance, such as by reducing the affected area, making its terms less onerous, moving the

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P.2d 860 (1974); *Stewart Title Guar. Co. v. Lunt Land Corp.*, 162 Tex. 435, 347 S.W.2d 584, 4 Tex. Sup. Ct. Jour. 530 (Tex. 1961); *Holly Hotel Co. v. Title Guar. & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1933); *Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 687 P.2d 371 (App. 1984); and *Brown's Tie & Lumber Co. v. Chicago Title Ins. Co.*, 764 P.2d 423 (Idaho 1988).

[50] See *Breck v. Moore*, 910 P.2d 599 (Alaska 1996). Similarly, in *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997), the court stated: "Recovery is generally limited to the amount necessary to remove the title defect or the difference between the fair market value of the property conveyed and its fair market value had it been as described in the title policy. ... [A]t least in cases involving a partial and not a total failure of title, the measure of damages is the same--i.e., the difference in fair market value or the cost of restoring title, whichever is less, up to the limits of the policy." See also *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), in which an encroachment onto an easement was resolved by payment of a $100 fee to release part of the easement. The purchaser had insisted on rescinding the sale despite the easement holder's willingness to release. The court rejected the purchaser's claims against both seller and title insurer for "house hunting expenses, the cost of moving from their house, the cost of renting an apartment after they moved, the loss of favorable financing and depreciation on the house, closing costs, and house payments made to" their lender. Id. at 1205. Because the insurer had obtained the release at its own cost, the purchaser obtained no judgment award against the insurer. In *Perry*, the insurer was sued in its role as escrowee, not on the policy, but the result is entirely consistent with a claim on the policy. In *Weber Estates Investments, LLC v. Chicago Title Ins. Co*., 2014 IL App (4th) 130892-U, 2014 WL 4793008 (Ill.App. 4 Dist. 2014) (unpublished), the court reiterated that diminution in value and the cost to cure are two different ways to measure loss due to an encumbrance, and the insurer is required to pay whichever cost is less.

[51] *Breck v. Moore*, 910 P.2d 599 (Alaska 1996).

[52] *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012); *Kasco, L.P. v. Chicago Title Ins. Co.*, 2011 WL 4984741 (Cal.App. 2 Dist.) (unpublished).

[53] Condition 5(b) of the 2006 ALTA policies.

path of an easement, or adding terms that protect the insured's rights.[54] A common example is the limitation of a so-called blanket easement (one that does not specify a particular path and width) to encumber only the path of an existing utility line or access drive. In such cases, after the encumbrance is so limited, the loss payable is the difference in the value of the land as insured versus as encumbered by the right as limited. See §3.4.5 for a full discussion of measurement of loss after a title clearance action.

Another means of resolving a claim involving an easement, particularly a utility easement, is to relocate the easement and the service line. Once relocated, the easement may have little or no effect on value. However, in some cases, the diminution effect of the easement is less than the cost to relocate the easement and service line. Loss is always limited to the lesser of the diminution in value caused by the easement as it existed on the policy date or the cost to relocate it.[55]

The loss payable for a recorded covenant, condition or restriction on the use of the land for which there is policy coverage is the difference in the value of the property, with and without the restriction, as of the date of loss. Some restrictions have little effect on the value of the property on the open market.[56] It is generally recognized that most use restrictions are imposed as a means of preserving the value of the property. As a result, they typically increase rather than diminish the value of the encumbered land. See §11.4.1, regarding the no-loss exclusion and encumbrances. There may be no diminution in value due to a recorded restriction, if the use prohibited by the restriction would also be barred by a zoning or building ordinance.[57]

A common type of claim involves a use restriction that prohibits or limits the insured's intended use of the property. Loss is limited to the actual diminution in the fair market value caused by the existence of the restriction. Loss is not measured as the effect of a prohibition on a particular intended use of the property by the insured.[58] Even when the insured's particular intended use is

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[54] See, for example, *Kasco, L.P. v. Chicago Title Ins. Co*., 2011 WL 4984741 (Cal.App. 2 Dist.) (unpublished), in which the insured paid to limit a utility easement to the path of its existing power lines.

[55] In *Weber Estates Investments, LLC v. Chicago Title Ins. Co*., 2014 IL App (4th) 130892-U, 2014 WL 4793008 (Ill.App. 4 Dist. 2014) (unpublished), the court affirmed that the loss due to an underground gas pipeline was the $4,200 reduction in the property's value as undeveloped land, not the $521,578.76 the insureds spent to move the gas line.

[56] See, for example, *Security Union Title Ins. Co. v. RC Acres, Inc*., 269 Ga.App. 359, 604 S.E.2d 547 (Ga.App. 2004), reconsid.den. (Aug 31, 2004), cert.den. (Nov 22, 2004), in which the court held that the insured did not suffer a loss due to a flowage easement because the purchase price reflected the value of the property subject to the easement. See §11.4.1 for a complete discussion of cases on the subject of encumbrances that do not cause a loss.

[57] In *Gibbs v. Williams*, 2015 WL 5440628 (W.D.Wis. 2015) (unpublished), the court held that an attorney for the insureds did not commit malpractice by failing to submit a claim notice to the insurer concerning a recorded use restriction prohibiting use of the property for a business, because a county zoning ordinance also prohibited the property's use as a resort. The court held that, because the policy included Exclusion 1, the insureds "could not recover under the title policy."

[58] An insurer can assume a separate contractual obligation to identify encumbrances for the customer. In *Red Lobster Inns of America Inc. v. Lawyers Title Ins. Corp.*, 656 F.2d 381 (8th Cir. 1981), the property was encumbered by a restriction not shown on the policy that prohibited the restaurant use for which the land was purchased. The insured settled the restriction claim, then sued for the profit it would have made during the delay period. The insured's claim was not based on the policy, however, but on a separate contract under which the title insurer, as closing agent, agreed to

prohibited, the insured may sell the property at its market value and purchase other property that is not so restricted. The insured is made whole by the insurer's payment of the amount, if any, by which the property's value on the open market is diminished due to the restriction for which there is policy coverage.

Similarly, the loss payable for an easement for which there is policy coverage is measured as the difference in the value of the property, with and without the easement, as of the date of loss. See §9.6 for a complete discussion of decisions concerning policy coverage for easements.

The effect on value caused by an easement varies widely, depending on the location of the easement path and the nature of the easement. One helpful guide comes from the law and appraisal methods applicable to condemnation by utilities. A study by the Bonneville Power Administration in the Pacific Northwest noted the effect on value of an electrical or telephone transmission line easement:

> Overhead transmission lines can reduce the value of residential and agricultural property. The impact is usually small (0-10 percent) for single-family residential properties. The greatest impacts have been measured in intensively managed agricultural property (irrigator, etc.) and in rural, second (vacation) home developments. ... Impacts may be greater for smaller properties than for larger properties. ... Impacts are more pronounced immediately after construction of a new line and diminish over time.[59]

As the Bonneville study results indicate, there are a number of factors to be considered in setting the appropriate discount. The following is a discussion of some such factors.

One factor is the intensity or dominance of use by the easement holder. An easement for an encroaching building establishes substantial dominion of the easement holder over the affected area. An easement for an underground septic field, by contrast, allows unfettered use of the surface of the property. A claimed easement that is not in regular use by anyone has little or no effect on the market value of the property.[60]

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review all recorded use restrictions and verify that they would not prohibit the restaurant chain's use of the property. Such contractual arrangements are rare.

[59] A thorough discussion of the data collected and the formulae developed by the right-of-way agents in the Bonnevile study is reported in Cowger, Bottemiller and Cahill, *Transmission Line Impact on Residential Property Values*, Right of Way, September/October, 1996, p. 13. Right of Way is published by the International Right of Way Association. A second article with a self-explanatory title is Richard A. Forsten, Wendie C. Stabler and Olufunke O. Fagbami, *Cell Phone Towers Do Not Affect Property Values (Or the Case of Three Board Hearings and One Temporary Tower)*, in *Probate & Property*, May/June 2016 at p. 11. The authors make this statement: "Studies have long shown that cell towers have no appreciable effect on property values, but opponents of towers, and some boards that consider these applications, refuse to believe these studies."

[60] See *Osprey Landing, LLC v. First American Title Ins. Co.*, 157 A.3d 247, 2017 ME 46 (Maine 2017), which held that a recorded affidavit asserting that the public might have a prescriptive easement over the property, but which no member of the public was actually using, was a "merely hypothetical" encumbrance, "as is any loss or damage due to the hypothetical encumbrance." The court found that the insured had not proven any loss in value caused by the alleged easement.

Another factor is the nature of the easement.[61] Most utility transmission easements are innocuous; they may serve the property as well as burden it, creating more of a benefit than a diminution in value. Underground easements are particularly benign, in most cases. Nonetheless, some utilities arouse fears. An underground easement for a natural gas pipeline that runs under the insured's home may have no effect on the property's use or value, but the insured may assert that he or she is afraid of an explosion.[62] Similarly, some people are afraid of stray voltage from nearby high tension electrical lines. Nonetheless, loss is measured as the objective effect on the value of the property caused by the easement right for which there is coverage, and is not amplified based on the insured's particular concerns.

A third factor is whether the easement use is congruent with, or antithetical to, the insured's own use of the land. Shared use of the easement area for the same or complementary purposes causes little or no compensable loss.[63] For example, an access easement in favor of others running across the insured's own driveway or paved parking lot has a minimal impact in most cases, and may not even become known until the insured desires to change the property use. A cable television easement lying within a telephone easement area adds little or no additional burden to the land, and in most cases results in no diminution.

A fourth factor is the use to which the insured property is put. An easement that would cause significant diminution to residential property may have no effect on the value of agricultural land, and vice versa. An avigation easement might sharply reduce the value of a home, but have no effect on the value of a farm or ranch. A fiber optic cable easement would, in most cases, cause no diminution to a residence, but might prohibit tilling of the soil on a farm. An underground sewer easement that causes no diminution for a farmer might prohibit the building of an apartment complex, precluding the use for which the land is zoned.

Finally, the size of the parcel can be a factor in the easement's effect on value. A twenty-foot utility easement could prevent the building of a garage in the only permitted location on a small suburban lot, but not impede the use of an 80-acre hunting parcel at all.

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[61] See *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953) (underground gas line); *Bohr v. First American Title Ins. Co.*, 2008 WL 2977353 (M.D.Fla.) (unpublished) (easement allowing neighboring condominium unit owners to use swimming pool).

[62] In *Gaviota Holdings, LLC v. Chicago Title Ins. Co*., 2014 WL 7334429 (Cal.App. 2 Dist.) (unpublished), the court of appeals upheld a jury verdict based on an appraiser's opinion that land that had an underground gas pipeline easement was reduced in value by four percent due to the *possibility* of an explosion. This "diminution" percentage was derived from the effect on the value of parcels in the immediate vicinity of two actual gas pipeline explosions.

[63] Note, however, that in *Kasco, L.P. v. Chicago Title Ins. Co.*, 2011 WL 4984741 (Cal.App. 2 Dist.) (unpublished), the court refused to find no diminution in value due to a utility easement that was limited to the same area within the insured property as to which a neighbor established a claim of adverse possession, despite the insurer's urging that the insured had lost all use of that area due to the (non-covered) adverse possession claim. That ruling was apparently based primarily on the fact that the insured himself paid to have the easement limited to that area, and the insurer refused to pay for that work, and thus the court was unwilling to discount the loss due to the insured's mitigation efforts.

3.2.3.1.4 Liens

The policy protects against liens that affect the insured property. See §9.4 for a discussion of real estate taxes, and §9.5 regarding other types of liens. The first step in analyzing a claim based on a lien is to determine if the lien attaches to the insured property, remains enforceable, and imparts notice to a bona fide purchaser for value. There are a number of possible defenses. See §3.4.7.6 concerning liens and other instruments that do not impart constructive notice, and §3.4.7.5 concerning interests that are not in the chain of title. Section 3.4.7.7 addresses estate tax liens. See §3.4.7.1.3 regarding non-attachment of federal tax liens. Section 3.4.7.4 discusses the use of the adverse party's knowledge of the insured deed or mortgage to defeat the person's claim of priority under race-notice recording laws.

This section discusses how to resolve a lien claim under an owner's policy. An insured lender's loss due to a lien is often different from the loss payable to an owner. See §3.2.4.1 for a complete discussion of the loss payable to a lender insured due to a lien. Under a loan policy, the insurer often protects an insured against a lien by establishing that the lien is subordinate to the insured mortgage. See §3.4.7 on the subject of establishing priority over existing liens, and §3.4.7.1 concerning federal tax lien issues. See §3.4.7.3 for a complete discussion of the doctrine of equitable subrogation, which is used to subordinate mortgages and other liens to later-recorded mortgages.

It is most common for an insurer to resolve a claim concerning a covered lien by paying the cost to remove or subordinate it, rather than paying a loss to the insured.[64] See §3.6 regarding the insurer's right to settle a lien claim and §3.4 regarding the insurer's right to clear title.

The insurer may also purchase a release of the insured parcel from the lien rather than paying off the lien in full. The subject of releases of federal tax lien releases is discussed at §3.4.7.1. The insurer is also entitled in many cases to conduct watchful waiting, particularly when the lien will expire in the reasonably near future. See §3.1 on watchful waiting.

If the insured removes a lien, its recovery against the insurer is limited to the actual, reasonable cost paid by the insured to remove the lien.[65] When the insured takes such action, the

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[64] In *Swanson v. Safeco Title Ins. Co.*, 186 Ariz. 637, 925 P.2d 1354 (Ariz.App. 1 Div. 1995), the policy did not except a deed of trust. The court found that the proper measure of damage would be the cost to defeat the deed of trust or, if that was not possible, the cost to obtain its release. See also *Arizona Title Ins. & Trust Co. v. Smith*, 21 Ariz.App. 371, 519 P.2d 860 (1974); *Stewart Title Guar. Co. v. Lunt Land Corp.*, 162 Tex. 435, 347 S.W.2d 584 (Tex. 1961); *Holly Hotel Co. v. Title Guar. & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup.Ct. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1933); *Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 687 P.2d 371 (Ariz.App. 1984); and *Brown's Tie & Lumber Co. v. Chicago Title Ins. Co.*, 764 P.2d 423 (Idaho 1988). In *Neikes v. Ticor Title Company of Oregon*, 291 Or.App. 720, 423 P.3d 102 (Or.App. 2018), the title insurer obtained the release of a deed of trust, after which the insured suffered no loss, including a claimed lost sale, lost rent or an alleged decline in the property's value while its title was in jeopardy.

[65] For example, in *MacDonald v. Lawyers Title Ins. Corp.*, 1996 WL 114719, 79 F.3d 1141(Table) (4th Cir.) (unpublished), the insured sought payment from the insurer of the face amounts of six unexcepted liens. However, the insured had contested three of the liens and proven them to be invalid, and had settled with the other three lien claimants and obtained releases. The court affirmed the trial court decision limiting the insured's recovery from the insurer to the expense of removing the liens, including attorneys' fees,. The court distinguished the two cases cited by the insured, *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co.*, 950 F.2d 139 (4th Cir. (Va.) 1991), and *Title Ins. Co. of Richmond v. Industrial Bank of Richmond*, 157 S.E. 710 (Va. 1931), saying: "In *Bluff Ventures* and *Industrial Bank*, the plaintiff received as damages the face value of the lien because, in each case, the lien was valid and the face value of the

claim may be barred by the voluntary settlement provision, discussed at §2.14. Also, the insured is required to cooperate with the insurer in its efforts to clear title. See §3.4.1.2 for a complete discussion of that subject. Therefore, the insured jeopardizes its policy rights, and may limit its recovery, by interfering with or impeding the insurer's effort to remove, release or subordinate the lien for which there is coverage.

3.2.3.1.5 Lack Of A Right Of Access

All or most title insurance policies indemnify against loss due to the lack of a right of access to the insured land. This scope of this covered risk is explained at §9.7. The enhanced access coverage of the ALTA Homeowner's policy is discussed at §9.14.2.

The claim administrator's first objective is usually to determine if there is in fact a right of access or if one can be obtained. Only very rarely does a parcel truly have no means of access. A diligent investigation often discloses that current or former owners have traveled to the property over some route, by permission of a neighbor, over a trail used that is semi-public in nature, or adversely.

If there is an existing access road, drive or path but the insured does not have a right to use the pathway, it is sometimes possible to formalize the access right sufficiently to satisfy the actual right assured in the policy. The claim administrator or counsel should be careful not to seek, or promise to seek, a right greater than what the policy has assured. Carefully review any access endorsement issued to the insured to determine the exact scope of the rights assured. The insurer is not required, for example, to purchase a higher quality access right in order to foster the insured's plan to develop the land, in the absence of a very specific affirmative coverage of such right.

There is a complete discussion of the nature and quality of a right of access that qualifies as a "right of access," and a discussion of the types of access rights that are commonly granted by various governmental bodies and other classes of property owners, at §§9.7 and 9.7.1. Also see §9.7.1 for a discussion of access via water.

If the parcel became landlocked by a land division, most states recognize an easement by necessity or implication over the parcel from which the insured land was split. A thorough title examination will allow the claim administrator to determine if a severance occurred that would, by law, impose an easement by necessity across another parcel and, if so, over which parcel. Some states have laws permitting owners of landlocked property to seek a judicial declaration of access, essentially a private condemnation power, or to petition for public condemnation of a roadway.[66] Also, long-time use of an access path may have ripened into a prescriptive easement. An insurer will sometimes pay for a court order establishing such a right of access, but in other cases will not, depending on the nature of the right, the facts on which it is based, and the statute or case law on which the right is founded.

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lien was the cost of removing the lien. Neither case involved a situation where a lien ... turned out to be invalid or was settled for a lesser amount."

[66] For example, Minnesota Statute Section 164.08, subdivision 2(a), permits a private landowner to petition a town board for an access path termed a "cartway" to be run over neighboring land to provide access to a public road. That statute was construed in *Watson v. Bd. of Supervisors of Town*, 239 N.W. 913 (Minn. 1931) and *Cich v. Bay Lake Township*, 2018 WL 5915444 (Minn.App.) (unpublished). There is further discussion of private condemnation powers at §9.7.1.

If no access right exists at present, it is still often possible to obtain such a right by buying it from a neighbor. This is most effectively done through a personal meeting, preferably at the property so that a route can be mapped out. A briefcase or knapsack filled with twine, rebar or metal stakes, spray paint and a clipboard for holding a survey or map are most useful in walking the path and setting stakes for a surveyor to follow in order to prepare a description of the route. Some insureds are very good at asking their neighbors for such assistance. Others will ruin any chance of working out a deal, or have already so angered their neighbors that they will obtain no cooperation from them. On balance, the better approach is to send a person who is likeable and courteous, and to arm the representative with authority to buy the rights for a realistic sum. If more than one neighbor could provide an access right, the representative should approach all of the neighbors, but separately.

Property may have a right of access that is limited in nature or subject to restrictions. The existence of a loss, and its measure, for a limitation on access depends on the type of real estate and its locale. See §9.7.2 regarding public and private limitations on access. A limitation on access may cause no diminution in value. In one case, the policy failed to refer to a deed establishing a service drive on a highway. The insured did not allege any damage resulting from the service drive access. As a result, the court found the complaint against the insurer insufficient:

> So far as appears from the complaint, the land may be worth as much without access rights to a highway as with access rights. It is alleged that a service station was built on the property, and normal access rights to a highway would be thought to be valuable to such a structure. However, it might be that the station is visible from the highway, and access through the service road is adequate. It might be that denial of access except through certain turnoffs encourages traffic on the highway and makes the property more valuable for a service station than it would otherwise be. Without this basic allegation of diminution in value, it would seem that in any event plaintiffs have not stated a cause of action under the policy.[67]

Another common claim issue is an assertion by the insured that the right of access he or she enjoys does not include vehicular access. The claim administrator must determine if the policy provides that assurance. See §9.7.1 for a complete discussion of that subject.

The measure of damages for the lack of a right of access is the difference in value of the property with and without that right. A complete lack of a right of access is rare, but typically has a significant effect on the value of the property. For this reason, a common recourse in resolving claims involving access is to obtain an access route for the insured, either by clearing title to establish an easement or adverse possession (see §3.4), or by purchasing fee title or an easement for the insured (see §3.7). If the insurer is successful, no loss is payable to the insured.

The effect on value due to the lack of a right of access is normally related to the frequency and volume of travel to and from the property. On one end of the spectrum is urban property whose use and value depends on traffic by tenants, patrons or invitees, with the other end being rural property, particularly land on which there are no inhabited dwellings. In a case involving tax

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[67] *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal.App.2d 116, 331 P.2d 742 (1958).

assessment rather than title insurance, suburban property was found to be reduced in value by 10% because its access was via an easement that title insurers considered to be insufficient to insure as an access right. No market data existed to support a valuation, so the court's adjustment in value was "a judgment factor ... based upon all the known circumstances."[68]

3.2.3.1.6 Unmarketability Of Title

Most title insurance policies indemnify the insured against loss due to the unmarketability of the title as insured. See §9.8 for a complete discussion of the marketability of title covered risk.

There is no separate policy provision describing the manner in which loss due to unmarketability of title is measured. In most jurisdictions, there is no damage for lack of marketability of title unless the owner loses a contract for the sale of the property or is unable to obtain financing. Proof of a lost sale or loan due to a covered defect in or encumbrance on title is also a predicate to a policy claim for unmarketability of title.[69] The lack of such a rejection of title has been found to preclude any damage claim under the marketability coverage.[70] The rejection by the buyer or lender must be due to the unmarketability of the title, moreover, and must concern a matter as to which the policy provides coverage.[71]

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[68] *Hinzdel v. Dep't of Revenue*, 1997 WL 189468 (Or. Tax) (unpublished).

[69] In *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), the court affirmed a ruling that a supposedly vague legal description rendered title unmarketable, making the insurer liable for the insured's loss up to policy limits. The loss was fixed based on testimony that the "unmarketability" of the title had reduced the land's value by 90%, even though the description was modified at nominal cost. In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co*., 883 F.3d 1038 (8th Cir. (Mo.) 2018), a purchaser terminated a contract, allegedly due to mechanic's liens that had been filed by that time, but the court held that there was no coverage because title was not unmarketable on the policy date. The policy date was before the liens were filed and even before the work had been performed for which the liens were later filed.

[70] In *Finley v. First American Title Ins. Co.*, 2010 WL 4362582 (Cal.App. 1 Dist.) (unpublished), the court dismissed an action against the insurer brought by insured owners who claimed their title was unmarketable and that they would be unable to get a new loan, but failed to allege that they had applied for a loan or that a lender had actually refused to lend money due to the claimed defects in title. The court held that they were unable to establish any compensable loss caused by the claimed unmarketability of title. In *Booth v. Attorneys' Title Guaranty Fund, Inc.*, 2001 UT 13, 20 P.3d 319 (Utah 2001), the court found title marketable, and therefore did not address the claimed damages. However, it noted: "[f]urthermore, [the insureds] conceded at oral argument that because they never made any written application for financing and did not accept the discounted offer to buy, they did not suffer any actual damages. Therefore, there is no claim for damages under the ATGF policy." In *Lemon-Pittman v. Commonwealth Land Title Ins. Co*., 2014 WL 3498323 (E.D.La. 2014) (unpublished), Ms. Lemon-Pittman's fallback position was that Covered Risk 18 of the policy had been invoked. That coverage applies when "[s]omeone else refuses to perform a contract to purchase, to lease or to make a mortgage loan because of any violations on your land of any restrictions shown in Schedule B which happened before you became the owner of your land." The court said that this Covered Risk required the insured to allege four facts: (1) that someone else has refused to perform a contract; (2) the contract was one to purchase, to lease or to make a mortgage loan; (3) the breach of the contract occurred because of a violation of one of the restrictions listed in Schedule B of the Policy; and (4) the violation predates her ownership of the property. Ms. Lemon-Pittman had alleged that the SBA had refused to enter into a contract, rather than that it refused to perform on one. Further, its refusal was not based on a restriction in an instrument found in Schedule B. Thus, the court said, this Covered Risk also was not invoked.

[71] In *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d 596 (Cal.App. 6

Further, the strongest indicator that title is unmarketable is that it is under attack by a party claiming an interest in the property adversely to the owner.[72] Such is not the case when the infirmity lies with the insured's own interest in the land. Thus, when the claimed defect was the insured's own lack of authority as trustee to take title, the court found that the claim "does not void the conveyance to him. We see no reason, then, that his title should be impaired."[73]

Encumbrances do not render title unmarketable, because such a holding would render the titles to millions of parcels unmarketable.[74]

A title insurer will commonly take action to clear title of a matter that at least allegedly renders title unmarketable. See §3.4 regarding clearing of title. In some cases, the matter that allegedly renders title unmarketable has in fact been barred or cured by a curative statute or marketable title act. See the discussion of such matters under §3.1, concerning watchful waiting. Also, an insurer's willingness to insure title for a purchaser or lender will often resolve the claimed unmarketability issue. See §3.4.4 concerning the insuring of title and other measures the insurer may take, either while title is being cleared or generally. Delay damages, or a possible lost sale while the title insurer is clearing title, are not compensable losses. See §3.4.5 regarding the final determination provision.

Dist. 2011), a title insurer was found not to be liable to the insured owner due to the fact that the insured property, which was platted as seven lots, had been merged by a document recorded by the city some years before, which instrument was not excepted in Schedule B. Although a buyer had refused to purchase, the court was persuaded by Chicago Title's emphasis on the final phrase in the definition of marketability, which says that coverage is limited to "a matter affecting title to the land." The court held that the merger of parcels was a governmental restriction on the use of the land and did not affect its title. 199 Cal.App.4th at 1152; 131 Cal.Rptr.3d at 610. In *Latter & Blum, Inc. v. Ditta*, 223 So.3d 54 (La.App. 4 Cir. 2017), the court found that an encroaching fence made title unmarketable, excusing the buyer from the obligation to purchase, and a title insurer's willingness to issue a policy protecting against the encroachment did not cure the marketability issue. However, the decision did not concern title insurance policy coverage.

[72] A purchaser may not challenge its own title in order to be relieved of the obligation to purchase. For example, when the sole basis for the purchaser city to claim unmarketability was the offhand opinion of a person who had not examined the title, the court concluded: "Here, the city itself, rather than a third party, has undertaken to attack its own title." The court also noted that the purchaser had not made a claim on its title insurance policy. *Prestwood v. City of Andalusia*, 709 So.2d 1173 (Ala. 1997). Possible large future homeowners' association assessments were found not to make title unmarketable in *Commonwealth Land Title Ins. Co. v. Graoch Associates No. 73*, 2010 WL 1257748 (E.D.Ky.) (unpublished).

[73] *Keown v. West Jersey Title & Guar. Co.*, 161 N.J.Super. 19, 390 A.2d 715 (N.J.A.D. 1978). Exclusion 3(a) would seem to apply, and was argued. The court refused to apply the exclusion, based on the ruling that the exclusion requires an element of intent that did not exist in that case. See the cases at §9.8.3 concerning other acts of the insured which were found to exclude marketability claims.

[74] See *Osprey Landing, LLC v. First American Title Ins. Co.*, 157 A.3d 247, 2017 ME 46 (Maine 2017), in which the Maine Supreme Court ruled that a claimed prescriptive easement did not render title unmarketable, saying: "If we were to hold that a title becomes unmarketable merely because there is a possibility that a claim for an easement could be brought in the future, an untold quantity of titles across the state would subsequently become unmarketable, resulting in uncertainty of ownership and a profusion of litigation." In *Chesapeake Land Development Company LLC v. Chicago Title Ins. Co.*, 2017 WL 5930295 (W.D.Okla.) (unpublished), the court held that a use restriction does not make title unmarketable.

The policy's marketability coverage is subject to any applicable exclusions and exceptions. Thus, tortious conduct in the procurement of title does not create a marketability claim under the policy.[75] Also, Exclusion 1, concerning governmental regulation of the use of the property, serves as a limitation on the policy's marketability coverage. For example, title was not made unmarketable because the insured would be obligated to comply with subdivision laws before conveying the property.[76] When a valid subdivision existed on paper, but no roads existed, title was not unmarketable on the grounds that a building permit would be denied until streets had been built and/or street improvement bonds had been posted.[77] However, a pending municipal housing code violation lawsuit which rendered title unmarketable under state law was found covered despite the exclusion for building and zoning ordinances.[78]

If the insured establishes that title has been deemed unmarketable by proof of a lost sale or financing, loss is measured as the diminution in value due to the defect or encumbrance that renders title unmarketable. The loss is not measured as a dollar amount ascribed to the effect of the covered matter on the marketability of the title. Nonetheless, several courts have adopted unconventional or idiosyncratic loss measurements due to the effect of the unmarketability of title as applied to the particular facts of the claim. One type of measure has been lost revenue or expenses incurred by the insured while title was being cleared.[79] Another measure of loss can be the economic value of a lost sale.[80]

An insured must establish that he or she suffered an actual loss caused by the unmarketable title. An insured owner that lost title because its lender foreclosed did not suffer a loss resulting from unrecorded construction liens, even though those lien rights caused title to be unmarketable.[81]

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[75] *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal.App.3d 658, 172 Cal.Rptr. 248 (Cal.App. 2 Dist. 1981).

[76] *Nishiyama v. Safeco Title Ins. Co.*, 85 Cal.App.3d Supp. 1, 149 Cal.Rptr. 355 (A.D.Sup.Ct. 1978).

[77] *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (Cal. 1951).

[78] *Radovanov v. Land Title Co. of America*, 189 Ill.App.3d 433, 545 N.E.2d 351, 136 Ill.Dec. 827 (Ill.App. 1 Dist. 1989).

[79] In *Nebo v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 222, 98 Cal.Rptr. 237 (Cal.App. 4 Dist. 1971), when the insured was not the true owner, and tenants refused to pay him rent while ownership was being litigated, the loss was set as the lost rentals from date of policy until the insurer bought out the true owner. When the insured sold for more than it paid, but had spent more than a year trying to sell the property, the court awarded the insured the amount of the mortgage payments it made during the sales period. *Bozeman v. Commonwealth Land Title Ins. Co*., 470 So.2d 465 (La.App. 1985).

[80] In *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), the insured had contracted to sell the land at a large profit, which allegedly fell through because of a vague reference to a road in the legal description. The Supreme Court held that, because the insurer could not have done the Torrens action any faster than the insured did, its failure to conduct the Torrens action was not the source of the insured's lost profit. Nonetheless, the court permitted recovery of policy limits, based on testimony that the title issue reduced the value of the property by 90%. One very old decision, based on a policy that did not contain a final determination provision, found that such loss was not avoided by an insurer's curing of the title defect accomplished after the buyer rejected the purchase contract. *Montemarano v. Home Title Ins. Co.*, 258 N.Y. 478, 180 N.E. 241 (1932).

[81] "[T]here must be a causal connection between the unmarketability and the loss sustained." *Willow Ridge Ltd.*

3.2.3.1.7 Forced Removal Of Structure

A title insurance policy may give coverage against the forced removal of a structure. This type of coverage is often provided by endorsement. Also, Title Risk 12 of the ALTA Residential policy protects against the forced removal of a structure other than a boundary wall or fence. See §9.14.1 for a discussion of the Residential policy coverages and terms.

Covered Risks 18, 19, 21 and 23 of the ALTA Homeowner's policy concern the forced removal of existing structures. These covered risks are limited by deductibles and Maximum Dollar Amounts of Liability. Covered Risk 18 protects against the forced removal of "existing structures, or any part of them—other than boundary walls or fences—because any portion was built without obtaining a building permit" from the appropriate government office. Covered Risk 19 protects the insured if he or she is forced to "remove or remedy" existing structures because they violate an existing zoning law or regulation. The phrase "or remedy" makes it clear that the insurer has the right to remedy the violation as an alternative to removing the structure. Covered Risk 21 protects against enforced removal of existing structures because they encroach onto a neighbor's land. Covered Risk 21 specifies that it does not apply to encroaching boundary walls or fences. Covered Risk 23 protects against the forced removal of "existing structures which encroach onto an Easement or over a building set-back line, even if the easement or building set-back line is excepted in Schedule B." This covered risk may be negated by a possession, survey or other exception. There is no Maximum Dollar Amount of Liability for this covered risk. See §9.14.2 for a discussion of the Homeowner's policy coverages and terms.

The word structure is not defined in these policies. The term is broader than "house" or "principal structure." However, a "structure" includes only man-made improvements. For example, a lay dictionary gives the following definition for the word: "Something (as a building) that is constructed."[82] It may be helpful, in explaining the coverage to an insured, to refer to a definition of "structure" as found in a state statute.[83]

These coverages apply only when the insured is "forced to remove" a structure. The insured has not suffered loss immediately on learning that a structure encroaches, or that it violates a restriction or zoning ordinance. The insurer does not have a duty to cure the problem until the insured is forced to remove it.[84] One court explained:

Partnership v. Stewart Title Guar. Co., 706 F.Supp. 477, 487 (S.D. Miss. 1988).

[82] Webster's New Collegiate Dictionary (1973). The use of a lay dictionary is appropriate in finding the plain and ordinary meaning of a word that is not a term of art, as discussed at §9.1.3.1, *Insurance Contract Interpretation Principles*.

[83] For example, a Wisconsin statute says that the term structure includes a "dwelling," defined as "any building, or structure, or part thereof, used and occupied for human habitation ... and ... any appurtenances belonging thereto... ." The statute goes on to say that "[t]he term 'structure' shall also include fences, garages, sheds, and any type of store, commercial, industrial or manufacturing building." § 66.435(4), Wis.Stats.

[84] *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771 (Cal.App. 2 Dist. 1994). In *Trinder v. Connecticut Attorneys Title Ins. Co.*, 2011 VT 46, 22 A.3d 493 (Vt. 2011), the court cited *Manneck* in finding that letters from a neighbor, saying that structures encroaching onto its property were there by permission that could be revoked, were not "forced removal" triggering a duty to act under this covered risk. The court said: "[w]e conclude that

> The clause in the policy pertaining to forced removal coverage only comes into play if in fact there is a forced removal of the insured's structures which encroach on the property of another. ... [T]he insurer could have in good faith waited to act until, for example, a court order requiring removal or the imminent destruction of the encroaching improvements by bulldozers.[85]

Enforced removal coverage does not require the insurer to establish the insured's right to maintain the encroachment.[86]

A forced removal coverage is invoked only if the party having the power to command removal of the existing structure actually enforces that right.[87] The order requiring removal of the structure will typically dictate the action that the insured owner must take.

Forced removal coverage may not create a duty to defend an action seeking removal of a

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the language of the clause is unambiguous and by its terms applies only to situations where an insured is "forced to remove" structures that encroach on the property of another. To require coverage in situations where a structure is on neighboring land, but the neighbor has not affirmatively sought its removal, would extend the policy beyond its terms. … The clause is inapplicable here because the museum took no action to force homeowners to remove their septic system. The museum did not revoke permission to have the septic system on its property, nor did it demand removal by letter or through court action. That homeowners wished to resolve the uncertainty before the situation reached that level is understandable, but does not result in coverage that is beyond the terms of the policy. We need not reach homeowners' argument that potential imminent damage is synonymous with forced removal and could trigger coverage because under the facts found by the trial court there was no such impending demolition of homeowner's septic system in this case." In *Fee v. Stahley*, 2008 WL 4849844 (Minn.App.) (unpublished), although the insureds' septic cleanout, fence and part of their driveway were likely on their neighbor's land, the court held that the insurer had no duty to take affirmative action because "nobody has demanded that appellants remove any structures." Further, it said, "because appellants have suffered no loss, their claim is currently either improper or premature." In *Johnston v. Connecticut Attorneys Title Ins. Co*., 2014 WL 1494016 (D.Vt. 2014) (unpublished), the court held that a U.S. Forest Service letter demanding that property owners get their encroaching structures off of the Forest Service's land did not trigger the forced removal coverage of an ALTA Residential policy, because the Forest Service has never taken action to remove the structures. The court cited *Manneck*, *Trinder* and *Fee* as authority for its ruling. In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the insured's garage encroached onto the neighbor's property and the neighbors sued to force its removal. The insurer paid for the defense, based on Covered Risk 18 of the Homeowner's policy. Although the court said the garage could stay until it was voluntarily demolished or condemned, the insurer paid the insureds the Maximum Dollar Limit of Liability of $5,000 and refused to appeal the ruling. The court found that the insurer had fulfilled all of its policy duties, as to both indemnity and defense, relying mainly on *Manneck* in reaching its conclusions.

[85] *Manneck v. Lawyers Title Ins. Corp*., 33 Cal.Rptr.2d at 775-6.

[86] Id. The *Manneck* decision distinguished *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975), on the basis that the Residential policy does not include the language requiring the insurer to take "such action as may be appropriate to establish the title" as insured "without undue delay." The court found that encroachments of improvements created only the potential for coverage under Title Risk 12, since the coverage was limited to forced removal.

[87] See *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App. 4th 1294, 33 Cal.Rptr.2d 771, 775-6 (Cal.App. 2 Dist. 1994), which held that forced removal means "a court order requiring removal or the imminent destruction of the encroaching improvements by bulldozers."

structure.[88] Although generally the duty to defend extends to all covered risks, title insurers recognize that, in most cases, "forced removal" coverage does not obligate the insurer to contest the removal action. When one is "forced" to remove something, the implication is that there has already been an action seeking the removal, which has resulted in an order or judgment.[89] However, an insurer may elect to defend the enforcement action in order to assert any applicable defenses, if the insurer reasonably believes that it might prevent the entry of an order removing the structure.[90]

Forced removal coverage, as with all coverages, is limited by the policy's exclusions, exceptions and conditions.[91] A seminal decision found that the forced removal coverage was limited by the survey exception:

> [T]he plain language of the title insurance policy provides coverage for the unmarketability of title, as described by lot and tract number, and does not apply to any matters which a correct survey would have disclosed and which are not shown by the public records, such as the encroachments in the present case. Only forced removal coverage is provided for such encroachments, and no such forced removal occurred here.[92]

Thus, the court held that the coverage did not assure the ownership of improvements that encroached, including a swimming pool and deck.

Covered Risks 18, 19, 21 and 23 of the Homeowner's policy and Covered Risk 12 of the

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[88] See *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771 (Cal.App. 2 Dist. 1994).

[89] In an analogous situation, a policy insured against loss from "the enforcement or attempted enforcement" of a mortgage. The insureds submitted claims based on the premise that the property was not "salable" due to the mortgage insured over. However, the mortgage lender had not attempted to enforce the mortgage. The court found that the insureds had not suffered any actual loss, because there had not been any attempt to enforce. *Humphries v. West End Terrace, Inc.*, 795 S.W.2d 128 (Tenn.App. 1990). Also see §9.8.3 concerning "salability" claims in general.

[90] In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the insured's garage encroached onto the neighbor's property and the neighbors sued to force its removal. The insurer paid for the defense, based on Covered Risk 18 of the Homeowner's policy. Although the court said the garage could stay until it was voluntarily demolished or condemned, the insurer paid the insureds the Maximum Dollar Limit of Liability of $5,000 and refused to appeal the ruling. The court found that the insurer had fulfilled all of its policy duties, as to both indemnity and defense. The decision could be read to imply a duty to defend the action seeking the removal of the garage.

[91] In *Ghezeli v. First American Title Ins. Co*., 2013 WL 3828805 (Cal.App. 4 Dist.) (unpublished), the court found that Covered Risk 12 of the First American Eagle policy, protecting against forced removal of structures that violate restrictions, did not apply to structures that encroach into the path of an easement excepted in Schedule B.

[92] *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d at 776 (Cal.App. 2 Dist. 1994). In *Johnston v. Connecticut Attorneys Title Ins. Co*., 2014 WL 1494016 (D.Vt. 2014) (unpublished), the court also found that the survey exception limited the forced removal coverage, and rejected the insured's argument that the exception rendered the coverage illusory: "Although the survey exception limits forced removal coverage in the event an encroachment would have been revealed by an accurate survey or personal inspection, it does not render that coverage wholly illusory. Coverage remains available for forced removals on alternative grounds such as a structure built in violation of zoning laws or built without a building permit."

Residential policy use the phrase "*existing* structures," to make clear that the coverages are limited to the forced removal of structures that existed on the date of policy. Both policies also include exclusions for post-policy matters.[93]

The entire limited scope of a forced-removal covered risk is the cost to remove the structure. These coverages do not indemnify the insured against any diminution in the value of the property due to the structure that is removed, or any other effect of its removal. Thus, loss is measured as the cost of complying with the removal order.[94] The forced removal covered risks also do not obligate the insurer to pay for the cost of restoring the property, or altering its appearance or use, after the removal of the offending, existing structure.

An insurer may elect to resolve a forced removal claim, when feasible, by paying to cure a code violation, if that will induce the governing authority not to issue an order requiring the removal of the structure. Conditions 5.e of the Homeowner's policy gives the insurer the right to elect to cure title. However, the policy does not require the insurer to take such curative action, and liability under these covered risks is not measured by the cost to "cure" the forced removal. Conditions 6.c.(1) states that, if the insurer "remove[s] the cause of the claim with reasonable diligence after receiving notice of it," all obligations end as to the claim.

Another appropriate method for resolving a claim under the forced removal covered risks is for either the insurer or insured, or both, to obtain estimates for the cost of removal, followed by payment from the insurer to the insured or to the contractor of the cost to remove the structure.

Covered Risks 18, 19 and 21 of the Homeowner's policy state that they are subject to a deductible and a maximum coverage amount. Thus, the removal expense is limited to the Maximum Dollar Limit of Liability for that risk, after subtracting the applicable deductible amount.[95] This formula is found in Conditions 6.a, which states that, "[a]fter subtracting Your Deductible Amount if it applies," the insurer will pay the least of actual loss, policy limits or the "Maximum Dollar Limit of Liability then in force for" Covered Risks 16, 18, 19 or 21. This limitation on liability is restated in Conditions 4.a.(6), which says that the insurer may "[e]nd the coverage described in Covered Risk 16, 18, 19 or 21 by paying You the amount of Your insurance then in force for the particular Covered Risk" plus any accrued attorneys' fees and costs. Conditions 4(a)(6) does not mean that an insurer must pay the Maximum Dollar Amount of Liability to end the covered risk, because it does

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[93] See *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), in which the insured's existing garage encroachment was found to invoke Covered Risk 18 of the Homeowner's policy.

[94] See *First American Title Ins. Co. v. Columbia Harbison LLC*, 2013 WL 1501702 (D.S.C.) (unpublished), which found the insurer liable for the cost of removing and rebuilding a retaining wall whose removal was protected against by an endorsement, along with as-yet-undetermined costs in shrinking the size of a building that also encroached.

[95] In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the insured's garage encroached onto the neighbor's property, invoking Covered Risk 18 of the Homeowner's policy. Although the court said the garage could stay until it was voluntarily demolished or condemned, the insurer paid the insureds the Maximum Dollar Limit of Liability of $5,000, including the deductible amount, and refused to appeal the ruling. The court found that the insurer had fulfilled all of its policy duties, as to both indemnity and defense. The court rejected the insured's claim that other covered risks had been invoked, which was designed to allow recovery in an amount greater than the $5,000.

not use that defined phrase. Rather, it refers to "the amount of Your insurance then in force." That phrase means the amount of loss as set by the cost of removal, minus the deductible, and *up to* the Maximum Dollar Amount of Liability.

A hypothetical example is illustrative. Assume that the city orders the removal of a house an addition because it was constructed without a building permit, invoking Covered Risk 18, and that the city's removal order specifies that "removal" includes sealing off the remaining house to the outside, and removal of any foundation slab or basement. Assume that the policy amount is $100,000 and that the Maximum Dollar Amount of Liability for Covered Risk 18 is set at $20,000, with a deductible of 5% of the policy amount or $5,000. Assume that the estimated cost to remove the addition per the city's specifications is $40,000. Conditions 6 states that the deductible is subtracted first. In this example, if the removal order was issued within the first year after the date of policy, the policy amount would be $100,000, and the deductible would be $5,000. If the notice was sent to the insured during the year after the first policy date anniversary, the policy amount would have increased to $110,000 (see Conditions 9, which says that the policy amount increases by 10% a year for the first five years). The deductible would still be $5,000, because the deductible is always the lesser of the policy amount percentage or the dollar amount stated on Schedule A (the stated amount is $5,000 and $5,500 is 10% of the policy amount in the second year). After subtracting the deductible of $5,000, the loss would be $35,000. The insurer would pay the Maximum Dollar Amount of Liability of $20,000. The insured would pay the balance of the cost. The insurer may choose to be involved in the process of the structure's removal and pay the contractor as removal expenses are incurred, or elect to pay the insured the loss amount and allow the insured to manage the removal project.

Once the insurer has paid the Maximum Dollar Amount of Liability for a Covered Risk, all coverage for that type of risk, not just for that particular occurrence, is at an end. In the above example, after the insurer paid the Maximum Dollar Amount of Liability, the insured would not be entitled to be paid again if a second order was issued by the city requiring the removal of another existing structure.

3.2.3.1.8 Zoning Coverage

The ALTA Residential and Homeowner's policies provide limited zoning coverages. See §§9.14.1 and 9.14.2 for a discussion of the covered risks under those policies. The Residential policy assures against loss due to the inability to use the property for a single family residence. For the coverage to be triggered, then, the zoning code would have to prohibit the use of the existing structure for a single-family residence. This covered risk will rarely be invoked in areas that have adopted Euclidean zoning because, in such zoning codes, nearly all classes of property permit use as a single-family residence.[96] However, one court found the Residential policy zoning Covered Risk invoked by an ordinance permitting the owner to replace the mobile home on the parcel only with another mobile home, and not a stick-built house. The court ruled that "the term 'single-family residence' is patently ambiguous and must be construed against the drafter so as not to include a

[96] See Patricia E. Salkin, *American Law of Zoning* (5th Ed.), Chapter 1, Introduction: Public Control of Private Land (West).

mobile home," which it said invoked the coverage.[97]

The insurer will typically compare the cost of curing the zoning violation with the diminution in value due to the violation, and select the option that is less expensive or more expedient. If the insurer elects to pay a loss to the insured, such loss is measured as the difference in value of the property with the zoning as insured and the zoning classification that actually applies.[98]

3.2.3.1.9 Violation Of Building Or Subdivision Code

The ALTA Homeowner's policy provides limited coverage against existing violations of building or subdivision ordinances. See §9.14.2 for a discussion of these Covered Risks. The insurer will typically compare the cost of curing the violation with the diminution in value due to the violation, and resolve the claim using the option that is less expensive or more expedient.

3.2.3.1.10 Notice Of Exercise, Violation Or Enforcement

The 2006 ALTA policies contain four Covered Risks protecting against the effect of notices of the exercise of rights, or notices of the violation or enforcement of regulations and other matters against the property, if such notices are in the public records and not excepted in Schedule B of the policy. Those Covered Risks are discussed at §9.9.2 and §11.1. The subjects of the four coverages are for a notice of violation or enforcement concerning a zoning, building code, subdivision and environmental protection regulations (Covered Risk 5); a notice of an enforcement action based on an exercise of governmental police power (Covered Risk 6); a notice of an enforcement action based on an exercise of a governmental right of eminent domain (Covered Risk 7); and "[a]ny taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge" (Covered Risk 8).

The ALTA Homeowner's policy contains corresponding provisions. Covered Risk 5 of the ALTA 2006 policies is nearly identical to Covered Risk 14 of the Homeowner's policy. Covered Risk 6 of the ALTA 2006 policies is nearly identical to Covered Risk 15 of the Homeowner's policy. Covered Risks 7 and 8 of the ALTA 2006 policies are combined in Covered Risk 17 of the Homeowner's policy. Covered Risk 12 contains a similar coverage against existing violations of recorded covenants, conditions and restrictions. That coverage is discussed at the end of this section. See §9.14.2 for further discussion of the Homeowner's policy coverages.

Unlike the condemnation and takings coverages, which concern the loss of title, the covered risks concerning notices of violation or enforcement provide very limited coverage on subjects that are otherwise excluded from coverage because they do not affect title. The insured must establish that there is a recorded notice of violation or enforcement. If there is no such recorded notice, the

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[97] *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C.) (unpublished).

[98] See *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co.*, 706 F.3d 622 (5th Cir. (La.) 2013), in which the insured argued that the policy's loss provision should not apply to a zoning coverage given by endorsement because zoning is not a title defect, but the court held that the loss provision applies to all manner of covered matters. A very similar argument by the insured was rejected in *RA Southeast Land Company LLC v. First American Title Ins. Co.*, 2016 WL 4591740 (D.Nev.) (unpublished), which involved a declarant rights endorsement. Those decisions are fully discussed at §9.1.3.5, which covers the subject of integration of endorsements with the terms of the policy.

covered risk is not invoked. Further, these covered risks are limited by corresponding exclusions, even when no exception for the notice is found in Schedule B of the policy. See Exclusions 1, 2 and 3(d) (post-policy matters), discussed in Chapter 11.

Finally, and perhaps most importantly, Covered Risks 5 and 6 are limited to the exact subject of the recorded notice. Covered Risk 5 specifically states that there is coverage "only to the extent of the violation or enforcement referred to in that notice." Covered Risk 6 contains a similar explicit limitation. Thus, the insurer will typically resolve a claim under these covered risks by paying for the cost of correcting or complying with the violations that are described in the notice. These covered risks are not "compliance" coverage, however. They do not obligate the insurer to pay for the cost of obtaining a certificate of occupancy, a building permit, or other governmental certifications. If the governmental body insists on repairs, changes or improvements that go beyond the subject of the recorded notice, or that work will be part of a larger project on the property, the insurer will typically obtain estimates for the cost of the work necessary to comply with the matters described in the recorded notice and tender that amount to the insured so that the insured can proceed with the larger project. In some cases, the governmental body will have assessed penalties or fines, and interest on those amounts, due to the violations stated in the notice. The insurer typically agrees to pay such penalties, fines and interest that accrued up to the date on which the insured became aware of the notice. If the insured is tardy in submitting a notice of claim, the insurer typically will not pay penalties, fines or interest that accrued between the date of discovery and the date on which the insured submitted the notice of claim, because the insurer could have stopped the accrual of those penalties. The insurer may or may not elect to pay the penalties that accrue during the pendency of the claim.

The notice of violation or enforcement coverages do not state that the insurer will obtain the removal or satisfaction of the recorded notice. The insurer typically does not pay for the administrative cost of obtaining the removal of the notice. In some cases, the insurer will make the alternative election to pay the insured the amount by which the property's value is reduced due to the matter that is the subject of the notice, if that amount is less than the cost of compliance with the notice or such payment is more expedient.

As to condemnation claims and Covered Risks 7 and 8, if the policy was issued to an owner when he or she purchased the land, the insurer usually wishes to review the purchase contract and other closing documents to determine if the pending condemnation was disclosed and if the insured contracted to take title subject to its outcome. Exclusion 3(a) will likely apply if the insured "agreed to" the matter. See §11.2.2. When a buyer contracted to purchase property that was subject to a pending condemnation action, and the contract permitted the seller to receive the condemnation award, the insurer is entitled to presume that the purchase price accurately reflected the value of the property less the land that the insured knew would be lost, which also invokes the no-loss exclusion.

If the insured will receive a condemnation award from the government for the taking, the insured will not suffer a loss if the award represents the fair market value of the property or the diminution in value to the remainder parcel caused by the taking. See the discussion of the no-loss exclusion at §11.4.

If the condemnation action is still pending when the insurer receives notice of the claim, and there are meritorious defenses to the taking or a genuine dispute about the value of the property, the insurer may elect to assert those defenses as a means of clearing title or limiting the loss payable. See

§3.4 concerning the clearing of title. In the taking or condemnation had already occurred before the insured took title, the insurer's options in resolving the claim are often limited to paying the insured the lesser of policy limits or the value of the lost land. Such a claim is essentially the same as any other claim involving the loss of the title to all or a portion of the insured parcel. See §3.2.3.2 concerning total failure of title and §3.2.3.1.2 concerning loss of title to part of the insured land.

The Homeowner's policy also contains Covered Risk 12, which indemnifies the insured if he or she is "required to correct or remove an existing violation of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B." The Covered Risk contains this limitation:

> However, You are not covered for any violation that relates to:
>
> a. any obligation to perform maintenance or repair on the Land; or
>
> b. environmental protection of any kind, including hazardous or toxic conditions or substances
>
> unless there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.

In *First American Title Ins. Co. v. Silbiger*,[99] the court refused to interpret this coverage using its precise terms, in order to achieve a "broader" result. In *Silbiger*, the insured parcel contained an underground storm water retention vault that caved in during a heavy rain after the date of policy. The policy contained an exception for a recorded instrument in which the developer had agreed to maintain the vault, and which stated that the maintenance provision ran with the land. When the insured asked the city to repair the vault, it replied that he had that duty, under the recorded indemnity agreement. The insured sued the insurer, claiming coverage under Covered Risk 12. The court held that the indemnity agreement was a "covenant" against title, primarily because it was recorded and excepted in the policy. The court noted, correctly, that Covered Risk 12 applies even if the "covenant" is recorded and excepted. The court then held that the municipality's letter informing the insured that it had to repair the vault had "required" him to "correct" an "existing violation" of the "covenant." It is true that Covered Risk 12 does not use the phrase "forced removal," and does not refer to a recorded notice of violation or enforcement, as is found in a number of other coverages. The court held that this difference in language allowed it to disregard the numerous decisions that have found that enforcement means something more than a mere suggestion in a letter. However, the court went so far as to find that an insured could *feel* "required" to repair the vault because "one feels compelled by duty, community pressure, or the consequences of inaction, not just by operation of law." The court also refused to find that the insured's claim fell within the limitation of the covered risk, which says that it does not provide coverage for an "obligation to perform maintenance or repair on the Land." It also held that the post-policy exclusion did not apply because, although the vault collapsed after the policy date, the defective *design* of the vault existed on the date of policy. It said that "[t]his violation of the Indemnity Agreement existed well before the Silbigers

[99] 2016 WL 5394112 (N.D.Ga.) (unpublished).

ever bought the Property, and as a result, the Silbigers were never aware of nor able to fulfill their duties under the Indemnity Agreement." The *Silbiger* court's rulings are not a fair interpretation of the precise limits of Covered Risk 12.

3.2.3.2 Owner's Complete Failure Of Title

The measure of loss for an owner's complete failure of title is the fair market value of the property on the date of loss, or the policy limits, whichever is less.[100] Payment to the insured of the fair market value as of the date of loss is deemed to compensate the insured in full for his or her "actual monetary loss or damage," which the policy declares to be the measure of loss.[101] If the value of the property has fallen between the date the insured purchased it and the date of loss, loss is limited to the value as of the date of loss.[102]

When the value of the insured estate is more than what the insured paid for it, and the insured has paid the full purchase price, the loss is measured as the value of the property, and is not limited to what the insured paid for it.[103] An early New York decision, *Grimsey v. Lawyers Title Ins.*

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[100] *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990); *Miebach v. Safeco Title Ins. Co.*, 49 Wash.App. 451, 743 P.2d 845 (Wash.App. 1987), rev.den. 110 Wash.2d 1005 (1988); *Bonvillian v. Lawyers Title Ins. Corp.*, 239 So.2d 382 (La.App. 1970); *L. Smirlock Realty Corp v. Title Guar. Co.*, 421 N.Y.S.2d 232, 70 A.D.2d 455 (Sup.Ct.App.Div. 1979); 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650, 17 A.L.R. 4th 1067 (1981); subsequent appeal, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984); *Jones v. Southern Surety Co.*, 210 Iowa 61, 230 N.W. 381 (1930); *Gauler v. Solicitors' Loan & Trust Co.*, 9 Pa. County Ct. 634 (1891); *Wilson v. Bryn Mawr Trust Co.*, 24 Montg. Co. L. Rep. 202 (Comm. Pleas 1908), aff'd, 225 Pa. 143, 73 A. 1071 (1909); cases collected in Annotation, *Measure, Extent, and Amount of Recovery on Policy of Title Insurance*, 60 A.L.R.2d 972; *Gray v. Commonwealth Land Title Ins. Co.*, 27 A.3d 852 (N.H. 2011) (loss limited to fair market value of property on date insured discovered title was defective, not inflated purchase price paid by insured); *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012) (reversing appeals court decision permitting recovery for more than policy limits); *Gomez v. Fidelity Nat'l Title Ins. Co. of New York*, 34 Misc.3d 1233(A), 950 N.Y.S.2d 608 (Table), 2012 N.Y. Slip Op. 50360(U), 2012 WL 671935 (N.Y.Sup.) (unpublished) (rejecting claim for damages of more than policy limits). In *U.S. Bank, N.A. v. Ticor Title Ins. Co*., 2012 WL 2362456 (Mich.App.) (unpublished), which concerned a loan policy, the court held that the policy "does not insure against changes in valuation due to market fluctuations." See §3.2.3.4, regarding owner's policy date of loss, for a discussion of cases concerning the effect of a change in the value of the property from the policy date.

[101] Condition 8 of the 2006 ALTA policies (Conditions & Stipulations 7 of the 1992 ALTA policies) states: "[t]his policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy." Condition 6 of the ALTA Residential and Homeowner's policies both use the term "actual loss."

[102] *Gray v. Commonwealth Land Title Ins. Co.*, 27 A.3d 852 (N.H. 2011) (loss limited to fair market value of property on date insured discovered title was defective, not inflated purchase price paid by insured). In *U.S. Bank, N.A. v. Ticor Title Ins. Co*., 2012 WL 2362456 (Mich.App.) (unpublished), which concerned a loan policy, the court held that the policy "does not insure against changes in valuation due to market fluctuations." See §3.2.3.4, regarding owner's policy date of loss, for a complete discussion of the effect of a change in the value of the property from the policy date to the date of loss.

[103] *Securities Service, Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978) had adopted the out-of-pocket rule when the insured had not yet paid for the property in full. That decision was overturned or limited by *Miebach v. Safeco Title Ins. Co.*, 49 Wash.App. 451, 743 P.2d 845 (Wash.App. 1987), rev.den. 110 Wash.2d 1005 (1988), which held that loss due to a lien is measured as the cost to remove it. The two rules are not inconsistent.

Corp.,[104] had limited the insured's recovery to what the insured paid for the land. That rule was overturned in *L. Smirlock Realty Corp. v. Title Guarantee Co.*,[105] which held that, when the insured holds an estate that is less than fee simple, the insured may collect either its out-of-pocket acquisition costs and expenses or the fair market value of the insured estate, whichever is greater.

Some courts have stated that an owner's loss is not measured as the amount of the insured's equity in the property.[106] However, the owner's loss must represent the value of his or her actual investment in the real estate that the owner lost due to the covered defect in or failure of the title.[107] Also, when the insured learns that his or her title is invalid before the insured has paid the full purchase price, such as when the insured has entered into a contract for deed or installment purchase contract, the insured's loss is equal to the value of his or her estate or interest, and not as if the insured already held the full fee simple estate.

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[104] *Grimsey v. Lawyers Title Ins. Corp.*, 38 App.Div.2d 572, 328 N.Y.S.2d 474 (1971); modified 293 N.E.2d 249 (N.Y. 1972).

[105] 421 N.Y.S.2d 232, 70 A.D.2d 455 (Sup.Ct.App.Div. 1979); 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650 (1981); subsequent appeal, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (N.Y.A.D. 2 Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984).

[106] In *Swanson v. Safeco Title Ins. Co.*, 186 Ariz. 637, 925 P.2d 1354 (Ariz.App. 1 Div. 1995), the policy did not except a deed of trust that the seller had granted and which had been paid off but not released. The insureds had granted a deed of trust to the seller for part of the purchase price. The insureds said the unreleased lien stymied their attempt to refinance the carry-back debt. The seller foreclosed and made the high bid at the sheriff's sale, extinguishing the insureds' title. The trial court held that the insureds were entitled to recover the greater of their equity in the property or their out-of-pocket expenses. The appeals court reversed, holding that loss is limited to the lesser of the cost to remove the paid-off deed of trust or, if not removed, the difference in the value of the property with and without the lien. It rejected the insureds' argument that loss should be measured as the amount of money that they had paid toward the purchase price. The court acknowledged that loss measured as the amount of equity investment would yield a different loss payment to every insured, depending on the amount of that investment, rather than a uniform rule based on diminution in value due to the covered title defect or lien. "We decline to adopt a rule that would measure damages under title insurance differently in every case, comparing the 'out-of-pocket' losses and the 'loss of equity.' As evidenced by the parties' arguments, these terms can be as ambiguous as the term 'actual loss.'" 186 Ariz at 641, 925 P.2d at 1358. In *Gray v. Commonwealth Land Title Ins. Co.*, 27 A.3d 852 (N.H. 2011), the insured wanted to be paid her out-of-pocket expenses, including both purchase price and money spent to develop the land. The court rejected the claim and limited recovery to the fair market value of property on the date the insured discovered that title was defective. The court rejected the insured's incorrect reading of the *Swanson* decision.

[107] In *Gray v. Commonwealth Land Title Ins. Co.*, 27 A.3d 852 (N.H. 2011), the insured wanted to be paid her out-of-pocket expenses, including both purchase price and money spent to develop the land. The court limited recovery to the fair market value of property on the date the insured discovered that title was defective, and rejected the insured's citation to *Swanson v. Safeco Title Ins. Co*., 186 Ariz. 637, 925 P.2d 1354 (Ariz.App. 1 Div. 1995). In *Marchetti v. Chicago Title Ins. Co*., 829 F.3d 498 (7th Cir. (Ill.) 2016), the court held that the insured owners had no loss despite the total failure of their title, because they had made no equity contribution toward the purchase of the property. In addition, the insurer had paid off their lender and obtained a cancellation of the promissory note. The court said: "The Marchettis treat the policy as if it promised to pay owners the market value of the property. But that's not what it says. The property's market value matters only as one determinant of how much loss the owner suffers. The policy covers only 'actual monetary loss or damage sustained or incurred by the Insured Claimant.' The loss the Marchettis suffered was zero, because they had no equity interest in the property."

Most owner's title insurance policies contain provisions allowing the insurer to make payments to insured lenders, the holders of liens that the insured assumed or to which he or she took subject at time of purchase, or liens that the insured granted after the policy date. All such payments reduce the amount of the owner's policy and are deemed to be payments under the owner's policy. See §3.2.2 for a discussion of this policy-noncumulative provision. In many cases, the effect of the noncumulative provision is to limit the owner's loss payment, on a total failure of title, to his or her equity in the property, if any.

Sometimes, the insured has not paid for the insured estate in full at the time title fails, such as when the insured is purchasing under a land contract or contract for deed. In such a circumstance, loss may be measured as the lesser of the aggregate amount of payments made by the insured under the contract or the property's value, or the value of the estate or interest held by the insured as of the date of loss if such estate or interest can be valued separately. In New York, most such loss equations are governed by the rulings in the *Smirlock* case cited above.

If title completely fails, the insured's loss is measured as the value of the interest actually held by the insured, if that estate or interest is different from that stated in Schedule A of the policy. In *Kapelus v. United Title Guaranty Co.*,[108] the insured held fee title of record. He was divested of that title by a court, on proof that the deed he held was really for security only. The debt owed to the insured that was secured by the property was in an amount equal to about one-tenth of the value of the property. The insured's loss was limited to the debt, rather than the value of the fee simple estate that the court had already declared was not held by the insured.

3.2.3.3 Coinsurance Provision

The 1987, 1990 and 1992 ALTA Owner's policy stated that the insurer shall pay only a pro rata share of a loss if (a) the policy amount is less than 80 percent of the land's value as of the date of policy, or (b) after the policy date, an improvement is made to the property increasing its value by 20 percent or more.[109] This so-called coinsurance provision is not found in the 2006 and other ALTA policies.

If the property was underinsured on the date of policy, the actual fair market value on date of policy and the amount of insurance are compared to determine the pro rata share for which the

[108] 15 Cal.App.3d 648, 93 Cal.Rptr. 278 (Cal.App. 4 Dist. 1971).

[109] Conditions & Stipulations 7(b) of the 1992 ALTA Owner's policy states: "In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following: (i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or (ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement. The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A."

insurer is responsible. For example, if the policy is for $100,000, but the property was worth $150,000, the insurer must pay two-thirds of any loss.

If the property was improved by more than 20 percent after the date of policy, the proportionate loss share is determined by "the amount expended for the improvement." For example, if the amount of insurance was $100,000, and the property was subsequently improved at a cost of $50,000, the insurer's share of the loss is two-thirds of the total. The insured's pro rata share is thus tied to the amount invested in the property for which the insured obtained no additional insurance coverage.

The valid purpose of the coinsurance provision was to rectify two inherent deficiencies in risk-spreading in the title industry. The two prongs of the coinsurance provision addressed the two separate problems.

The first issue is deliberate underinsurance. Certain sophisticated purchasers of title insurance have, on occasion, purchased only as much title insurance coverage as they believed would be adequate to cover the amount of likely losses. For example, an insured might project that it is unlikely to face a loss of greater than 20 percent of the value of the property, and purchase only that amount of insurance. This practice cuts at the heart of the basic principle of insurance: the spreading of risk. Insurers' premiums are based on the value of the property insured, not the dollar amount of the most serious or likely risks assumed as to each property. The industry is already modestly capitalized, and offers only a narrow return on investment. A shift to underinsurance, without a coinsurance provision built into policies, could be a terminal illness for the industry.

In automobile or property insurance, the insurer prevents deliberate underinsurance by obtaining an independent value of the property based on established resale values or construction cost formulae. Title insurers typically do not make such an independent analysis of value. Further, mortgage loan amounts are often not reflective of the value of the real estate because the loan includes other real estate collateral or personal property. Thus, the coinsurance provision allows the insurer to accept the insured's valuation of the real estate for insurance purposes without unduly burdening the insured with proving that value. A gift or below-market sale price may also trigger the coinsurance provision.[110]

The second issue addressed by the coinsurance clause is the improvement of the property after the policy is issued. In other lines of insurance, periodic renewal premiums are paid, at which time the insurer has the ability to adjust the amount of coverage to match the actual value of the property, and charge the appropriate premium. In title insurance, however, there is no such renewal premium. The insured is not prompted to consider whether or not the policy should be increased to

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[110] "In some situations, the attorney may want to have this condition [the proportional loss provision] eliminated by endorsement. For example, if consideration is not given in cash or the transfer is a gift, the amount of insurance must be agreed on by some method other than simply using the agreed purchase price. The insurer will request a copy of an appraisal or some other reasonable indication of value. Once the amount of insurance is agreed, the attorney might request deletion of this provision to eliminate the risk of estimating, at the time of a claim, whether the amount of insurance was less than 80 percent of the value of the land on the date of the policy." *California Title Insurance Practice*, CEB, §6.75(2), p. 165. This provision "…intends to prevent an insured from benefiting from paying for less insurance than the value of the interest in land being acquired." Joyce D. Palomar, *Title Insurance Law*, 2013-2014 Edition, § 10:31, p. 901, West/Thomson Reuters.

cover the current fair market value of the property. Even if the insured on a title policy did think about getting more coverage as the value of the property was increased, however, he or she would often decide not to increase coverage for the reasons discussed immediately above.

If the property has been improved since the policy date, however, almost any loss will be greater than it would have been before the improvement. In *Fohn v. Title Ins. Corp. of St. Louis*,[111] for example, the policy was issued for $20,000. Several years later, five percent of the land was found not to be owned by the insureds. Appraisers' testimony put the value of the lost property at time of discovery at policy limits. This dramatic increase in value was the due both to appreciation and to improvements added to the property after the date of policy. The insurer argued that loss should be limited to the value of the lost property as of date of policy, but the court applied the *Overholtzer* rule that loss is determined as of date of discovery.[112] It granted recovery of policy limits. See §3.2.3.4 regarding the date of loss under an owner's policy.

The coinsurance provision of the NYBTU form of policy was discussed in *L. Smirlock Realty Corp. v. Title Guarantee Co.*[113] The subsequent improvements were found to be less than 20 percent of the policy amount, so the provision did not apply. The insurer argued that the later-built improvements should not be included in valuing the property. The court disagreed, justifying its conclusion on the language of the coinsurance provision, which the court found to contemplate the consideration of the value of later improvements.[114]

3.2.3.4 Owner's Policy Date Of Loss

When the insurer will resolve a claim by paying the diminution in value caused by a covered matter, the value of the property with and without the covered matter must be established as of the appropriate date of loss. The choice of which date is used to measure the property's value can have a significant effect on the amount of loss that is payable. The date of loss under an owner's policy is different from that under a loan policy.[115] The date of loss on loan policies is discussed at §3.2.4.2.

The 2006 ALTA policies state that the insured is entitled to select the date on which loss will be measured, when the insurer seeks to clear title and is unsuccessful. Conditions 5(b) of the 2006 policies states:

(b) If the Company pursues its rights under Section 5 of these Conditions

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[111] 529 S.W.2d 1 (Mo. 1975).

[112] See *Overholtzer v. Northern Counties Title Ins. Co*., 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953), discussed below.

[113] 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650 (1981); subsequent appeals, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984).

[114] Id.

[115] See, for example, *First Internet Bank of Indiana v. Lawyers Title Ins. Corp.*, 2009 WL 2092782 (S.D.Ind.) (unpublished), in which an insured lender argued that loss under a loan policy should be measured on date of discovery, as is the case for an owner's policy. The court ruled instead that loss under a loan policy is measured on the date on which the insured loses its security, because that is the date on which the lender loses its security in the real estate.

and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

Under a 2006 policy, if the insurer has sought to clear title and was unsuccessful, the insured may make this election. The insurer may give the insured a notice of its right to elect one of the two dates of loss in order to prompt the insured to make the election. The two dates presented in Conditions 5(b) of the 2006 policies apply only when the insurer has sought to clear title and was unsuccessful. The 2006 policies do not specify the date of loss in other circumstances.[116] Earlier policy forms also do not specify the date on which loss will be measured. Neither of the dates provided in Conditions 5(b) have been accepted by courts as the date of loss under other circumstances.

The courts in a number of states have established the date of loss to be used for owner's policy losses. The most influential modern decision is *Overholtzer v. Northern Counties Title Ins. Co.*[117] That court held that "liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted."[118] Most states that have considered the issue follow the *Overholtzer* date-of-discovery rule.[119] Under most circumstances, the *Overholtzer* date of loss rule

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[116] In *Marcantel v. Stewart Title Guar. Co*., 2017 WL 5991734 (D. Utah 2017) (unpublished), for example, the court noted that the policy does not set a loss date, other than the two dates that apply if the insurer seeks to clear title but fails. Because the insurer did not seek to clear title in *Marcantel*, neither of those dates applied. The court declined to set the date on which loss should be measured.

[117] 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953).

[118] 253 P.2d at 125.

[119] *Hartman v. Shambaugh*, 96 N.M. 359, 630 P.2d 758 (1981) ("Once a defect is discovered, the insured should be required to move with reasonable haste to resolve the problem. If he becomes aware of a defect but does nothing while the value of the property continues to change, he should not be allowed to reap any benefit by his inactivity. If the defect is discovered subsequent to a bona fide contract to sell, the insured should still be allowed to recover for value up to the date of discovery, since he is unaware of any defects up to that point, and has no reason to take any steps toward resolving the problem."); *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990), 979 F.2d 1187 (7th Cir. 1992) (Wisconsin law); *Sullivan v. Transamerica Title Ins. Co.*, 35 Colo.App. 312, 532 P.2d 356 (1975); *Happy Canyon Invest. Co. v. Title Ins. Co. of Minn.*, 38 Colo.App. 385, 560 P.2d 839 (1976); *Swanson v. Safeco Title Ins. Co.,* 186 Ariz. 637, 925 P.2d 1354 (Ariz.App. 1 Div. 1995); *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (App. 1927); *Narbeth Bldg & Loan Ass'n v. Bryn Mawr Trust Co.*, 126 Pa.Super. 74, 190 A.149 (1937); *L. Smirlock Realty Corp. v. Title Guarantee Co*., 97 App.Div.2d 208, 469 N.Y.S.2d 415 (A.D. 2 Dept. 1983); *Jalowitz v. Ticor Title Ins. Co.*, 165 Wis.2d 392, 478 N.W.2d 67 (Table), 1991 WL 271040 (Wis.App.) (unpublished); *Rakhshani v. Chicago Title Ins. Co*., 2007 WL 1470460 (Minn.App.) (unpublished); *Kaufer v. Chicago Title Ins. Co.*, 2002 WL 1651341 (Cal.App. 2 Dist.) (unpublished); *Kasco, L.P. v. Chicago Title Ins. Co.,* 2011 WL 4984741 (Cal.App. 2 Dist.) (unpublished); *Stewart Title Guar. Co. v. Shelby Realty Holdings, LLC,* 83 So.3d 469 (Ala. 2011) (question of date of loss certified to Supreme Court returned to trial court unanswered due to insufficient information, but decision discusses date of discovery cases). See also Annotation, *Measure, Extent, and Amount of Recovery on Policy of Title Insurance*, 60 A.L.R.2d 972; Heffernan, *The Timing of Loss in Title Insurance Claims*, ABA TIPS *Title Insurance Litigation Committee News*, Spring 1999; and Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance,* 85 Fla. B.J. 10 (2011); J. Bushnell Nielsen, *The*

favors the insured by increasing the loss to account for inflation in value from policy date to the date of discovery of the defect, or improvements that the insured has made since the policy date.[120] When property has risen in value, even a partial failure of title can result in a loss equal to policy limits.[121] Conversely, the risk of a decline in value is on the insured, not the insurer:

> A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected.[122]

If the property is worth less than policy limits on the date on which the owner discovers the defect in title, recovery is limited to the fair market value as of that date.[123]

Early decisions in several states declared that loss under an owner's policy is measured on the date of policy. However, only two states, Georgia and Virginia, continue to apply date of policy as the date of loss.[124] Date of discovery favors the insured when values are rising. However, after real

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Rationale Behind the Date of Loss Under Owner's and Loan Title Insurance Policies, The Title Insurance Law Newsletter, October 2019.

[120] This can serve as a judicial "inflation rider." Inflation endorsements, once very common but now rare, increase policy amounts by an inflation index, despite the fact that no annual renewal premium is charged. The use of date of discovery as the loss date causes roughly the same result for partial losses, except that the policy amount is still the absolute limit of coverage. See §9.11.4 for a discussion of inflation endorsements.

[121] See *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975).

[122] *McLaughlin v. Attorneys' Title Guaranty Fund Inc*., 61 Ill.App.3d 911, 378 N.E.2d 355 (1978).

[123] *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. (Wis.) 1990); *Demopoulos v. The Title Ins. Co.*, 61 N.M. 254, 298 P.2d 938 (1956). In *Gray v. Commonwealth Land Title Ins. Co.*, 27 A.3d 852 (N.H. 2011), the court found loss limited to the fair market value on the date of discovery, which was far less than the price paid by the insureds a short time before. The difference in value was due to market decline and because the insureds assumed at time of purchase that the parcel was a buildable lot but it was not. In *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), however, the insured was permitted to recover policy limits when a resale of the property fell through, even though the minor title defect was cured before the sale failed to close. In *U.S. Bank, N.A. v. Ticor Title Ins. Co*., 2012 WL 2362456 (Mich.App.) (unpublished), which concerned a loan policy, the court rejected the insured's argument that, in order to indemnify the insured for title "as insured," the insurer must pay the insured policy limits, although the property had declined in value since the policy date. It said: "Ticor insures against defects, liens, and encumbrances; it does not insure against changes in valuation due to market fluctuations. We find that the trial court erred in simply awarding the amount of insurance to plaintiff."

[124] The Georgia Supreme court adopted the date-of-policy rule in *Beaullieu v. Atlanta Title & Trust Co.*, 60 Ga.App. 400, 4 S.E.2d 78 (1939). The rule was followed by an appeals court in *Security Union Title Ins. Co. v. RC Acres, Inc*., 269 Ga.App. 359, 604 S.E.2d 547 (Ga.App. 2004), recons.den. (August 31, 2004), cert.den. (November 22, 2004). *Beaullieu* was quoted in *U.S. Life Title Ins. Co. v. Hutsell*, 164 Ga.App. 443, 296 S.E.2d 760 (1982). Courts in a number of other states have declined to adopt the *Beaullieu* reasoning, which analogizes to a breach of warranty claim, on which a seller is liable as of the date the warranty is given. Virginia first adopted date of policy as the date of loss in *The Title Ins. Co. of Richmond, Inc. v. Industrial Bank of Richmond, Inc*., 156 Va. 322, 157 S.E. 710 (1931), which involved a special assessment and a loan policy. The insurer argued that the insured suffered no loss, because it sold the property at a profit after taking title through foreclosure. The court said that the insured was entitled to the additional money it

estate values declined dramatically during the real estate depression that began in 2007, several courts that considered the issue for the first time adopted the date of policy rather than date of discovery, at the request of insureds who sought to have their claims valued at pre-depression prices.[125] When the property's value has declined since the policy was issued, measuring loss as of the policy date causes the insurer to pay for both the diminution in value caused by the covered matter and the decline in the property's value due to market conditions. As one commentator observed, however, market value decline is a risk properly apportioned to the owner; it is not a risk for which one buys insurance coverage.[126] Further, once a state sets the rule that loss is measured as of the policy date, insureds whose property increased in value from policy date to discovery of the title matter will be paid less than they would be if date of discovery were the standard.

The current Texas T-1 and T-1R policies do not identify date of loss. However, one former version of the Texas T-1 policy said loss was measured as of the date on which a proof of loss was submitted.[127] Earlier forms of the Texas policy had explicitly recited the date of policy as the date of loss.[128]

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should have received on resale if it had not had to pay off the assessment and, in order to come to that conclusion, it said that the "loss occurred at the time it, relying on the policy, made its purchase, and is not measured by what it might realize at some future time under other conditions." In *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co.*, 950 F.2d 139 (4th Cir. 1991), the court rejected the insurer's argument that an insured lender did not suffer a loss due to a judgment lien, and reiterated the *Industrial Bank* holding concerning the date of loss. In *Devereux v. Commonwealth Land Title Ins. Co.*, 74 Va. Cir. 217, 2007 WL 5971429 (Va.Cir.Ct. 2007), which involved a claim on an owner's policy, the court said that the distinction between owner's and loan policies had been raised and rejected in *Industrial Bank*. The court also felt obligated to follow *Industrial Bank* despite the compelling argument that the issuance of an inflation endorsement clearly suggested that loss would be measured based on the value of the property at a date after the date of policy. The court held that the owner's loss was to be measured as of the date of purchase.

[125] In *Whitlock v. Stewart Title Guar. Co*., 399 S.C. 610, 732 S.E.2d 626 (S.C. 2012), the South Carolina Supreme Court answered the question certified to it by a federal court and announced that loss under an owner's title insurance policy is measured as of the date of policy, not date of discovery, despite prevailing case law and a well-reasoned dissent. Several recent decisions concerning loan policies have also adopted the policy date as the loss date. See §3.2.4.2 for those cases. In *Breck v. Moore*, 910 P.2d 599 (Alaska 1996), the Alaska Supreme Court, after citing *Overholtzer* and cases that have followed it, commented that "[d]iminution of value should be estimated as of the time of the transaction. Subsequent market factors are therefore irrelevant in estimating this diminution." 910 P.2d at 608. However, the statement may be dictum. In *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished), the insurer rather than the insured proposed to measure the loss on the policy date. The court rejected the policy date as the date of loss, but declined to make a ruling on the correct date of loss.

[126] Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance*, 85 Fla. B.J. 10 (2011).

[127] An earlier version of the Texas T-1 owner's policy, at Conditions & Stipulations 7(a), stated that loss was the lesser of the Amount of Insurance or "(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy at the date the insured claimant is required to furnish to Company a proof of loss or damage in accordance with Section 5 of these Conditions and Stipulations."

[128] See, for example, the policy construed in *Southern Title Guar. Co. v. Prendergast*, 494 S.W.2d 154 (Tex. 1973).

3.2.3.5 Valuing The Property

The most commonly used measure of loss is the reduction in value of the property resulting from the title defect. Thus, evidence of the value of the property is only one part of the equation. The amount of the loss may not be extrapolated solely from an opinion of the land's worth. For example, evidence of the change in the property's assessed value from the time of purchase to the date the covered matter was discovered was not proof of the diminution in value caused by the title defect:

> The Neighbors attempted to prove their damages by establishing the current assessed values of the properties through their own testimony. The assessed values were lower than the purchase prices and the Neighbors concluded that the amount of the decrease represented their damages. Neither Neighbor, however, established that the decrease in value was based solely on the [title defect]. ... As noted by the trial judge, "[The decrease in value] may have been because of the economy or they paid too much for it. There are a lot of things." We agree.[129]

Several early cases held that, when the claim surfaced while a sale was pending, the loss may be measured as a *bona fide* reduction in sales price attributable to the defect.[130] Note, however, that the policy terminates on the sale of the property. See §7.3 concerning termination of the owner's policy. Further, any such reduction must be attributable only to the title defect, and negotiated in good faith. A reduction in price combined with an assignment of the title claim itself was found to render the amount of the reduction inherently untrustworthy for fixing the diminution in value.[131] The two primary means for valuing diminution are by the mathematical formula explained at §3.2.3.6 and an appraisal (see §3.2.3.7).

If the insured fails to provide reliable evidence of the difference in value of the property with and without the claimed title defect, it has not proven a loss and may not recover under the policy. Reliable evidence is normally provided by either a bona fide reduction in sale price as a result of the defect, or competent appraisal testimony. Most jurisdictions allow an owner of property to testify as to the value of his or her own property, but such testimony is not expert testimony. Therefore, such lay owner testimony alone is insufficient to establish loss.[132]

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[129] *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 667 (Va. 1994).

[130] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987); *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45 (Fla.App. 1984); *Happy Canyon Investment Co. v. Title Ins. Co. of Minnesota*, 38 Colo.App. 385, 560 P.2d 839 (1976); *Pioneer Title Ins. Co. v. Ina Corp.*, 80 Nev. 196, 391 P.2d 28 (1964) (reduction amount accepted, although appraised diminution was less). However, in *Shah v. Chicago Title and Trust Co.*, 119 Ill.App.3d 658 (1983), the court found that a mere hypothetical difficulty in selling property was no more than speculation about possible loss.

[131] See *Second Benton Harbor v. St. Paul Title Ins. Corp.*, 126 Mich.App. 580, 337 N.W.2d 585 (1983).

[132] In *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash.App.Div. 1) (unpublished), the insured produced only lay owner testimony of value as to a parcel mistakenly insured in the policy. The court found this insufficient, ruling that the insured "should have produced the best evidence available for estimating the dollar amount of its loss. ... We uphold the trial court's ruling that [the insured] failed to prove its damages by a preponderance of the evidence." The court affirmed the award of $0 damages. In *Lauritzen v. First American Title Ins.*

3.2.3.6 Calculating Per-Square-Foot Value

FORM 16, Appendix A
Mathematical formula letter

One commonly-used method to value the loss of the title to relatively small portions of the insured parcel is by the use of a mathematical formula. This formula avoids the delay of the appraisal process. It is more objective than an appraisal in the sense that it is formulaic rather than being based on an opinion of value. The use of a formula is not appropriate in every case. However, it can be a helpful aid when the property at issue is negligible in area, a competent appraiser cannot readily be located, or when the insured wants to avoid the delay in obtaining an appraisal.

The formula works as follows: first, determine the total number of square feet in the insured parcel, including the disputed parcel.[133] Then divide the value of the property as of the date of loss by the total square footage. Value can be determined from the purchase price, a recent appraisal, or assessed value. If the property is improved, the per-foot value will be weighted by the value of the improvements. The improvement value should not be considered in determining a loss of unimproved land. A good starting point in such cases is often the assessed value of the land separate from improvements. If the assessed value of the land only is not available for the year as of which the loss is to be measured, first determine the value of the entire property as of the correct time, and then adjust that number according to the ratio of value for the current year between improvements and raw land. The loss value is determined by multiplying the per-foot value by the number of square feet of the affected area.

The above formula is also appropriate in claims involving unexcepted easements. However, in such cases, the land value is discounted to a percentage thereof to reflect the fact that title is not lost, but encumbered. The amount of the discount varies according to the type of easement involved and the use to which the land is put. A commonly-used discount factor is 50%, but the appropriate

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Co., 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the insurer argued that the insured was not competent to testify about diminution in value. The court ruled on summary judgment that the insured could testify, based on the rule developed in condemnation cases that "an owner of real property who is familiar with his property is competent to give evidence on the market value of that property." *Utah Dep't of Transp. v. Jones*, 694 P.2d 1031, 1036 (Utah 1984). The court gave little guidance as to how the diminution in value should be measured, but did say that all "categories or theories of damages that Lauritzen might articulate... must be linked to the language of the Policy." In *Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150 (Tex. 2012), the Texas court said that a property owner may testify about the value of his property. This Property Owner Rule creates "a rebuttable presumption that a landowner is personally familiar with his property and knows its fair market or fair rental value, and thus is qualified to express an opinion about that value." However, the owner’s testimony "does not necessarily provide relevant evidence of value that can support a judgment" because the owner’s testimony must "meet the same requirements as any other opinion evidence."

[133] Square footage is sometimes recited in tax or assessment records. Most surveyors have software that will compute area, and basic software of this type is available on the internet. Area can be computed by hand in most cases, using principles of geometry. The square footage of a rectangular parcel is equal to its length multiplied by its width. If the parcel is not a rectangle, the area can be determined by reducing the parcel to one or more rectangles and triangles. Every triangle has half the area of the rectangle of which it is a subpart.

number can be anywhere from 10% to 90%, depending on the situation.

3.2.3.7 Valuation By Appraisal

FORM 14, Appendix A
Letter of instruction to appraiser

FORM 15, Appendix A
Instruction to insured obtaining own appraisal

FORM 91, Appendix A
Agreement for binding appraisal

The second means of valuing a loss of land, or the effect of an encumbrance on title, is by appraisal. It is the insured's responsibility to provide a proof of loss. When the insured seeks payment for the loss of title to the insured parcel, or its loss in value due to a covered matter, a valuation is part of its proof of loss and the insured should pay for and deliver an appraisal to the insurer. The insurer also has the right to obtain an appraisal.

There are a number of types of appraisals available. The circumstances will dictate which form of appraisal is preferred in each situation. Frequently, in rural areas especially, the choice of appraisers and appraisal types is quite limited. The usual preference is a valuation performed by a person holding accreditation from one or more of the various appraisal associations. The best-known certification is from the Appraisal Institute, whose members carry the designation of MAI (Member, Appraisal Institute). In most locations, the simplest and least expensive valuation is the "broker price opinion" or BPO, which is prepared by a real estate broker based on comparable-sales information, and which is typically delivered as a relatively simple written report. In a lawsuit concerning the amount of loss payable under the policy, the court will allow only a qualified real estate appraiser, using a recognized and reliable appraisal method, to opine about the diminution in value caused by the title issue.[134]

On occasion, the insured and insurer agree to retain an appraiser jointly, sharing the cost. In such cases, the parties will want to work together to find an appraiser who is qualified, independent, and without a conflict of interest. The inquiry may begin with obtaining a list of appraisers in the general locale who meet the educational and certification standards desired by the parties. The insurer and insured should both then review the list and identify in writing which, if any, of the appraisers listed would have a conflict of interest. Conflict of interest is necessarily a flexible standard, depending on the size of the community and the stature of the parties in the local real estate community. However, it might encompass the following: family and marital relationship, business partnerships between the insured and the appraiser, steady or current use of the appraiser by either

[134] See *Feduniak v. Old Republic Nat'l Title Ins. Co*., 2015 WL 1969369 (N.D.Cal.) (unpublished), in which the court refused to allow a financial analyst with no prior experience in the valuation of real estate to testify at trial about his theory concerning the diminution in value caused by an easement. The court applied the *Daubert* factors used to test the reliability of an expert witness' theory and method, and concluded that the analyst's method was untested junk science.

party, and any relationship of the appraiser to the property to be appraised. From the remaining names on the list, then, the insurer and insured may agree on one person to perform the appraisal. The insurer and insured may also agree in writing to be bound by the opinion given by the appraiser.

3.2.3.8 Appraisal Methodology

The Uniform Standards of Professional Appraisal Practice (USPAP) are considered the most learned set of national standards for appraisal method. USPAP was developed in the 1980s by a joint committee representing the major U.S. and Canadian appraisal organizations, following the savings and loan crisis. The Appraisal Foundation (TAF) was formed by those groups, and took over administration of USPAP in 1987.[135]

The three appraisal methods are comparable sales, capitalization of income, and replacement cost. The comparable sales or "market" method is the most reliable in most instances, but the income method is most appropriate for property which is income-producing. The cost method is typically considered the best measure of value for newly-constructed buildings.[136]

The income method was applied in *L. Smirlock Realty Corp. v. Title Guaranty Co.*[137] That case illustrates the complexities which can be involved in the use of the income method. The income method was also applied in *Gauler v. Solicitors' Loan & Trust Co.*,[138] in which the insured paid for a ground lease, but failed to get title to the ground which was leased. The court awarded the full cumulative income from the lease. It failed to discount that cumulative income to present value, however, which is the normal modern appraisal method. In a third case, the income method was used to establish a loss in value caused by a reciprocal parking easement.[139]

A valuation for purposes of determining the diminution in value due to a covered matter under a title insurance policy is different from the method customarily used by an appraiser to value the real estate. The standard appraisal method may be altered by specific written instructions from the client. Such an instruction letter is required for every request for a diminution in value appraisal. The appraiser must be instructed to produce two values, not one—the value of the property without the covered matter, and the value subject to the covered matter. In order to produce a value for the property as if the covered matter did not exist, the appraiser is instructed to make an assumption of commonly referred to as a hypothetical condition, which is defined as an assumed fact that is contrary to known fact, but which is supposed for the particular purpose of the valuation analysis. The appraiser should state in the report that he or she made this hypothetical condition assumption. Also, both values are to be produced as of the same date, which is the date of loss and not the present

[135] See http://www.uspap.org/.

[136] See *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chapter 4, *The Valuation Process*.

[137] 421 N.Y.S.2d 232, 70 A.D.2d 455 (Sup.Ct.A.D. 1979); 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650, 17 A.L.R. 4th 1067 (1981); subsequent appeal, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (N.Y.A.D. 2 Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984).

[138] 9 Pa. County Ct. 634 (1891).

[139] *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45 (Fla.App. 1984).

date. This also is contrary to appraisal industry custom, in which value is determined as of the present.

In addition, the appraiser may need an instruction to value the property according to the use to which it was devoted on the date of loss, which in most jurisdictions is the date of discovery. The seminal modern decision on the measure of loss, *Overholtzer v. Northern Counties Title Ins. Co.*, stated that "liability should be measured [as of date of discovery] by the use to which the property is then being devoted."[140] In *Overholtzer*, the insured parcel was a farm on the policy date. The insured had invested money to convert it to a sawmill before he discovered the covered matter, which was a pipeline easement that frustrated use of the property as a mill. By measuring the value based on the converted use, the *Overholtzer* court increased the amount of loss payable to the insured.

Generally used appraisal standards require an appraiser to establish fair market value according to the property's highest and best use. However, that "best use" is hypothetical, and may be different from the use to which the property is devoted when the title defect is discovered. When valuing diminution under an owner's policy, a title insurer typically instructs the appraiser to value the property based on the use to which the property was devoted on the date of discovery, following the *Overholtzer* formula stated above, whether or not that existing use was the "highest and best use" of the property at that time.

The tension between the insured's actual use and the property's highest and best use is illustrated in *Anderson v. Fidelity Nat'l Title Ins. Co. of California*.[141] In that case, as in *Overholtzer*, the property was subject to an unexcepted underground pipeline easement, and the insured was in the process of developing the property when he discovered the easement. However, unlike *Overholtzer*, the insured had not built the improvements yet, but had merely drawn plans and sought approvals. The insurer sought to measure loss based on the present use, which was a lot with a boarded-up house on it. The court ruled, however, that the insured was entitled to have loss measured based on the highest and best use of the property, which was as the future site of an approved duplex. The court relied on the patently incorrect statement from *Overholtzer* that "[t]he policy necessarily looks to the future. It speaks of the future." It also justified its conclusion on the premise that the insured had relied on the "representations" about the state of title found in the policy, a doctrine that California has since rejected.[142]

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[140] 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953). The popular *Overholtzer* holding that loss should be measured on a date after the policy date is based on the court's questionable assertion that a title insurance policy necessarily speaks to the future. That statement was later rebutted by *Quelimane Co., Inc. v. Stewart Title Guar. Co*., 19 Cal.4th 26, 77 Cal.Rptr.2d 709, 960 P.2d 513 (Cal. 1998), which made the conventional observation that "[t]itle insurance, as opposed to other types of insurance, does not insure against future events. It is not forward looking. It insures against losses resulting from differences between the actual title and the record title as of the date title is insured." *Quelimane* emphasizes that *Overholtzer* gives the insured a benefit by setting the loss date after the policy date, including the value of improvements built by the insured.

[141] 17 Cal.Rptr.2d 539 (Cal.App. 6 Dist. 1993) (unpublished). The decision is not precedential. It was previously published at 14 Cal.App.4th 370 but later withdrawn from publication. It nonetheless retained its California Reporter citation, apparently by accident.

[142] "In this case, we see no reason why Anderson's recovery should depend upon the fact that, unlike the Overholtzers, he had not already constructed improvements at the time the defect in title was discovered. Anderson relied upon representations by Fidelity in planning improvements on the property and in closing the sale. More importantly, he

Another important factor in determining the correct appraisal method is what assumptions the appraiser is asked to make other than the hypothetical assumption that title is not affected by the defect that is the subject of the claim. An "extraordinary assumption" is an assertion about a physical, legal or economic characteristic of the property that the appraiser has been instructed by the client to presume to be true but which, if not true, "could alter the appraiser's opinions or conclusions."[143] The appraiser will typically list all such extraordinary assumptions that he or she has been told to make in the first section of the appraisal report.

A "hypothetical condition" is a condition that is contrary to what the appraiser knows to be the true physical, legal or economic characteristics of the property, but that is used and is necessary to complete a valuation for the particular purpose of the assignment.[144] When an appraiser is asked to perform a diminution in value appraisal, the appraiser is told to produce two values, with and without the title defect or encumbrance. The "without" value is based on the hypothetical condition that the defect or encumbrance does not exist. The "with" value, of course, does not include the hypothetical condition. It is the difference between the two values that represents the diminution in value.

In most situations, the appraisal should not be based on any extraordinary assumptions. The one hypothetical condition described above is found in almost every appraisal performed for a title insurance loss valuation. However, the title insurer should be vigilant, in reviewing the appraisal report, to verify that the valuation does not rest on any other hypothetical condition. For example, it is possible for a sophisticated or creative appraiser to create a fanciful and exaggerated "diminution" in value by beginning with extraordinary assumptions about improvements that might be built and income that could be derived from those improvements, subtracting from that value the cost of constructing the hypothetical building. The correct method for title insurance claim purposes is to instruct the appraiser to value the property with the improvements that were in place when the title defect was discovered, and not based on hypothetical improvements that the insured might have built but for the covered matter.[145] The correct method for valuing raw land is to establish its value on the

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relied upon Fidelity's representations in tendering the purchase price to the seller. Anderson's inability to develop the property in the manner expected due to a recorded easement missed by Fidelity may be just as injurious as a property owner's discovery of an easement after development." 17 Cal.Rptr.2d at 542.

[143] *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chapter 4, *The Valuation Process*, p. 56; Uniform Standards of Professional Appraisal Practice U-3.

[144] *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chapter 4, *The Valuation Process*, p. 56; Uniform Standards of Professional Appraisal Practice U-3.

[145] In *Rakhshani v. Chicago Title Ins. Co.*, 2007 WL 1470460 (Minn.App.) (unpublished), the court held that an insured used an incorrect method for valuing loss due to a missed easement, when his appraisal was premised on value ascribed to a hypothetical building that might have been constructed that would have encroached into the area of the easement that was subject of the claim. The appeals court affirmed the holding of the trial court that diminution was not to be measured based on the assumption of the existence of buildings that had not been built. In *Gomez v. Fidelity Nat'l Title Ins. Co. of New York*, 34 Misc.3d 1233(A), 950 N.Y.S.2d 608 (Table), 2012 N.Y. Slip Op. 50360(U), 2012 WL 671935 (N.Y.Sup.) (unpublished), the insured claimed that he had intended to add several floors to the existing building on the insured parcel, and was thwarted because the neighboring existing building encroached not one inch but several inches onto the insured parcel. The court held that loss due to the encroachment was not to be measured as the value the

open market in its present, undeveloped state, based on sales of comparable parcels of roughly equivalent size, location and zoning classification, not a hypothetical value based on assumed but non-existent improvements.[146] However, when the policy insures the title to condominium units not yet built, the court may allow the appraiser to testify about the value of those proposed units.[147]

The correct method for title insurance claim purposes is to instruct the appraiser to value the property based on all of the facts about the property that existed on the date of valuation, including its then-current zoning classification and applicable building code standards, facts about its physical state including any environmental contamination, tenants, and other facts that affect its value.[148] An appraiser can radically increase or decrease the value of the property, and thus the purported loss, by resting the valuation on other hypothetical conditions, such as that the property is fully leased, properly managed, not in bankruptcy, or that zoning approvals and building permits not yet received will be granted.[149] However, such assumptions and methods turn the appraisal into a hypothetical

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insured property would have had if the additional stories had been added, minus the cost of the structure, as the insured proposed. Rather, it said, the loss was the difference in the value of the property on the date of discovery, with and without the encroachment. The court cited *L. Smirlock Realty Corp. v. Title Guar. Co.,* 97 A.D.2d 208 (2nd Dept.1983), which quoted with approval from *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953) that "liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is *then* being devoted."

[146] In *Weber Estates Investments, LLC v. Chicago Title Ins. Co*., 2014 IL App (4th) 130892-U, 2014 WL 4793008 (Ill.App. 4 Dist. 2014) (unpublished), the court affirmed that the loss due to an underground gas pipeline was the $4,200 reduction in the property's value as undeveloped land, not the $521,578.76 the insureds spent to move the gas line or the $574,000 claimed effect on the value of the land as if it were already developed. The court granted the insurer's motion to exclude the testimony of the insured's appraiser, because he had based his opinions on assumptions that are not valid in measuring a title insurance policy loss. In *Rakhshani v. Chicago Title Ins. Co.*, 2007 WL 1470460 (Minn.App.) (unpublished), the diminution effect of a municipal sewer easement was properly measured based on the land as vacant, not based on an assumption of a building that might have been built over the easement area.

[147] In *IDC Properties, Inc. v. Chicago Title Ins. Co.*, 2017 WL 5151347 (D.R.I.) (unpublished), the court denied the insurer's motion to exclude the testimony of an appraiser who set a value on three condominium units not built. The court said the policy insured the title to those units. The insurer's main objection was that the appraiser assumed that other unit owners would have approved the building of the units, although he considered it unlikely that the unit owners would give their consent. The court allowed the testimony because the insured asserted that the policy protected against the risk of unit owner approval.

[148] In *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc.*, 2013 WL 5435716 (D. Utah) (unpublished), the court held that a title insurer was entitled to receive through discovery information about environmental contamination on the property and its cleanup cost, to be used by the insurer to determine if the loss of the insured lease was a net loss or gain to the insured.

[149] In *Spalding v. Stewart Title Guar. Co*., 463 S.W.3d 770 (Mo. 2015), the court refused to overturn a jury verdict that accepted the valuation performed by the insured's appraiser, who testified that the 419 acres purchased by the insured for $1.5 million was worth $5.7 million if it included the one acre whose title failed, but had a value of only $1.6 million without the one acre, yielding a "diminution" of $4.1 million. This appraiser assumed that the vacant land had already been transformed into a subdivision of 385 lots and that all necessary permits and approvals had been issued. Also, the hypothetical subdivision included parcels that were not insured in the policy and never owned by the insured. The court said that the insurer's arguments about the method went to the appraiser's credibility, and said it was not error to refuse to bar his testimony at trial. Similarly, in *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn.

rather than a way of measuring the insured's actual loss.

A property's valuation may also be wildly distorted if the appraiser uses speculative assumptions or methods in valuing the effect of the title issue, such as an assumed percentage reduction in the value of property due to its allegedly unmarketable title, the loss of privacy at an exclusive residential development due to an access easement, the fear of stray voltage when the claim is about a power line easement, or the fear of an explosion or contamination caused by a pipeline easement that is the subject of the claim.[150]

In some circumstances, land or interests in property have a greater value in the aggregate

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2012), the insured's appraiser valued the property as if it had already been converted from farm land to a large residential subdivision, and that all necessary permits and approvals had been issued. In *Helms v. Old Republic Nat'l Title Ins. Co.*, 2018 WL 708123 (D.Neb. 2018) (unpublished), the appraiser asserted that a fifty percent diminution in value to farm land was due to his contention that, without the land at issue, the farm could not be irrigated by a sprinkler running from a center pivot. The court refused to exclude the testimony of the insured's appraiser, because he had the requisite credentials, but the insurer would be entitled to cross-examine him to develop its assertion that he used an unsupported assumption in creating an assumed diminution in value.

[150] Some appraisals include factors that are in the category of inadmissible junk science. See, for example, *First American Title Ins. Co. v. 273 Water Street, LLC*, 2013 WL 3871443 (Conn.Super.) (unpublished), in which the diminution in value to a parcel caused by a pedestrian easement would have been $40,000 if the property had been owned by someone other than a celebrity, but a real estate broker opined, with little or no supporting data, that the effect on value to that property was more than $2 million because it had been the long-time residence of Katharine Hepburn. Also, in *Mattson Ridge, LLC v. Clear Rock Title, LLP,* 824 N.W.2d 622 (Minn. 2012), the court accepted an appraiser's unfounded opinion that the value of property with "unmarketable" title is reduced by up to 90%, as if there was a scientific formula for the effect of unmarketability of title. It is relatively common for an appraiser to make an assumption that the property owner could obtain a permit for building or land division, or that the property could be rezoned, or that certain uses would be allowed despite the terms of encumbrances that burden the property and are excepted in the policy. All such assumptions change the property's value due to speculative assumptions about actions that might occur that had not occurred on the date of loss. Such assumptions should not be accepted for valuations to set diminution in value. In *Gaviota Holdings, LLC v. Chicago Title Ins. Co*., 2014 WL 7334429 (Cal.App. 2 Dist.) (unpublished), the court of appeals refused to overturn a jury verdict that accepted an appraiser's opinion that a property subject to an underground gas pipeline easement was worth four percent less due to the *possibility* of an explosion. This "diminution" percentage was derived from a study of the reduction in values of property in the vicinity of two actual gas pipeline explosions. The appraiser also reduced the value of the property by another four percent due to the loss of "privacy" at an exclusive residential vacant home site if the owner shared a driveway already built and used by oil company personnel under an excepted lease. The appraiser admitted, however, that anyone who would build a home on the 38-acre parcel would not use the existing driveway but would build a new one far away from the existing drive. The combined alleged reduction in value due to these speculative factors was $1,510,000. In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC,* 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016), the appeals court refused to find that the trial court had erred in allowing the jury to hear appraiser testimony about how the average consumer's view of "environmental stigma" on the property would affect its planned development. The appraiser who testified gave opinions that were a cross between traditional appraisal science and consumer focus group testing. He opined, based mainly on a focus group test, that "potential buyers of homes in a dense residential subdivision—such as the one BBC planned to develop on the subject property—would be 'scared off' by the environmental stigma [but that the land] could be developed for large-acreage estate parcels because potential buyers would be less likely to view the environmental issues as a deterrent." The court thus allowed the loss payable due to an encumbrance on title to be distorted by subjective opinions about contamination. In a second appeal after trial, the court refused to overturn the substantial jury verdict that was based on the appraiser's stigma opinions. *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, ___ Ga.App. ___, 835 S.E.2d 21 (Ga.App. 2019).

than separately, which is commonly known as the assemblage value factor.[151] The title insurer does not dispute this as a principle sometimes applied in valuing property for other purposes. Assemblage is an assumption, however, and one not consistent with the particular valuation method required to determine the diminution in value to the insured parcel due to a covered matter. If the insured owned several adjoining parcels, all of which parcels are insured in the same policy, the appraiser may appropriately consider the assembled value of the combined parcels in measuring a policy loss. However, for title insurance purposes, the appraiser may not value the insured parcel based on the assumption that the insured could acquire separate parcels or interests owned by other parties. The appraiser also may not disregard the ownership regime to which the property was subject when the policy was issued. In *American Title Ins. Co. v. East West Financial*,[152] a number of insureds made claims on their units in a condominium project. The insured's expert appraised the property not as separate units owned by different people, but as one combined resort complex under a new ownership regime. The *East West* court said this appraisal method was flawed, because it did not value the interests insured, which were units in an existing condominium regime:

> Although it might be that the "highest and best" use for the individual condominium units would be as rooms in an operating motel, this is not what was insured. As the district court pointed out, what was insured was "title to and the validity of ... mortgage liens on *individual condominium units*." *Id.* While it is true that a number of these units were located in the same motel, the insurance was not issued on this basis and did not insure the condominium units as potential rooms in a motel.
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> *   *   *   *
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> ... Even though the "proportionate share" of the motel's value (*i.e.*, the value of the motel divided by the number of individual condominium units), *might be* the best evidence of the value of the unit, it is not necessarily so. *See Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990). A given unit might be worth more or less than the value of the motel divided by the number of units. It was Bay Loan's responsibility to introduce evidence as to the value of each unit... .[153]

In *Bohr v. First American Title Ins. Co.*,[154] the insured bought all three units in a condominium, obtaining title insurance policies for each unit from a different insurer. All of the policies missed a recorded amendment stating that an excepted easement did not expire when the existing building was demolished, which the insured said frustrated her plans to tear down the small condominium and

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[151] See *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chapter 9, pp. 198-9, and Chapter 12, p. 313. That text states that certain parcels can achieve their highest and best use only when assembled with other parcels, and the appraiser doing a standard analysis of highest and best use may either determine if assemblage is possible, or make the assumption that the property owner will be able to assemble parcels. Id. at p. 313.

[152] 16 F.3d 449 (1st Cir. 1994).

[153] *American Title Ins. Co. v. East West Financial*, 16 F.3d 449, 460-1 (1st Cir. 1994) (emphasis in original).

[154] 2008 WL 2977353 (M.D.Fla.) (unpublished).

build a much larger one. The court held that the insured was not permitted to value the entire property as one parcel, but the appraiser could consider the assemblage value of the units in determining highest and best use:

> Nothing in the policies or the case law cited or located by the Court prohibits the expert appraiser from considering the recognized doctrine of assemblage as a relevant factor in determining diminution of value so long as it is in the context of appraising each unit individually. … This is not to say that use of assemblage is required here, but only that an expert appraiser is not precluded from utilizing it if consistent with proper standards for professional appraisal practice.[155]

Thus, *Bohr* says that, if the insured owns more than one condominium unit or all of them, the appraiser may consider and include any increase in value that results from the fact that the insured has assembled the units into one person's hands, but must value the units in their present regime and physical structure, not as a proposed or hypothetical regime or project. However, in *Allison v. Ticor Title Ins. Co.*,[156] involving a 200-unit condominium, the appraiser valued the resort as a whole, and then divided that value by the number of units. The resort had been structured as a quasi-time-share, with 75-year unit leases, a rental pooling agreement, and a hotel services management contract. Because the web of contracts was so complicated, and the entities holding the contract rights were in bankruptcy so that the court would have the power to extinguish the contracts, the court found it acceptable to assume that the entire regime would be extinguished and replaced. This ruling violated the principle that the title insurer indemnifies the insureds based on the interests that they bought.

It is imperative that the insurer understand valuation method well enough to identify the specific ways in which an appraisal report deviates from the appropriate method. A claim administrator must carefully analyze an appraisal submitted by an insured to verify that it was performed based on the appropriate assumptions, using the method that is correct for the specialized purpose of ascribing a diminution in value under the policy's terms. The administrator must verify that the valuation date is correct and that the appraiser did not include false or speculative opinions or assumptions that skewed the value opinion.

If there is litigation over the amount of the diminution, the testimony of an appraiser should be excluded under a motion in limine if his or her valuations are based on a method or assumptions that are inconsistent with the policy's terms.[157] In many cases, the motion in limine is limited to an

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[155] Id. at *10.

[156] 907 F.2d 645 (7th Cir. 1990); later decision 979 F.2d 1187 (7th Cir. 1992).

[157] See *Weber Estates Investments, LLC v. Chicago Title Ins. Co*., 2014 IL App (4th) 130892-U, 2014 WL 4793008 (Ill.App. 4 Dist. 2014) (unpublished), in which the court barred testimony of the insured's appraiser because he used invalid assumptions. See also, *Feduniak v. Old Republic Nat'l Title Ins. Co*., 2015 WL 1969369 (N.D.Cal.) (unpublished), in which the court refused to allow a financial analyst with no prior experience in the valuation of real estate to testify at trial about his theory concerning the diminution in value caused by an easement. In a very well-reasoned decision, the court applied the *Daubert* factors used to test the reliability of an expert witness' theory and method, and concluded that the analyst's method was untested junk science. In *Gaviota Holdings, LLC v. Chicago Title Ins. Co*., 2014 WL 7334429 (Cal.App. 2 Dist.) (unpublished), however, the court refused to overturn a jury verdict based

explanation as to why the appraiser's method is incorrect *for purposes of valuing an insurance loss*.[158] The appraiser may have excellent qualifications. The insurer need not attack the qualifications or credentials of the appraiser, and may typically concede that the assumptions and conditions used by the appraiser would be permissible in a different kind of valuation. In many cases, the valuation must be excluded simply because it rests on a method, or on assumptions and conditions, that are inappropriate for this type of valuation.

3.2.3.9 Consequential Damages

There are a variety of elements of damage that insured owners sometimes claim as loss in addition to the loss as described in the policy. Most of these subjects are addressed under §3.4.9, in the context of damages incurred while title is being cleared. Some consequential damage claims are brought as tort claims, which are discussed in Chapter 15.

However, the diminution in value measure of loss as stated in the policy is not merely one type of loss payable under the policy, but the *sole* measure of the loss that is payable under this contract of indemnity. Thus, most courts have refused to grant damages to insureds that go beyond the measure of loss stated in the policy.[159] However, certain classes of damage are not explicitly barred by the terms of the policy.[160] For example, one court refused to dismiss a claim against an insurer for the "tax consequences" of its claimed breach of contract. The Ninth Circuit admitted that

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on a value that was based on incorrect assumptions that greatly affected the claimed diminution, ruling that those issues went to the witness's credibility only. In *Helms v. Old Republic Nat'l Title Ins. Co.*, 2018 WL 708123 (D.Neb. 2018) (unpublished), the court refused to exclude the testimony of the insured's appraiser, because he had the requisite credentials and valued the real estate, but the insurer would be entitled to cross-examine him to develop its assertion that he used the wrong method to establish diminution in value. The appraiser asserted that a fifty percent diminution in value to farm land was due to his contention that, without the land at issue, the farm could not be irrigated by a sprinkler running from a center pivot.

[158] *The Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, acknowledges that the appraiser should be forthcoming in the report as to the assumptions and limitations on which the valuation opinion is based: "The use of extraordinary assumptions, hypothetical conditions, or general limiting conditions and assumptions may result in a circumstance in which an appraiser cannot render an unqualified opinion of value. Proper disclosure and explanations directly associated with citations of value estimates help avoid misunderstandings or abuses of appraisals." *The Appraisal of Real Estate*, Twelfth Edition, Chapter 4, *The Valuation Process*, at p. 56.

[159] In *Gray v. Commonwealth Land Title Ins. Co*., 27 A.3d 852 (N.H. 2011), the court rejected the insured owner's claim for building costs she had incurred on the property before she discovered that her title was bad, because the policy limits compensable loss to the diminution in value to the property up to the land's value. In *Granelli v. Chicago Title Ins. Co.*, 2012 WL 2072648 (D.N.J.) (unpublished), the court dismissed the insureds' claims that they had lost the capital gains tax deferral on the sale of a residence because the title defect held up its sale, in addition to their carrying costs for the house, lost use of the sale proceeds and the depreciation in the home's value from 2008 to 2012. The Third Circuit Court of Appeals reversed the summary judgment in favor of the insurer because it found a question of fact as to whether or not the insurer had cleared title diligently, but did not address the lower court's findings on the additional elements of loss claimed by the insured. *Granelli v. Chicago Title Ins. Co*., 569 Fed.Appx. 125, 2014 WL 2724459 (3rd Cir. (N.J.)) (unpublished).

[160] See Mark A. Brown and Christopher W. Smart, *Are Consequential Damages Recoverable From Title Insurers Or Has There Been A 'Change In Policy'?*, 81 Fla. Bar. J. 60 (Oct. 2007).

neither party had cited any state law holding that a party may recover losses due to tax consequences caused by a breach of contract, but "Hawai'i courts generally allow plaintiffs to recover any loss that can be shown with reasonable certainty, and have rejected a per se rule that certain types of losses are too speculative as a matter of law."[161] On remand, however, the district court ruled that the insurer was not required to pay any taxes, because the money received by the insured was in payment for substantive rights rather than damages incurred because of defective title.[162]

3.2.4 Determining Amount Of Loss On A Loan Policy

Once a lender has come into title to the insured parcel, a claim is resolved under a loan policy in the same manner as it would be under an owner's policy, except as noted throughout this chapter. Thus, the reader may follow the practices described throughout this chapter that address claims concerning title defects, access and encumbrances if the claim has been made under a loan policy and the lender is in title when the claim is made.

However, loan policy claims are not resolved in the same manner as owner's policy claims while the lender holds its mortgage and its borrower owns the land whose title is insured. An owner's policy insures the owner's title to the land. However, the primary purpose of a loan policy is to insure the validity, priority and enforceability of the insured lender's security interest in the land. Not every defect in title impairs the lender's security position. Also, a claim concerning a lien is resolved differently under a loan policy, as explained in §3.2.4.1.

Thus, while an owner has the right to seek a resolution of a claim as soon as he or she discovers that title is defective,[163] a lender does not suffer a loss unless three events occur. These three events are sometimes referred to as the "three Ds": a defect in title, a default by the borrower, and a diminution in property value that causes the lender's collateral to be worth less than the amount of its loan. This truism has been phrased in various ways:

> The broad rule set forth in these cases is that a secured lender suffers an indemnifiable "loss" under a title policy only if the lender fails to recoup the debt because of the insured-against senior lien.[164]

Defining and measuring actual loss under a title insurance policy is not the same for

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[161] *Morgan v. Chicago Title Ins. Co.*, 2007 WL 1073773 (9th Cir. (Hawaii)) (unpublished).

[162] *Morgan v. Chicago Title Ins. Co.*, 2007 WL 3332820 (D. Hawaii) (unpublished).

[163] *Green v. Evesham Corp*., 179 N.J.Super. 105, 430 A.2d 944 (A.D.1981); *CMEI, Inc. v. American Title Ins. Co*., 447 So.2d 427 (Fla.App. 1984); *Miller v. Title U.S.A. Ins. Corp. of New York*, 1991 WL 24537 (Tenn. 1991) (unpublished); *Cale v. Transamerica Title Ins. Co*., 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990).

[164] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App.4th 972, 24 Cal.Rptr.2d 912, 915-6 (Cal.App. 4 Dist. 1993). In accord are *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990); *Green v. Evesham,* 179 N.J.Super 105, 430 A.2d 944 (App.Div. 1981); *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990), in addition to the cases quoted directly hereafter. The *Karl* and *Cale* cases are discussed in Carollo, *Do Title Insurance Policies Protect Lenders?*, Real Estate Review (Summer 1995), p. 57.

> the owner who has title to property, and a mortgagee who holds only a security interest in the borrower's title. The fee interest of an owner is immediately diminished by the presence of a lien since resale value will always reflect the cost of removing the lien. A mortgagee's loss cannot be measured unless the underlying debt is not repaid and the security for the mortgage proves inadequate. Green v. Evesham Corp., 179 N.J.Super. 105, 109, 430 A.2d 944, 946 (1981). For a mortgagee, title insurance undertakes to indemnify against loss or damage sustained by reason of defects of title or liens upon the land, but does not guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid.[165]

> [W]hile a title insurance policy insuring the interest of a real estate owner and a title insurance policy insuring the interest of a mortgagee are both contracts of indemnity, ... nevertheless, substantive differences between the insured interest of an owner and that of a mortgagee results [sic] in a significant difference in what constitutes 'loss or damage' under each type of title policy. Title defects and liens directly and adversely affect the property owner because the owner is entitled to the full market value of the property and that value is immediately reduced by outstanding title defects and liens. A mortgagee's loss is measured by the extent to which the insured debt is not repaid because the value of security property is diminished or impaired by outstanding lien encumbrances or title defects covered by the title insurance. Therefore, superior liens or title defects in claims may exist which reduce the market value of the security property (the value to the owner) yet result in no loss or damage to the insured mortgagee because the effect of the title problems does not reduce the value of security property below the amount of an indebtedness secured or because the indebtedness is otherwise secured or paid.[166]

> [The insurer's] liability is limited to the lesser of: (1) Bay Loan's actual loss; (2) the amount of insurance; or (3) the indebtedness secured by the insured mortgage at the time of the loss. ... [The lender's] actual loss under each policy would be the lesser of (1) the amount uncollectible from the defaulting borrower, or (2) the fair market value of the unit at the time the prior mortgagee foreclosed.[167]

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[165] *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521, 525 (1988) [quoted in *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231, 1237, note 10 (1st Cir. 1993)]. See also, *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095 (Maine 1997) and *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), in which the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits. The *Blackhawk* analysis was also adopted in *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016).

[166] *CMEI, Inc. v. American Title Ins. Co.*, 447 So.2d 427, 428 (Fla.App. 1984).

[167] *American Title Ins. Co. v. East West Financial*, 16 F.3d 449, 456 (1st Cir. 1994).

A lender that has not proven that the loan is in default and that its security had been impaired "has not yet proven that it incurred any loss."[168]

Because a lender does not immediately suffer a loss due to an encumbrance on or defect in title, it is customary for a title insurer to adopt watchful waiting in response to a claim under a loan policy when the claim concerns a matter affecting title, and not the validity, priority or enforceability of the insured mortgage, when the lender insured has not yet taken title to the property. For example, the existence of an easement on the property that is not excepted in the policy does not cause the lender a loss payable under the policy unless and until the lender becomes the owner of the property. See §3.1 for a complete discussion of watchful waiting. Also see §7.9, which discusses how, under Condition 2, the loan policy continues in effect if the lender takes title to the property.

Once the lender does take title to the property, the insurer may assume that all conditions for payment of a claim under the loan policy have been fulfilled. The insurer will then resolve a covered claim made by the insured lender in essentially the same manner as it would under an owner's policy.

When the validity, priority or enforceability of the insured mortgage are attacked, the insurer will not respond to the claim by adopting a watchful waiting posture. Instead, the title insurer will promptly address a loan policy claim made before the lender takes title that attacks the insured mortgage and invokes a Covered Risk. For example, the insurer will act to protect or preserve the priority of the insured mortgage versus another lien or interest that claims priority over the mortgage. The insurer will also defend the insured mortgage's validity, such as against the assertion that the borrower's signature was forged. If a party holding a senior lien that is not excepted in the policy threatens to extinguish the insured mortgage, the insurer will defend the insured against that threat.

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[168] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co*., 156 Misc.2d 814, 595 N.Y.S.2d 302 (Sup. 1993). In accord are *Florida Home Ins. Co. v. Braverman*, 163 So.2d 512 (Fla.App. 1964) and *Goode v. Federal Title and Ins. Corp*., 162 So.2d 269 (Fla.App. 1964); *National Title Ins. Co. v. Safeco Title Ins. Co*., 661 So.2d 1234, 1236 (Fla.App. 3 Dist. 1995); *Kimberly Recreation Ass'n v. Butts*, 1997 WL 170293 (Ohio App. 10 Dist.) (unpublished). The *Kimberly* court put the matter this way: "The lending institution is only interested to the extent of its loan. The ultimate validity of the title, for other purposes, is simply not relevant to the lender." In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co*., 320 P.3d 406 (Colo.App. 1 Div. 2014), the court quoted 2 Gregory J. Notarianni, *Colorado Practice Series: Methods of Practice* § 63:3, at 271 (Cathy S. Krendl ed., 6th ed., 2012), which says: "An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee its loan amount, then there is no damage compensable under the loan policy." However, the court found that the insured lender was not premature in bringing suit against the insurer for payment based on its defective lien, although it was still litigating with the defaulted borrower and might obtain some payment from it. The court held that the final determination clause did not stay the coverage suit, since the insurer was not paying for the lawsuit against the borrower, and that action will not clear title. In *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997), even though the borrower was not in default, the insurer was found liable for the reduction in the lender's security caused by the undisclosed easement. The court also had bad news for the lender, however: it upheld a judgment in favor of the easement holder against the lender for trespass. The court reasoned that, when the construction lender discovered the trespass, it could have ordered the half-built house moved, but instead took an indemnity from the borrower and continued funding the loan. This fact supported the jury's verdict that the lender "aided and assisted" the borrower's trespass. The conditions to payment of loss under a loan policy are examined in Pedowitz, *Title Insurance in New York Today*, New York State Bar Journal, Vol. 68, No. 2, p. 12 (Feb. 1996). The article is a thorough analysis of the coverage of the title insurance policies.

One caveat to the above principle is that the insurer may elect to conduct watchful waiting and take no action due to the existence of a senior lien for which there is policy coverage, when there is no imminent threat that the insured's lien will be extinguished by the other lien holder. This response is especially common if the insured mortgage also has not yet been foreclosed, because there is no ready forum in which to litigate the priority issue and the amount of loss, if any, is typically not calculable until the insured takes title or is foreclosed out.[169]

However, a senior lien will threaten the insured if the borrower defaults and the senior lien holder forecloses. If the insurer conducts watchful waiting, it will typically inform the insured that it should give notice immediately if the senior lender starts a foreclosure action or gives notice of a non-judicial sale. The risks in the watchful waiting approach are that the insured lender will not receive notice of the foreclosure sale or will fail to inform the insurer in time to permit redemption of the senior lien, and that the amount of the senior debt may increase and magnify the amount of the loss paid at a later time. If a foreclosure action is brought by the holder of a senior lien for which there is policy coverage, the insured is not required to bid at that sale to protect its lien,[170] and the insured's failure to bid has been held not to be a violation of a duty to mitigate loss or of the policy requirement that the insured provide all reasonable aid to the insurer in clearing title.[171]

A shorthand statement of these principles is that the insurer will immediately respond to a claim made by an insured lender under Covered Risks 9 through 13 of the 2006 ALTA Loan policy, whether or not the insured is in title, because those risks concern the insured mortgage. However, the insurer will respond with watchful waiting as to any claim by a lender insured under Covered Risks 1 through 8 or 14 unless and until the lender takes title to the property. As with all general rules, there can be exceptions to this simple dichotomy.

This section began with the statement that there are three predicate conditions before a lender's loss will become "immediate." The second condition is proof that the borrower has defaulted on the loan. The borrower's default has been established if the lender has obtained a foreclosure judgment.[172] If the borrower has defaulted but the lender has elected not to foreclose the mortgage, the lender may establish default by showing the insurer that the borrower has been sued under the

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[169] *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.*, 217 S.W.3d 308 (Mo.App. S.D. 2007). Also see cases at §3.2.4.4. However, one court found a complaint filed by a lender for policy loss survived a motion to dismiss although the borrower was not yet in default and the senior lien covered by the policy had not yet been foreclosed. *State Resources Corp. v. Security Union Title Ins. Co.*, 2013 WL 209564 (E.D.Okla.) (unpublished).

[170] *Trigiani v. American Title Ins. Co.*, 392 Pa.Super. 427, 573 A.2d 230 (1990); *Wheeler v. Equitable Trust Co.*, 221 Pa. 276, 70 A. 750 (1908); *Walker v. Transamerica Title Ins. Co.*, 65 Wash.App. 399, 828 P.2d 621 (1992); *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 595 N.Y.S.2d 302 (Sup. Ct. 1993); and *Chicago Title Ins. Co. v. The Huntington National Bank*, 719 N.E.2d 955, 87 Ohio St.3d 270 (1999). The *Chrysler First* and *Huntington Bank* courts both noted that the insured was not required to bid when the insurer had an equal opportunity to do so.

[171] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 595 N.Y.S.2d 302, 307 (Sup. Ct. 1993).

[172] *Goode v. Federal Title Ins. Co.*, 162 So.2d 269 (Fla.App. 1964).

note and has not paid the money judgment.[173]

The third condition to payment of loss is proof that the lender's security position has been reduced due to the existence of the covered matter. In order to make this determination, the insurer and insured must consider all of the loan collateral, not just the land whose title is insured.[174] If the value of the collateral is sufficient to fully secure the lender, even subject to the covered matter, no loss is payable:

> A title insurer only undertakes to indemnify the insured lien holder if a defect causes a *loss*; without a loss there is no obligation to pay benefits. In other contexts it has been noted that a secured lender's interest in the security is limited to repayment of its loan; if the loan is fully satisfied a lender ordinarily suffers no damage. Regarding secured lenders, if the loan is fully secured as of the date of foreclosure notwithstanding the contractual default, the lender suffers no damage from such default. Here, plaintiffs were solely interested in the property as a security for their loan, and if they fully recouped all amounts due them the fact that title to the property was not as represented did not cause any cognizable loss.[175]

The subject of the proper means of determining the real estate's value is discussed beginning at §3.2.4.3.

The three conditions to payment of a loan policy loss (default, defect in title and diminished security) need not always occur in a particular order. In *Atlanta Title & Trust Co. v. Allied Mortgage Co.*,[176] the lender paid a superior lien before its loan went into default. Later, the lender sold the loan at a loss. Later still, the loan went into default. The court held that the lender had made a sufficient showing that its security had been impaired.

If the insured lender elects to pay off a lien without the insurer's written consent, the voluntary settlement provision of the policy bars recovery from the insurer for the amount paid.[177]

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[173] *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990).

[174] In *First Community Bank v. Commonwealth Land Title Ins. Co.*, 2014 WL 4720153 (M.D.La. 2014) (unpublished), the insured lender had no security in the property, because it was insured as having a first lien but actually held a second lien that had been foreclosed. The court held that loss was the least of the debt, the property's value or policy limits, following the senior's lender foreclosure that extinguished the insured lien.

[175] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (1993) (citations omitted). The *Karl* court recognized that *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990), had adopted a seemingly inconsistent position, and the court adopted the reasoning of the dissent in *Cale* rather than the majority position. In agreement with *Karl* are *Title Ins. Co. of Richmond v. Industrial Bank of Richmond, Inc.*, 156 Va. 322, 157 S.E. 710 (1931); and *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988). The *Karl* and *Cale* decisions are discussed in Carollo, *Do Title Insurance Policies Protect Lenders?*, Real Estate Review, Summer, 1995, p. 57.

[176] 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940).

[177] For example, in *Diversified Mortgage Investors v. U.S. Life Title Insurance Co. of New York*, 544 F.2d 571 (2nd Cir. 1976), a construction lender wished to settle with lien claimants before it made additional advances. The lender was

Similarly, the insurer is not obligated to bond off or pay a lien which is claimed to be prior to the insured mortgage, rather than exercising its right to establish the priority of the mortgage in litigation.[178]

A loan title insurance policy insures title, not the loan itself or any aspect of it. The policy does not insure that the debt underlying the security interest is itself valid, as fully discussed at §9.10. The policy insures the validity, enforceability and priority of the lender's lien on the real estate which serves as collateral, or partial collateral, for the loan. However, as one court put it, "a title insurance contract insures only the title to the land securing the debt and not the debt itself."[179] The policy does not insure against the possibility that the mortgage cannot be enforced because the loan funds were never advanced by the loan assignor.[180]

Also, the policy does not protect the lender against any representations it might make to others about the loan or its collateral, including the state of title. For example, in *National Title Ins. Co. v. Safeco Title Ins. Co.*,[181] a purchase money mortgage policy did not except a junior mortgage. The junior lien secured money the buyer borrowed in lieu of what was to have been cash equity. The borrower defaulted, and the lender made a claim on a mortgage insurance policy. The mortgage insurance company declared its policy void because the lender did not disclose the fact that the borrower had also borrowed the equity money. The lender was forced to repurchase the loan from the mortgage investor. The court found that the title insurer was not responsible for the insured's expenses:

> In this case, National did not allege, nor could it have, that its security was impaired by the second mortgage, which was satisfied two years after the closing, and four years before the owners defaulted on the first mortgage. ... In short, National's loss

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denied an injunction that would have prohibited the insurer from raising the voluntary settlement defense if it paid off the liens. See §2.14 for a complete discussion of the voluntary settlement provision.

[178] In *National Loan Investors, L.P. v. Chicago Title Ins. Co.*, 1999 WL 195819 (Conn.Super.) (unpublished), the lender claimed that the insurer had a duty to pay or bond off a construction lien rather than litigate over priority for seven years, during which time back taxes and other liens stacked up. The court refused to find such a duty, saying: "[t]he court agrees with the defendant that it did not have any contractual obligation under section 3(c) of its policy to settle the case or bond off the lien. It had a clear and unambiguous obligation to defend the claim of a superior lien by McDonald-Sharpe. This lien, as noted previously, was ultimately discharged and priority of title upheld in the defendant's insured." The court also relied on the final determination clause. See §3.4.6 for a complete discussion of the insurer's right to clear title for a lender.

[179] *Gerrold v. Penn Title Ins. Co.*, 637 A.2d 1293, 1295 (N.J.Super.A.D. 1994), citing *Bank of Miami Beach v. Fidelity & Casualty Co. of New York*, 239 So.2d 97 (Fla. 1970). See also *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 552 S.W.2d 425 (Tex. 1977), which held that "the payment of the note is not insured. The insurer underwrites only against loss due to a defect in the security." Also, 12 *Couch on Insurance* § 185.88 (3d. ed.1995) says that "if the value of the mortgaged property is less than the amount due on the mortgage, it has generally been held or recognized that the mortgagee can recover only the value of the property, not the amount due on the mortgage."

[180] *Gerrold v. Penn Title Ins. Co.*, 637 A.2d 1293 (N.J.Super.A.D. 1994).

[181] 661 So.2d 1234 (Fla.App. 3 Dist. 1995).

> was occasioned not by the short-lived and long-discharged second mortgage, but by the owners' default on the first mortgage. That default was not in any way attributable to the undisclosed second mortgage.[182]

3.2.4.1 Loan Policy Loss Caused By Prior Lien

Under a loan policy, the insurer often protects an insured against a lien by establishing that the lien is subordinate to the insured mortgage. See §3.4.7 on the subject of establishing priority over existing liens, and §3.4.7.1 concerning federal tax lien issues. See §3.4.7.3 for a complete discussion of the doctrine of equitable subrogation, which is used to subordinate mortgages and other liens to later-recorded mortgages.

Once a lender has come into title to the insured parcel, a claim is resolved under a loan policy in the same manner as it would be under an owner's policy, except as noted throughout this chapter. Thus, the reader may follow the practices described in those sections of this chapter that address claims concerning title defects, access and encumbrances if the claim has been made under a loan policy and the lender is now in title.

One situation in which the loss paid to a lender is different from what is paid under an owner's policy is that of a senior lien not excepted in the loan policy. Under an owner's policy, the insurer is required to remove a lien that is not excepted in the policy by paying whatever amount is necessary, up to the policy amount or the value of the property, as explained in §3.2.3.1.4. Under a loan policy, however, loss is the lesser of the cost to remove the prior lien or the amount by which the insured lender's security is impaired by the lien, which may be substantially less, as explained below in this section.

Because a lender's loss is limited to the amount by which its security is impaired by a lien, an insured lender may not simply pay off a lien and expect the title insurer to reimburse it in full, or demand that the insurer pay the lien in full. Thus, if the insured lender elects to pay off a lien without the insurer's written consent, the voluntary settlement provision of the policy bars recovery from the insurer for the amount paid.[183] Also, the insurer is not obligated to bond off or pay a lien which is claimed to be prior to the insured mortgage, rather than exercising its right to establish the priority of the mortgage in litigation.[184] When the insured brings a lawsuit against the insurer for alleged breach

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[182] Id. at 1236.

[183] For example, in *Diversified Mortgage Investors v. U.S. Life Title Insurance Co. of New York*, 544 F.2d 571 (2nd Cir. 1976), a construction lender wished to settle with lien claimants before it made additional advances. The lender was denied an injunction that would have prohibited the insurer from raising the voluntary settlement defense if it paid off the liens. See §2.14 for a complete discussion of the voluntary settlement provision. In *Atlanta Title & Trust Co. v. Allied Mortgage Co.*, 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940), the lender paid a superior lien before its loan went into default. Later, the lender sold the loan at a loss. Later still, the loan went into default. The court held that the insurer was required to reimburse the lender, but only because it proved that its security had been impaired by the lien.

[184] In *National Loan Investors, L.P. v. Chicago Title Ins. Co.*, 1999 WL 195819 (Conn.Super.) (unpublished), the lender claimed that the insurer had a duty to pay or bond off a construction lien rather than litigate over priority for seven years, during which time back taxes and other liens stacked up. The court refused to find such a duty, saying: "[t]he court agrees with the defendant that it did not have any contractual obligation under section 3(c) of its policy to settle the case or bond off the lien. It had a clear and unambiguous obligation to defend the claim of a superior lien by McDonald-

of the policy before the relative priority of the insured mortgage and the adverse lien has been decided, the coverage action is premature and should be dismissed without prejudice or stayed.[185]

An insured lender's loss due to a covered lien that is superior to the insured lien, or another covered title defect or encumbrance, is equal to the amount by which the covered matter reduces its security to less than the loan amount.[186] The value of all of the collateral held by the lender as

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Sharpe. This lien, as noted previously, was ultimately discharged and priority of title upheld in the defendant's insured." The court also relied on the final determination clause. See §3.4.6 for a complete discussion of the insurer's right to clear title for a lender.

[185] In *Johnson v. North Dakota Guar. and Title Co.*, ___ F.Supp.3d ___, 2018 WL 6706672 (D.N.D. 2018) (permanent citation not yet available), a lawsuit by the lender seeking payment from the title insurer of a loss caused by another lien was stayed until the relative priority of the two liens had been established in a separate action filed before the coverage suit was brought. The court reasoned that the amount of loss, if any, could not yet be fixed, because "the amount that Johnson stands recover in the instant action should he prevail on the issue of NDG&T's liability is largely dependent upon the priority of his mortgage on the Subject Property and thus the outcome of the State litigation." In *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990), the court held the insured's suit against the insurer was premature because the lien dispute was not yet resolved. In *Centrum Financial Services, Inc. v. Chicago Title Ins. Co.*, 2010 WL 936201 (D.N.J.) (unpublished), the court dismissed the lender insured's lawsuit seeking payment of loss as being premature, because the insurer was still litigating the priority of the insured mortgage versus the competing lien. For additional authorities, see § 3.4.5 concerning the final determination clause. However, in *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), the court quoted 2 Gregory J. Notarianni, *Colorado Practice Series: Methods of Practice* § 63:3, at 271 (Cathy S. Krendl ed., 6th ed., 2012), which says: "An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee its loan amount, then there is no damage compensable under the loan policy." However, the court found that the insured lender was not premature in bringing suit against the insurer for payment based on its defective lien, although it was still litigating with the defaulted borrower and might obtain some payment from it. The court held that the final determination clause did not stay the coverage suit, since the insurer was not paying for the lawsuit against the borrower, and that action will not clear title.

[186] *National Title Ins. Co. v. Safeco Title Ins. Co.*, 661 So.2d 1234, 1236 (Fla.App.3 Dist. 1995); 60 A.L.R.2d 972. In *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014), the court held that the "policy provides for indemnity 'only to the extent that [the insured's] security is impaired and to the extent of the resulting loss that it sustains.' It does not 'guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid.'" In *Levi v. Commonwealth Land Title Ins. Co.*, 2011 WL 4542904 (S.D.N.Y.) (unpublished), the court found that the insured would have been fully secured if the insured mortgage had been valid, and thus had established a loss in the full amount of the loan. In *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp*., 282 F.R.D. 423 (N.D.Ill. 2012), the court held that loss under an ALTA Residential Limited Liability Junior Loan policy is limited to the amount, if any, by which the lender's security interest in the property is reduced due to an undisclosed senior lien. In *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits. See also *Southwest Title Ins. Co. v. Northland Bldg. Corp.*, 552 S.W.2d 425 (Tex. 1977), which held that "the payment of the note is not insured. The insurer underwrites only against loss due to a defect in the security." In *RCN Capital, LLC v. Chicago Title Ins. Co.*, 2018 WL 1459437 (Conn.Super.) (unpublished), the insured lender came into title by making a cash bid at a tax foreclosure sale of the property. The lender took title free of an unexcepted prior lien. However, the insurer did not receive summary judgment on the lender's policy claim because the lien holder received some of the insured's cash bid amount, which the court said might represent lost "equity" in the property. In *Johnson v. North Dakota Guar. and Title Co.*, ___ F.Supp.3d

security is combined to determine if the lender is fully secured, even after considering the reduction in value due to the covered lien or encumbrance.[187] The lender's loss may not exceed the least of the policy amount, the insured's loan balance, the value of the insured parcel or the cost to remove the covered lien or encumbrance.[188] An important factor in determining the property's value is the date on which the real estate is valued. See §3.2.4.2 regarding the date on which loss is measured under a loan policy.

When the claim involves a senior lien in an amount greater than the property's value, the insured lender loses all of its security in the property. Its loss is usually the least of the insured's indebtedness, the value of the real estate, or the cost to obtain a release of the prior lien.[189] See §3.2.3.1.4 and §3.2.4.4 regarding release of liens.

Conversely, in some cases, the lien or other matter for which there is coverage is minor in relation to the value of the property, and the property's value is equal to or greater than the loan amount plus the amount of the lien for which there is coverage. When the property value is enough to fully secure the loan even subject to the covered lien or encumbrance, the insured does not suffer a loss, and the insurer is not required to remove the lien or encumbrance.[190] Also, the insured lender is

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___, 2018 WL 6706672 (D.N.D. 2018) (permanent citation not yet available), the court rejected the insured lender's claim that his loss due to a competing lien should be calculated based on two North Dakota statutes, N.D.C.C. §§ 32-03-13 and 32-03-32, that define the damages that flow from the breach of an agreement to convey real estate as being the market value of equivalent property. The court said that there was no authority for the proposition that a law addressing damages for a breach of an agreement to convey real property "is applicable in the context of a claim for damage flowing from an alleged breach of a service agreement."

[187] For example, see the formulae used by the courts in *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*135 Wis.2d 324, 400 N.W.2d 287 (App. 1986), rev'd and rem. 144 Wis.2d 68, 423 N.W.2d 521 (1988), in which the lender held as collateral both real and personal property, securing a farm loan.

[188] See Condition & Stipulation 7(a)(ii), 1992 ALTA Loan Policy; Condition 8(a)(ii), 2006 ALTA Loan Policy.

[189] In *First Community Bank v. Commonwealth Land Title Ins. Co.*, 2014 WL 4720153 (M.D.La. 2014) (unpublished), the insured lender had been insured as having a first lien but there was an unexcepted first lien and the senior debt was for than the property's value. The senior's lender foreclosure extinguished the insured lien. The court held that loss was the least of the insured's debt, the property's value or policy limits. In *First American Title Ins. Co. v. Patriot Bank,* 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits. Also, 12 Couch on Insurance § 185.88 (3d. ed.1995) says that "if the value of the mortgaged property is less than the amount due on the mortgage, it has generally been held or recognized that the mortgagee can recover only the value of the property, not the amount due on the mortgage."

[190] *First Commerce Realty Investors v. Peninsular Title Ins. Co.*, 355 So.2d 510 (Fla.App.1978) (no loss payable when property was worth more than insured's debt plus prior unexcepted lien); *CMEI Inc. v. American Title Ins. Co.*, 447 So.2d 427 (Fla.App.1984) (no loss suffered due to two easements not excepted, when value of property subject to the easements was more than loan amount). In *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.,* 347 S.W.3d 582 (Mo.App. S.D. 2011), the policy failed to except a deed of trust senior to the insured deed of trust. The insured argued that it need not prove a loss due to the senior lien. The court disagreed, saying: "[t]he mere existence of the Allison deed of trust did not establish actual loss under this lender's title insurance; defects, liens, encumbrances or other matters resulting in no loss or damage to the injured claimant are unambiguously excluded from coverage under the White Pine Policy." However, a bankruptcy court held that an insurer was liable for policy limits after it put the lender in title to the insured parcels, because those parcels were the product of a land division without a permit. The court excused

not affected by a defect in title if the loan is repaid in full or in an amount that is equal to the property's value. Thus, when the insured lender receives money from the borrower or third parties that is equal to or more than the value of the property, it does not suffer a loss payable by the title insurer for a title defect.[191]

A lender that has paid a lien but is unable to show that its security was impaired by it has not proven a loss.[192] In *Green v. Evesham Corp.*,[193] a $60,000 prior mortgage was not excepted in a policy insuring a $15 million mortgage. Rather than foreclose, the lender purchased the property and bought out all other lien interests. It resold the property at a profit, but then demanded from the insurer the amount paid to the prior missed mortgagee. The court found no loss because, once it owned the entire property, the lender had collateral of $4 million more than its debt.

The loss measurement for a junior mortgage depends largely on the amount of equity in the property above the amount of the senior lien. Whenever the policy makes exception for a senior lien, the insured's loss is the least of the equity in the property to which the insured's lien should attach, the policy limits, the amount of the lien for which there is coverage, or the amount of the insured's loan. The amount of equity in the property, subject to the senior excepted lien, may be less than the amount of the lien for which there is coverage. In that case, the insurer is not required to pay off the covered lien in full, but only to pay the amount of the equity that should have existed.

In some cases, the policy makes exception for a lien securing a loan in an amount greater than the value of the property. In such cases, the insured has no security in the real estate due to prior excepted lien. The existence of a second, covered lien or encumbrance does not cause the lender to suffer a loss.[194] However, when the insured would have had partial security in the property but the

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the insured from proving a diminution in value by labeling the loss provision an "exclusion." It judicially rescinded the conveyances. *In re Evans*, 492 B.R. 480 (Bkcy.S.D.Miss. 2013).

[191] In *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012), the bank made a loan of $450,000. The borrower later claimed that his identity had been stolen and that the mortgage was void. The bank settled with the borrower for $175,000. An appraisal valued the property at $126,000. The court found that the bank suffered no loss, since it received through settlement "an amount considerably in excess of the value of the insured Mortgage." In *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.*, 347 S.W.3d 582 (Mo.App. S.D. 2011), the court found that the insured had not proven a loss after electing to release its lien on payment from the borrowers of all of the money they had. The amount the lender received was about the same as the value of the property at that time, which was less than its value when the loan was made.

[192] See *Ring v. Home Title Guar. Co.*, 168 So.2d 580 (Fla.App. 1964). In *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (1993), the lender resold the property for slightly more than the combined amount of the debt and the money it had paid to remove the unexcepted tax lien. The court rejected the lender's argument that the lien reduced its profit on resale, and was thus payable as a loss, which would be contrary to the indemnity nature of the title insurance policy: "an insured lender who receives full value in discharge of his note does not suffer a compensable 'loss' under his title policy merely because an insured-against lien reduced the equity cushion seized on the foreclosure." 20 Cal.App. 4th at 982-3, 24 Cal.Rptr.2d at 919. In *Citibank v. Chicago Title Ins. Co.*, 214 A.D.2d 212, 632 N.Y.S.2d 779 (A.D. 1 Dept. 1995), the court held that a lender suffered no loss because it took title to the property free of the junior liens that were the covered matter.

[193] 430 A.2d 944 (N.J. Super. Ct. A.D. 1981).

[194] In *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co*., 144 Wis.2d 68, 423 N.W.2d 521 (1988), the court stated: "If the interest held by [the insured] was valueless without the superior lien, it cannot claim any lost value because

lien for which there was policy coverage wiped out that equity, the lender is entitled to payment of a loss equal to the amount of the equity to which its lien would have attached if it had been in the position as stated in the policy.[195]

When the policy makes exception for a senior mortgage and that lien is foreclosed, extinguishing the insured's junior lien and all equity to which it attaches, the insured suffers no covered loss; the extinguishment of the insured's lien renders any policy claim moot.[196] When the foreclosure of the senior lien occurs while the insurer is clearing title or asserting the (junior) priority of the insured lien, however, the insured may not be obligated to bid at the foreclosure sale to protect its lien.[197]

When the policy insures a lender's mortgage covering more than one parcel, loss equals the amount, if any, of the impairment of the lender's security on the combined collateral, although courts have disagreed about how to apply the pro tanto reduction clause of the 1992 ALTA Loan policy.[198]

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the lien existed. Conversely, if the security interest held by [the insured] had established value, the greatest amount it can recover as a mortgagee for the title defect under its policy of title insurance is the value of the interest held in the land up to the stated policy limits of the insurance." In *First United Bank of Bellevue v. First American Title Ins. Co.*, 496 N.W.2d 474 (Neb. 1993), the insured held a second mortgage, and the property was worth less than the excepted first mortgage. The court found that the insured second mortgagee never had any security in the property, and suffered no loss because of a title defect. Likewise, when the insured lender held a fourth lien rather than a third as insured, but the prior lender's foreclosure sale would not have netted the insured any proceeds if it had had a third lien, the insured did not suffer a loss under the policy, in *Grunberger v. Iseson*, 75 App.Div.2d 329, 429 N.Y.S.2d 209 (1980). Similarly, in *Twin Cities Metro-Certified Development Co. v. Stewart Title Guar. Co*., 868 N.W.2d 713 (Minn.App. 2015), the court held that, in order for an insured junior mortgagee to be entitled to be reimbursed by the insurer for mechanics' liens it had paid off, the lender was required to prove that the property had a value greater than the excepted first mortgage. If it did not, the mechanics' liens could not have caused a loss to the insured because the insured mortgage did not attach to any equity in the property. *Twin Cities* relied in part on the holding in *Blackhawk* that is quoted in this footnote.

[195] *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993).

[196] *Debral Realty, Inc. v. Ticor Title Ins. Co.*, 1998 WL 1181730 (Mass.Super.) (unpublished). The court distinguished *Trigiani v. American Title Ins. Co*., 392 Pa.Super. 427, 573 A.2d 230 (1990).

[197] In *Trigiani v. American Title Ins. Co*., 392 Pa.Super. 427, 573 A.2d 230 (1990), the title insurer attempted to defeat mechanic's liens in litigation and was unsuccessful. While that action was pending, the holder of the first mortgage (excepted in the policy) foreclosed, extinguishing the insured's lien. The court ruled that the insured was entitled to policy limits, because there would have been sufficient equity in the property to fully secure the insured if the mechanic's liens had not been filed.

[198] See *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988). A lender does not suffer a loss if it recovers the full amount of the loan from the sale of the collateral. See *CMEI, Inc. v. American Title Ins. Co.*, 447 So.2d 427 (Fla.App. 1984) and other cases discussed at §9.10. This general principle was codified in Conditions 9(b) of the 1992 ALTA Loan policy, which states that "[p]ayment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto." Two courts refused to apply Condition 9(b) when there were still loan balances owed and the insureds failed to collect on insured collateral. In *Doss & Associates v. First American Title Ins. Co.*, 325 Ga.App. 448, 754 S.E.2d 85 (Ga.App. 2013), the insured lender had a valid lien on six parcels and resold them for more than its loan amount. Its lien on a seventh parcel was extinguished by foreclosure of a senior lien not excepted in the policy. The lender claimed that it was still owed money because it applied the proceeds from the sale of the six parcels to

The measure of loss is not necessarily the cost of removing the lien or encumbrance from the one affected parcel, and the loss is not fixed until the lender disposes of all of its collateral.[199] The reduction in a lender's security position on one parcel of real estate due to the covered lien or encumbrance may be fully offset by the value of other collateral.

In many situations, the amount of a lender's loss, if any, is determined by a formula. The first step in the formula is to subtract the amounts of the liens *excepted* in the policy from the fair market value of the parcel or parcels that serve as security for the insured's loan. This establishes the amount of the net equity to which the insured lien would attach but for the lien or encumbrance for which there is policy coverage. If there is no net equity because the superior, excepted lien amounts are more than the property is worth, the insured has not suffered a loss due to the lien or encumbrance for which there is coverage. Rather, there was no equity in the real estate to which the insured's lien could attach, even if the matter for which there is policy coverage had not existed.

If there are no senior excepted liens, or if there is positive net equity in the property after subtracting excepted lien amounts, loss is the least of the equity amount, the cost to remove the covered matter, or the indebtedness held by the insured. The insurer will typically either pay to remove the covered matter, or pay the insured the lesser of the equity amount or the debt. No loss is payable to the insured lender for that portion of its debt that is above the amount of the net equity, because that amount was not secured by the insured real estate. However, if the equity amount is more than the amount of the indebtedness, the insured lender would have been fully secured by the real estate if title had been as insured, and its loss is equal to the amount by which the covered matter reduces its security, if at all.

The next step is to subtract the amount of the lien or encumbrance for which there is policy coverage from the net equity in the property. If this net, net equity amount is less than the amount of the insured lender's indebtedness, the loss equals the amount of the insured's debt that is not secured due to the existence of the covered matter. Loss equals the amount of the insured's debt that is not

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interest and penalties first, leaving a small principal balance. The insurer argued that the policy had been reduced to zero by Conditions 9(b). The court refused to grant the insurer summary judgment. Similarly, in *Preservation Capital Consultants, LLC v. First American Title Ins. Co*., 406 S.C. 309, 751 S.E.2d 256 (S.C. 2013), the loan policy amount was $3,075,000. The loan was secured by three parcels, including a defective lien on a small parcel that the lender knew would be in second position. The lender foreclosed on the main parcel, making a credit bid of $3,250,000. By the time of that sale, the debt with interest was $3,641,190. After subtracting the bid amount, the loan balance was $391,190, just over the amount of the lost equity in the second-lien parcel. The court held that the credit bid did not extinguish the policy, saying simply that it was unfair to reduce the policy amount dollar-for-dollar based on the credit bid amount. In *Equity Income Partners LP v. Chicago Title Ins. Co.*, 241 Ariz. 334, 387 P.3d 1263 (Ariz. 2017), the Arizona Supreme Court held that a lender's credit bid did not constitute a "payment" under Condition 9(b).

[199] See *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.,* 144 Wis.2d 68, 423 N.W.2d 521 (1988) (on farm loan secured by personal and real property, loss measured as the amount of security lost by the lender due to the covered matter after it sold all of the collateral, including the personal property not insured by the policy). In *Chicago Title Ins. Co. v. The Huntington National Bank*, 1998 WL 548959 (Ohio App. 5 Dist.) (unpublished), modified by 719 N.E.2d 955, 87 Ohio St.3d 270 (1999), the insured lender obtained mortgages on two houses owned by the borrower. A prior mortgage on one parcel was not excepted in the policy. The measure of loss was the extent to which the lender's combined security in the two mortgaged properties was reduced by the prior mortgage. The court rejected the lender's argument that the cost to remove the lien was the measure of loss.

secured by the insured parcel due to the existence of the covered matter. Sometimes, that reduction in security is the full amount of the covered lien or encumbrance; in other cases, the covered matter does not leave the insured with less security than its loan amount. The following examples illustrate the loss equation.

Example 1—No loss because of insufficient security even *without* title defect. Assume a property value of $100,000, a first lien of $110,000 that is excepted in the policy, and a second lien that is not excepted in the policy (in any amount). There is no impairment of security, and thus no loss payable to the insured, because the insured would have no security in the property even if the covered matter did not exist, due to the amount of the excepted prior lien.

Example 2—No loss because insured is fully secured. Assume a property value of $100,000, a first lien of $10,000 not excepted in the policy, and that the insured mortgage loan has a balance of $60,000. There is no impairment of security, and thus no loss payable to the insured, because there is sufficient equity in the property to fully secure the insured even subject to the first lien that was not excepted. An insurer could elect to remove the first lien, but any such payment may be deemed premature, as explained above. If the first lender brings a foreclosure or notices a sale, the insurer should pay off the senior debt and take an assignment of the note. If it does not and the insured mortgage is extinguished, loss is limited to the loan balance of $60,000.

Example 3—Loss limited to partial impairment of security. Assume a property value of $100,000, a first lien of $50,000 that is not excepted in the policy, and that the insured mortgage loan has a balance of $60,000. Unless and until the first lien is foreclosed, the only effect of the first lien is to impair the insured's security by $10,000. The insurer could elect to remove the first lien or pay a loss to the insured of $10,000. However, any such payment may be deemed premature, as explained above. If the first lender brings a foreclosure or notices a sale, the insurer should pay off the senior debt and take an assignment of the note. If it does not and the insured mortgage is extinguished, loss is limited to the loan balance of $60,000.

Example 4—Loss limited to amount of prior lien. Assume a property value of $100,000, a first lien of $10,000 that is not excepted in the policy, and that the insured mortgage loan has a balance of $150,000. The lender's security in the property would be limited to its value of $100,000 even if the first lien did not exist. The existence of the first lien for which there is policy coverage causes the insured's security to be reduced by the amount of the lien. The insurer will typically pay $10,000 or whatever amount is required to pay to obtain a release of the senior lien. If the first lender brings a foreclosure or notices a sale, the insurer should pay off the debt and take an assignment of the note. If it does not and the insured mortgage is extinguished, loss is limited to the value of the property. No loss is payable for the portion of the insured's debt that was more than the value of the property.

Example 5—Loss equals amount of insured's debt. Assume a property value of $100,000, a first lien of $100,000 that is not excepted in the policy, a policy amount of $50,000, and that the current indebtedness on the insured mortgage is $40,000. There is a complete impairment of the insured lender's security, due to the existence of the prior lien for which there is policy coverage. However, loss is limited to the insured's indebtedness of $40,000, which is less than either the policy limits or the amount of the prior lien.

Example 6—No loss on loan secured by several parcels. Assume that the insured mortgage encumbers three parcels, each of them worth $100,000; that the amount of the indebtedness secured by the mortgage is $150,000; and that one of the three parcels is encumbered by a first lien of $100,000 that is not excepted in the policy. The insured has no security in the parcel subject to the first lien for which it has coverage. However, it has no loss, because the remaining two parcels have a combined value of more than the amount of the indebtedness, so that the loan will be repaid in full on the sale of the other collateral.

3.2.4.2 Loan Policy Date Of Loss

The loan policy does not expressly state the date on which loss is to be measured. The rationale adopted by most courts as to the proper date of loss under an owner's policy does not apply in the same way to a loan policy. One early case measured loss under a loan policy as of the date on which the insured lender discovered the title defect, treating a loan policy as operating under the same principles that apply to an owner's policy.[200] However, as a number of courts have stated, an owner suffers an "immediate" loss when the insured discovers a defect in title, whereas a lender does not suffer a loss due to a title defect until it loses its loan collateral or becomes the owner of the property. See the full discussion of this distinction between the two types of policies at §3.2.4. Because of this difference in the nature of the two forms of policy, modern decisions acknowledge that the date of loss is different under the owner's policy and the loan policy, and that the date of discovery is not appropriate for a loan policy because the lender does not suffer a loss on that date.[201]

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[200] *Narbeth Building & Loan Ass'n v. Bryn Mawr Trust Co.*, 126 Pa.Super. 74, 190 A. 149 (1937).

[201] *Associated Bank, N.A. v. Stewart Title Guar. Co.,* 881 F.Supp.2d 1058 (D.Minn. 2012) stated that "the majority of courts considering the issue have held that such loss cannot be measured until the note has not been repaid and the security for the mortgage is shown to be inadequate," and cited *Falmouth Nat'l Bank v. Ticor Title Ins. Co.,* 920 F.2d 1058 (1st Cir.1990). The courts reached the same conclusion in *Marble Bank v. Commonwealth Land Title Ins. Co.,* 914 F.Supp. 1252 (E.D.N.C.1996); and *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.,* 144 Wis.2d 68, 423 N.W.2d 521, 525 (1988); and *Demopoulos v. Title Ins. Co.,* 61 N.M. 254, 298 P.2d 938, 939 (1956). The difference between the two types of policies has been acknowledged by almost all courts. See *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc*., 347 S.W.3d 582 (Mo.App. S.D. 2011) (acknowledging that loss is measured differently under the two types of policies); *Equity Income Partners LP v. Chicago Title Ins. Co*., 2012 WL 3871505 (D.Ariz.) (unpublished) (date of discovery rule appropriate for owner's policies; date of policy used as date of loss on loan policies). In *First Internet Bank of Indiana v. Lawyers Title Ins. Corp.*, 2009 WL 2092782 (S.D.Ind.) (unpublished), the insured argued, based on *Overholtzer*, that loss should be measured on date of discovery for both owner's and loan policies. The court relied on *Karl* to find that loss under a loan policy is measured on the date on which the insured loses its security: "[t]he better reasoned cases have instead determined loss in a lender's title insurance policy at the date of foreclosure. Using an earlier date would necessarily require speculation and estimation about the value of the property before it is even certain whether the lender will suffer a loss, while the date of foreclosure provides a value and loss amount based on a real transaction. This rule to use the date of foreclosure does not systematically favor the insurer or the lender. Market conditions determine which party benefits from the date-of-foreclosure rule. This court predicts that Indiana would follow the consensus view that the loss in a title insurance policy for a mortgage holder is determined at the date of foreclosure." *Id.* at *6. The reasoning of *First Internet Bank* was adopted in *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014). That court explained that measuring loss on the date of the foreclosure of a senior lien that extinguishes the insured lien "is appropriate because the foreclosure is when the insured actually incurs a covered loss." In *Associated Bank, N.A. v. Stewart Title Guar. Co.,* 881 F.Supp.2d 1058 (D.Minn. 2012), likewise, the court held that, because a lender does not know it will ever suffer a loss due to a covered matter, loss cannot be measured or paid until the adverse, covered lien is enforced by foreclosure. In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016), the court acknowledged that Georgia uses the policy date as the loss date for owner's policies, under *U.S. Life Title Ins. Co. of Dallas v. Hutsell*, 164 Ga.App.

Thus, although the jurisdictions are not unanimous as to the date of loss under a loan policy, there is a very strong consensus amongst the modern decisions that the date of loss is one of two dates, depending on the circumstances. Loss is measured either on the date on which the lender takes title to the property, or the date on which the insured mortgage is extinguished by a covered event, such as the foreclosure of a superior lien for which there is policy coverage.[202] Conversely, if the insured elects to release the insured lien or allows it to be extinguished due to an event that is not covered, the policy terminates and no loss is payable, rendering moot the issue of the loss date.

Most covered title issues concern defects in or encumbrances on title. A lender does not suffer a loss due to such an issue unless and until it takes title to the property, because only when it takes title to the real estate collateral does the value of the real estate affect the lender's ability to get back the amount of its loan. Thus, when the insured forecloses the insured mortgage and takes title, most courts hold that loss payable to the insured is measured based on the covered matter's effect on the value of the property as of that date.[203] The seminal modern decision of *Karl v. Commonwealth Land Title Ins. Co.*[204] so held:

> At [foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure: either cash as paid by a third party bidder or the realty as bought in by the foreclosing lender. It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time.
> …The "fair market value as of foreclosure" approach also eliminates other concerns raised by the plaintiffs which otherwise are inherent in a delayed determination of

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443, 296 S.E.2d 760 (1982), but it identified the loss date for a loan policy as being the date on which the lender takes title.

[202] See J. Bushnell Nielsen, *The Rationale Behind the Date of Loss Under Owner's and Loan Title Insurance Policies*, *The Title Insurance Law Newsletter*, October 2019.

[203] *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014); *Associated Bank, N.A. v. Stewart Title Guar. Co*., 881 F.Supp.2d 1058 (D.Minn. 2012); *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co*., 144 Wis.2d 68, 423 N.W.2d 521 (1988); *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co*., 657 A.2d 890 (N.J. Super. 1995); *First Commerce Realty Investors v. Peninsular Title Ins. Co*., 355 So.2d 510 (Fla.App. 1978); *Palliser v. Title Ins. Co. of New York*, 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908); *Emigrant Mortgage Co., Inc. v. Washington Title Ins. Co*., 78 A.D.3d 1112, 913 N.Y.S.2d 251 (N.Y.A.D. 2 Dept. 2010); *Grunberger v. Iseson*, 75 App.Div.2d 329, 429 N.Y.S.2d 209 (1980); *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D. Idaho) (unpublished); and *Marble Bank v. Commonwealth Land Title Ins. Co*., 914 F.Supp. 1252 (E.D.N.C. 1996) (citing *Karl* and adopting date of foreclosure because "[o]nly the completion of foreclosure signifies that a lender will not collect on its note"). The Karl and Cale decisions are discussed in Carollo, *Do Title Insurance Policies Protect Lenders?*, Real Estate Review, Summer, 1995, p. 57. In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016), the court adopted the statement from *First American Transportation* that "a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer's liability to a mortgagee should be measured using the foreclosure date," reasoning that the foreclosure date is "appropriate because the foreclosure is when the insured actually incurs a covered loss."

[204] 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (Cal.App. 4 Dist. 1993).

> loss. For example, following foreclosure lenders may invest cash or their own time and effort in renovation of the property. An increase in market value as a result of such contribution should not redound to the benefit of the insurer. Similarly, a lender's expertise in marketing which results in a sale at higher than market value should not profit the insurer [citation omitted]. Finally, it seems unfair to measure damage by a market sale which may occur at a time distant from the date of foreclosure, during which period inflation or deflation may have altered the value of the property.[205]

Similarly, if the insured lender takes a deed in lieu of foreclosure, most states value the property as of the date of the delivery of that deed.[206] Conversely, when the insured elects not to foreclose on the insured deed of trust after the borrower defaults, the insurer may properly respond that the amount of the loss will not be fixed unless and until the insured forecloses and comes into title.[207] Similarly, no loss is payable due to a covered title risk if the validity and priority of the insured mortgage have not been challenged and the borrower has not yet defaulted. See §3.2.4 for a complete discussion of the borrower's default as a predicate to loss under a loan policy.

In other cases, the title issue concerns the priority of the insured mortgage versus a competing lien or property interest, or something that renders the insured mortgage invalid. In such cases, the threat posed to the insured is that the insured mortgage may be extinguished by the foreclosure of the competing, covered lien or other action. When the insured mortgage is extinguished, which is typically by a court order, due to an issue for which the policy provides coverage, most courts have held that the date of loss is the day on which the insured mortgage is extinguished.[208]

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[205] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 984, 24 Cal.Rptr.2d 912, 920 (Cal.App. 4 Dist. 1993). The *Karl* court recognized that *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990), had adopted a seemingly inconsistent position, and the court adopted the reasoning of the dissent in *Cale* rather than the majority position. The *Karl* case was remanded and refined on appeal. In *Karl v. Commonwealth Land Title Ins. Co.*, 60 Cal.App.4th 858, 70 Cal.Rptr.2d 374 (Cal.App. 4 Dist. 1997), the court rejected the insured's argument that fair market value should be reduced by the costs of resale to thus measure the insured's actual net recovery after resale. In *U.S. Bank, N.A. v. First American Title Ins. Co*., 2012 WL 1080876 (M.D.Fla.) (unpublished), the court used the appraised value of the property at about the time of the senior lender's sheriff's sale and, because the borrower had attempted to conduct a short sale, the court also subtracted 7.4% as the costs of sale.

[206] *Goode v. Federal Title Ins. Co.*, 162 So.2d 269 (Fla.App. 1964).

[207] In *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D. Idaho) (unpublished), the insurer defended the insured lender against construction liens. That litigation was resolved, but the insured kept putting off the sheriff's sale on its foreclosure. The court held that loss could not be determined until there was a final determination in the form of a foreclosure sale. In *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.*, 347 S.W.3d 582 (Mo.App. S.D. 2011), the policy failed to except a lien senior to the insured deed of trust. Because the insured lender had not foreclosed, the insurer responded that no loss would be suffered or calculable until it did so. The insured then settled with the borrower by accepting a compromise amount that "was supposedly the last dollars he had," and released its deed of trust. The court determined that the insured had not proven that it suffered a loss due to the unexcepted prior deed of trust.

[208] *Chrysler Financial Services Corp. of America v. Chicago Title Ins. Co.*, 641 N.Y.S.2d 13, 14 (A.D. 1st Dept.

Notwithstanding the numerous decisions that have developed the above rules in many jurisdictions, several courts have held that loss under a loan policy is to be measured on the date of policy.[209] The usual rationale for this interpretation is that the policy date is the proper loss date in a claim in which the insured mortgage was invalid when granted. The insured mortgage cannot be foreclosed if it is void or invalid. However, in many cases, the insurer is able to cure the claimed infirmity in the insured mortgage, either by litigation or otherwise. The insurer's right to clear title may not be abridged, and no loss is payable to the insured lender if the insurer delivers either title or a valid and enforceable mortgage to the insured.[210] When the insured mortgage is invalid, the insurer often takes action to clear title or to establish the lien of the mortgage as insured. In such cases, the policy provides that no loss is payable until there has been a final determination adverse to the insured (and that no loss is payable if the insurer succeeds). See §3.4.5 regarding the final determination clause, and §3.4.6, discussing the clearing of title for an insured lender.

Unfortunately, however, the policy date has been adopted as the loan policy loss date in several cases even when there was no defect in the insured mortgage.[211] Those courts have admitted

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1996) (adopting date of foreclosure sale and allowing interest on amount payable to accrue from that date). Footnote 11 of the *Karl* decision anticipated this type of claim, and said that "our opinion in this case should not be construed as imposing upon the insured lender, who discovers a prior undisclosed lien, the unconditional obligation of curing the lien and then foreclosing, in order to cause maturation of the title company's liability." 20 Cal.App. 4th 972, 984, 24 Cal.Rptr.2d 912, 919 (Cal.App. 4 Dist. 1993). See also, *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp*., 282 F.R.D. 423 (N.D.Ill. 2012) (loss "caused by a surprise, more-senior lien can be measured only after the foreclosure sale of the secured property" because "[o]nly then can the parties know whether the seniority of the lien actually caused a loss."). In *U.S. Bank, N.A. v. First American Title Ins. Co*., 2012 WL 1080876 (M.D.Fla.) (unpublished), the insured deed of trust was extinguished by the foreclosure of a senior deed of trust. The court used the appraised value of the property at about the time of the sheriff's sale to value the property. However, because the borrower had attempted to conduct a short sale, the court also subtracted 7.4% as the costs of sale. In *Morris v. Chelsea Title & Guaranty Co.*, 12 N.J.Misc. 428, 171 A. 819 (N.J. 1934), the court held that loss was to be measured as of the date on which a decree was entered that declared the mortgage invalid.

[209] *The Title Ins. Co. of Richmond, Inc. v. Industrial Bank of Richmond, Inc*., 156 Va. 322, 157 S.E. 710 (1931), the Virginia Supreme Court held that loss under a loan policy is measured on the date of policy. *Citicorp Svgs. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988), used date of policy on the premise that the insured mortgage was void at inception, even though the mortgage was replaced by an equitable lien that the lender foreclosed in order to take title. *Citicorp* has since been rejected by a number of other courts. However, in each of those decisions, the insurer admittedly took action to establish title as insured, or to impose an equitable lien on behalf of the insured lender. See the discussion of those cases at §3.4.6.2. This rule applies even where an insured mortgage has been wholly invalidated, because "[i]f the plaintiff had received a valid mortgage and foreclosed it, all he would have been able to realize would have been the value of the property." *Demopoulos v. Title Ins. Co.,* 61 N.M. 254, 298 P.2d 938, 939 (1956).

[210] See §3.4.6 concerning the clearing of title for a lender, §3.4.6.1 regarding the insurer's right to tender title to the insured lender in lieu of establishing the validity of the insured mortgage, and §3.4.6.2 concerning the insurer's right to establish an equitable lien as a means of clearing title. Also, see §3.4.7.3 concerning the doctrine of equitable subrogation, which is frequently used to establish an equitable lien in favor of the insured with priority over competing liens. In *G&B Investments, Inc. v. Henderson (In re Evans)*, 460 B.R. 848, 899 (Bkcy.S.D.Miss. 2011), the insured mortgage was invalid and the title insurer was found not to have attempted to cure its invalidity. The court used the date of the loan as the loss date, relying on *Citicorp Svgs. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988), which used date of policy because the insured mortgage was void at inception.

[211] In *Equity Income Partners LP v. Chicago Title Ins. Co*., 2012 WL 3871505 (D.Ariz.) (unpublished), the court held

that they adopted the policy date simply because the real estate was worth more at that time than when the lender took title to it. This use of the policy date as the loss date when the insured mortgage was not defective when granted has since been rejected, because it has the effect of causing the insurer to pay the insured for a decline in market value, which is not a loss caused by defective title.[212] One court explained:

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that loss was to be measured on the date the loan was made, because according to the court that is when the lender suffered its loss. It cited *Citicorp* as its authority for selecting that loss date. However, in *Equity Income*, the court's reliance on *Citicorp* was misplaced, because the insured deed of trust was not defective. The lender conducted a successful trustee's sale and took title to the property. The claim issue was access, not the validity of the insured lien. The *Equity Income* court also relied on *G&B Investments*, 460 B.R. 848 (Bkcy.S.D. Miss. 2011), which skipped the pretext of *Citicorp* and flatly held that "[a]llowing the insurer to wait to value the [insured interest] in a falling real estate market works to the insurer's benefit, a result that does not construe an ambiguity in the policy in favor of the insured." In *First American Title Ins. Co. v. Johnson Bank*, 353 P.3d 370, 237 Ariz. 490 (Ariz.App. 1 Div. 2015), the insured deed of trust was not defective. The claim concerned a use restriction. The facts were thus similar to those in *Equity Income*. The Arizona appeals court adopted the reasoning of *Equity Income*, and set the policy date as the loss date. The Arizona Supreme Court accepted review, however. The high court significantly modified the appeals court rulings and rejected the reasoning of *Equity Income*. 239 Ariz. 348, 372 P.3d 292 (Ariz. 2016). In *Johnson Bank*, the Supreme Court adopted the date of policy as the loss date, but only as to the facts of that claim. The court said that, "[w]hen the title defect is an undisclosed lien, the foreclosure date might well be the appropriate valuation date because the lender's damage results from not having priority in the foreclosure proceeds." One of the authorities that supported that limited rule, the court said, was the criticism of *Equity Income* found in Christopher B. Frantze, *Equity Income Partners LP v. Chicago Title Insurance Co. and Recovery Under A Lender's Title Insurance Policy in A Falling Real Estate Market*, 48 Real Prop. Tr. & Est. L.J. 391 (2013). Also, the Supreme Court rejected the ruling of the appeals court, which had assumed that the title defect caused the borrowers to default in order to grant summary judgment to the lender. The high court said that, "[o]n remand, Johnson Bank will have to prove that the title defect caused the borrowers' default and subsequent foreclosure to justify using the date of the policies as the valuation date. If Johnson Bank fails to satisfy this burden, then the proper valuation date is the foreclosure date." The *Johnson Bank* court also said: "[u]nder the policies, First American did not expressly agree to indemnify or otherwise insure against the risk of a drop in the real estate market." This is a commonly-accepted principle. However, in *Whitlock v. Stewart Title Guar. Co*., 399 S.C. 610, 732 S.E.2d 626 (S.C. 2012), the South Carolina Supreme Court held that loss under an owner's policy is measured as of the date of policy. The court seemed to indicate that the date of loss could change depending on whether the property has depreciated or appreciated in value since the policy date. The *Whitlock* ruling may also apply to loan policies. It does not make sense to have different rules about the date of loss that are applied based on whether property is depreciating or appreciating in value, because the policy does not insure the risk of a change in the market value, as the Arizona court recognized. See §3.2.3.4 for a complete discussion of the date of loss under an owner's policy. In *Bank of Sacramento v. Stewart Title Guar. Co*., 2011 WL 6396533 (9th Cir. (Cal.)) (unpublished), vacating 2010 WL 3784096 (E.D.Cal.), the Ninth Circuit vacated a district court ruling that definitively stated that a bank may not collect as loss the depreciation in the property's value during the time in which the insurer is clearing title. However, the appeals court held only that the bank "has alleged legally cognizable damages caused by the claimed breach in the form of increased carrying costs for any additional time title was unmarketable due to the alleged lack of reasonable diligence." It said it did "not reach the validity of any of the other damages theories asserted by the Bank." The decision is unpublished. Decisions on owner's policies that have addressed the question of whether or not depreciation in the value of the land can be claimed as loss under the policy are discussed at §3.2.3.4 and §3.4.9.5.

[212] *Premier Community Bank v. First American Title Ins. Co*., 2015 WL 3949327 (W.D.Wash. 2015) (unpublished); *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished). In *Premier Community Bank*, the insurer obtained an equitable lien on the property and converted it to title, which it tendered to the lender insured. The lender demanded to be paid the amount by which the property had declined in value from the policy date to the day on which title was tendered to it. The court rejected that claim, and found that the insurer owed no money to the

> Having reviewed the arguments of the parties and the relevant case law, and construing those in favor of the insured, the Court finds that the loss to a lender under a title insurance policy is determined at the date of foreclosure. This is the majority approach to valuing the lender's loss. See Joyce D. Palomar, 1 *Title Insurance Law* § 10:16, *Paying the insured's loss—Date value is to be measured* (2014–2015 ed.). The risk allocation discussion supporting this view is applicable in this case because the Policy provides indemnity only to the extent a loss suffered by Credit resulting from a title defect thereby compromising its security interest in the Property. The title insurance policy does not place the risk of a decreasing real estate market upon the insurer. The Policy does not guarantee that the Property was worth the amount of the loan used to purchase it nor that the loan will be repaid. Based on the reasoning in these cases, the Court concludes that the proper valuation date is as of the date the loss is realized by the insured—the date of the foreclosure sale.[213]

The above quote is merely a restatement of long-established twin principles. First, a title insurance policy does not insure that the property now has or ever had any particular value.[214] Second, the insurer does not indemnify the insured lender against depreciation in the land value that is not caused by a title defect.[215] When a property's value increases, the insured receives a benefit from the fact

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lender for the decline in value. It rejected the *Citicorp* analysis, because *Citicorp* had ignored the insurer's right to tender title to the insured in full satisfaction of its policy duties. See §3.4.6.1 for a complete discussion of that principle.

[213] *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055, *8 (unpublished).

[214] "A title policy is a contract of indemnity, not of guaranty, and provides reimbursement for actual loss only. A title insurance policy provides for indemnity only to the extent that [the insured's] security is impaired and to the extent of the resulting loss that it sustains." *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir.1990) (quotation marks and citations omitted). A title insurance policy "does not guarantee either that the mortgaged premises are worth the amount of the mortgage, or that the mortgage debt will be repaid." *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.,* 144 Wis.2d 68, 423 N.W.2d 521 (1988) (the "insurable value of a mortgage on real estate is the fair market value of the realty which secures the mortgage, and is not controlled by the original purchase-price of the mortgage"); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012); *Atlanta Title & Trust Co. v. Allied Mortgage Co.,* 64 Ga.App. 38, 12 S.E.2d 147 (1941). In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016), the court said that the policy does not "guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid."

[215] In *U.S. Bank, N.A. v. Ticor Title Ins. Co*., 2012 WL 2362456 (Mich.App.) (unpublished), the court rejected the insured's argument that, in order to indemnify the insured for title "as insured," the insurer must pay the insured policy limits, although the property had declined in value since the policy date. It said: "Ticor insures against defects, liens, and encumbrances; it does not insure against changes in valuation due to market fluctuations. We find that the trial court erred in simply awarding the amount of insurance to plaintiff." The court rejected the insured's claim for a decline in property value during the time in which the successful title clearance action was pending, in *First Federal Savings Bank v. Stewart Title Guar. Co.,* 451 S.E.2d 916 (S.C.App. 1994). In *Yesilevich v. Republic Title Co.,* 2011 WL 10068810 (Ill.App. 1 Dist.) (unpublished), the court held that "[a] title insurance policy is unaffected by a change in the property's value, such as depreciation or appreciation." Likewise, in *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014), the court rejected the insured's attempts to value its loan collateral based on old and suspect appraisals rather than actual sale prices after foreclosure. The court also rejected the insured's argument that the

that loss is measured as of a date well past the policy date, because that appreciation increases the amount by which a title defects reduces the land value.

Most courts have held that the policy is not ambiguous due to the lack of an express statement as to the date on which loss is measured.[216] However, several courts have found that the lack of a policy term creates an ambiguity in the policy, because that lack of a provision is what has allowed the courts to split in interpreting the policy.[217] Nonetheless, even some of those courts have held that the majority view is the more rational of the two.[218]

3.2.4.3 Valuing The Property

Once the loss date is determined, the property's value may be established by one of several methods. Several courts have accepted the foreclosure sale price as establishing the value of the property.[219] However, a credit bid by the lender is not a very accurate test of value, especially when the lender is the only bidder. Thus, the majority view is that a bid by a third party at the foreclosure sale establishes fair market value, while a bid by the lender of its own debt does not.[220] Some courts have used the price at which the lender resold the property as the best evidence of its value, although such sales are often at distressed prices.[221]

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earlier appraisal date should be used because the insurer delayed foreclosure by defending against the adverse lien claims. In *First American Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 372 P.3d 292 (Ariz. 2016), the Arizona Supreme Court said that, "[u]nder the policies, First American did not expressly agree to indemnify or otherwise insure against the risk of a drop in the real estate market." One of the authorities it relied on for that statement was Christopher B. Frantze, *Equity Income Partners LP v. Chicago Title Insurance Co. and Recovery Under A Lender's Title Insurance Policy in A Falling Real Estate Market*, 48 Real Prop. Tr. & Est. L.J. 391 (2013).

[216] See, for example, *First Internet Bank of Indiana v. Lawyers Title Ins. Corp*., 2009 WL 2092782 (S.D.Ind.) (unpublished); *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (Cal.App. 4 Dist. 1993); *First American Bank v. First Am. Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. 2014); and *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016).

[217] In *Equity Income Partners LP v. Chicago Title Ins. Co*., 2012 WL 3871505 (D.Ariz.) (unpublished), the court held that the lack of a policy loss date provision rendered the policy ambiguous, and accepted the insured's contention that loss should be measured as of the policy date rather than the date on which the insured took title through foreclosure or had its lien extinguished. In *First American Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 372 P.3d 292 (Ariz. 2016), the Arizona Supreme Court rejected the reasoning of *Equity Income*, but did agree that the policy was ambiguous due to its lack of a provision declaring the date of loss. The *Johnson Bank* decision is fully discussed above, this section. In *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished), the court found that the loan policy was ambiguous because the date of loss is not defined and jurisdictions have developed two competing rules on the date of loss—date of the policy and the date on which the insured takes title through foreclosure sale. The court went on to hold that the foreclosure sale date is the more reasonable of the two rules to apply when the insured mortgage is foreclosed and the insured takes title.

[218] See *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished).

[219] *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co.*, 657 A.2d 890 (N.J. Super. 1995); *First Commerce Realty Investors v. Peninsular Title Ins. Co*., 355 So.2d 510 (Fla.App. 1978); *Palliser v. Title Ins. Co. of New York*, 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908).

[220] *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252 (E.D.N.C. 1996); *Volunteer State Life Ins. Co. v. Union Title Guarantee Co.*, 175 La. 183, 143 So. 43 (1932) (bid of $2,500 on property later resold at $12,000 and

When the lender makes a credit bid, the value may be established by an appraisal[222] or a stipulation between the insured and the senior mortgagee.[223] However, appraisals from the time the loan was made are inherently unreliable when they were prepared long before the foreclosure date and are based on facts that have changed or optimistic assumptions that are no longer valid.[224] See §3.2.3.7 regarding the use of appraisals for valuation of loss. Construction loans raise a special problem in establishing value, because partially built improvements are difficult to value. One method is to use the value of the property when finished, less the cost to complete.[225]

In some circumstances, the measure of loss is the amount paid by the lender to clear title. For example, when the lender held a mortgage on a land contract vendee's interest, but the vendee's interest had already been assigned, the loss was found to equal what the lender paid to obtain the vendee's interest in the course of its foreclosure.[226]

For title defects other than liens, one possible measure of diminution in value is proof of a reduction in the resale price. In *Hodas v. First American Title Ins. Co.*,[227] the lender discovered an undisclosed title interest when it attempted to resell the property after foreclosure. That sale fell apart and the property was later sold at a lower price. The court accepted the reduction in sale price as evidence of the diminution in value and allowed recovery in that amount. One scholar has pointed out, however, that the "loss of benefit of bargain" measure of loss adopted in *Hodas* is contrary to settled authority, since it implicitly incorporates not only compensation for diminution in value but also the loss of resale profit.[228] Further, it is incumbent on the insured to establish that a reduction in sale price was due solely to the title defect. Finally, a sale price reduction may invoke the voluntary settlement clause of the policy (see §2.14) or terminate the policy (see §7.9) or both.

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appraised at $20,000 not an accurate measure of value); *Chicago Title Ins. Co. v. The Huntington National Bank*, 719 N.E.2d 955, 87 Ohio St.3d 270 (1999) (third party bid establishes fair market value).

[221] In *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252 (E.D.N.C. 1996), the court used the resale price even though the original asking price had been $16 million and the sale price was $7.5 million. In *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014), the court used resale prices. One piece of collateral was sold by the creditor and flipped on the same day at twice the value. The court used the second sale price as the best evidence of the property's value.

[222] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 641 N.Y.S.2d 13, 14 (A.D. 1st Dept. 1996); *Stewart Title Guar. Co. v. Treat*, 810 S.W.2d 953 (Ark. 1991) (involving partial failure of title, not a lien).

[223] *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988).

[224] *First American Bank v. First American Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. (La.) 2014).

[225] *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Central Trust & Savings Co*., 255 Pa. 322, 99 A. 910 (1917).

[226] *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988).

[227] 696 A.2d 1095 (Maine 1997).

[228] Comment, *Title Insurance Law Newsletter*, June 1997, p. 3. Visit alta.org for information on subscribing to this monthly newsletter.

3.2.4.4 Amount Of Omitted Prior Liens And Insured's Indebtedness

Once the property's value is determined, the insurer must determine the dollar amount or value of the covered matter. When the covered matter is a lien, this is ordinarily readily determined by ordering a payoff statement. When the matter is something other than a lien, the value is determined by appraisal or a reasonable alternate method. In *CMEI Inc. v. American Title Ins. Co.*,[229] the title claim was based on two unexcepted easements. The insured admitted, however, that the value of the property was more than the loan amount even subject to the encumbrances. Therefore, the court ruled that there was no loss, and found it unnecessary to make a diminution calculation. The same rule was applied in *Madison National Bank v. St. Paul Title Ins. Co.*,[230] in which the diminution in value caused by the covered matter did not cause the lender's security to be impaired.

To analyze the amount of the loss, the insurer must also determine the amount of the debt. Under a 2006 ALTA Loan policy, "Indebtedness" is a defined term, and includes principal, interest, penalties, late fees and a host of other charges.[231] Under the 1992 and earlier ALTA policy forms, there is no definition of "indebtedness," but the debt includes principal and interest to the date of discovery.[232] It may also include additional advances made by the lender to protect the lien of the mortgage.[233] Under policies other than the 2006 ALTA Loan policy, all payments of principal reduce the policy amount dollar for dollar. The 1992 loan policy states, at Conditions and Stipulations 2(c), that the policy amount may not exceed the amount of the principal "reduced by the amount of all payments made." In turn, Conditions and Stipulations 2(c) is tied to ¶¶ 7(a)(ii) and 9, which state, respectively, that liability is limited to "the amount of the unpaid principal indebtedness," and that all payments "by any person of the principal of the indebtedness ... shall reduce the amount of insurance pro tanto." The parties may agree to use the amount of the foreclosure judgment.[234] See a further discussion of those policy provisions at §3.8.

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[229] 447 So.2d 427 (Fla.App. 1984).

[230] 389 F.Supp. 629 (N.D. Ala. 1975).

[231] "… the Indebtedness is the sum of (i) the amount of the principal disbursed as of Date of Policy; (ii) the amount of the principal disbursed subsequent to Date of Policy; (iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance; (iv) interest on the loan; (v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law; (vi) the expenses of foreclosure and any other costs of enforcement; (vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title; (viii) the amounts to pay taxes and insurance; and (ix) the reasonable amounts expended to prevent deterioration of improvements; but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured."

[232] *Lawrence v. Chicago Title Ins. Co.*, 192 Cal.App.3d 70, 237 Cal.Rptr. 264 (1987); *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990).

[233] *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (Cal.App. 4 Dist. 1993).

[234] *Falmouth Nat'l Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990).

Case law confirms that the lender insured does not suffer a loss if the entire principal is repaid. In *The Cadle Co. v. Stewart Title Guar. Co.*,[235] a senior lien caused the insured mortgagee no loss when the insured received payments from the borrower, the federal government and a loan assignee that totaled more than either the policy amount or the value of the property. The *Cadle* court ruled without discussion that the money received by the insured lender from an assignee of the loan could be counted as a repayment of the debt. However, in the typical assignment situation, the sale of the loan secured by the insured mortgage does not extinguish the debt. Rather, the new owner of the debt becomes the insured. In *C.A.M. Affiliates, Inc. v. First American Title Ins. Co.*,[236] the original insured sold the loan while suing the insurer for a claimed policy loss. The insurer argued that the sum paid for the loan was a full repayment of the loan which terminated the policy under Conditions and Stipulations 9(b). The court disagreed, saying:

> C.A.M.'s payment was not a repayment of the principal of the indebtedness. Rather, it was simply a transfer of the indebtedness from one entity to another for a premium. Consequently, this section of the insurance policy does not apply, and First American is responsible for the claims made by plaintiffs against their policies. The loan balance should be reduced by amounts recovered on other collateral securing the same loan.[237]

However, one court found that the lender was permitted to apply the proceeds of a credit life insurance policy to interest first, and then principal, thus increasing the loss payable under the policy.[238] This ruling was based on the fact that the policy was found not to have an "other insurance" clause requiring a dollar-for-dollar offset of another insurance payment against the loss payable under the title insurance policy.

Once the value of the property, the amount of the Indebtedness and the amount of the lien or encumbrance for which there is coverage have been determined, the amount of the insured lender's loss of security is calculated as explained in §3.2.4.1.

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[235] 1999 WL 623464 (6th Cir. Ohio) (unpublished).

[236] 306 Ill.App.3d 1015, 715 N.E.2d 778, 240 Ill.Dec. 91 (Ill.App. 1 Dist. 1999).

[237] 715 N.E.2d at 784, 240 Ill.Dec. at 97.

[238] *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co.*, 657 A.2d 890 (N.J. Super. 1995).

3.3 Defense Of Insured

The second method by which the insurer may respond to a covered claim is to accept the insured's defense in an action affecting title.[239] Defense of the insured is not, strictly, an alternative to the other options which the insurer normally possesses, because it is an independent policy obligation. The defense duty is the subject of Chapter 4.

3.4 Clearing Title

FORM 12, Appendix A
Notice of insurer's intent to clear title—2006 ALTA policy

FORM 13, Appendix A
Notice of insurer's intent to clear title—Residential policy

FORM 64, Appendix A
Measure of loss payable if title clearance unsuccessful

FORM 92, Appendix A
No duty to bring lawsuit to clear title

The policy gives the insurer the "right at its own cost to institute and without undue delay" to bring suit or "do any other act" which in the insurer's opinion "may be necessary or desirable to establish the title to the estate or interest as insured."[240] This right is one of the several options the insurer holds for resolving a covered claim under the policy. The insurer has no duty to purchase for the insured a right in property whose title is not insured by the policy.[241]

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[239] See *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 331 P.3d 491 (Idaho 2014), which rejected the insured lender's position that the insurer should have written a check to the insured for policy limits rather than defend the insured in litigation against a claim that its lien was void as a violation of the state homestead law. The insurer successfully defended the insured. The court dismissed the lender's lawsuit against the insurer, holding that the insurer was entitled to resolve the claim by defending the insured deed of trust. It said that the policy clearly permits the insurer to defend title as "a contractual alternative to payment of an insured's claim," which right "was available to Stewart at its discretion."

[240] Condition 5(b) of the 2006 ALTA policies states: "The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently." Also see Conditions and Stipulations 4(b), 1992 ALTA Owner's and Loan policies; Conditions 4(e), ALTA Residential policy; and Conditions 4.a.(8), ALTA Homeowner's policy.

[241] In *Geo Finance, LLC v. University Square 2751, LLC*, 2014 WL 7369940 (E.D.Mich. 2014) (unpublished), the policy insured the title to real estate the insured purchased at a mortgage foreclosure sale. The insured later learned that there was a geothermal water supply system hooked up to the building, including pipes and other equipment, that was

The insured may not preclude the insurer from exercising the option to clear title by insisting that the insurer pay the insured or the adverse party.[242] As one court noted, a requirement that the insurer honor such a demand would limit the remedies for which the insurer contracted in the policy:

> By clear and unambiguous language, then, Stewart Title had the option to establish by litigation the title as Stewart Title insured it in each case and Stewart Title had no liability for loss or damage where litigation ensued until a court determined the title was not as it was insured to be. ... Absent a finding adverse to the title or to the lien [of the mortgage insured], as the case may be, no claim arose or loss occurred for which Stewart Title could be held responsible under its policies. ... Indeed, to hold otherwise would rob Stewart Title of its right under each policy to institute litigation to cure a defect in a title or lien and thus would convert each policy from one that indemnifies the insured's state of title into one that guarantees it.[243]

The right to clear title includes action taken to mitigate the insured's damages caused by the title defect ("to prevent or reduce loss or damage").

When an insurer elects to clear title, the insured may later argue that the insurer is estopped from asserting that there is no coverage for the matter.[244] However, the more correct view is that there can be no such estoppel or waiver.[245] The policy says that, by clearing title, the insurer "shall not thereby concede liability or waive any provision of this policy." Further, most states follow the rule that an insured cannot obtain coverage by waiver or estoppel. To avoid any such claim, the insurer may wish to explain before clearing title that it does not thereby admit coverage for the matter being cleared.

Most often, a title insurer clears title by filing suit in the insured's name, but some jurisdictions have approved the clearing of title in the insurer's name.[246] However, the insurer may

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owned by the party that sold metered water to the property under an unrecorded contract. The court held that the title insurer was not required to buy the water system for the insured, because the policy did not insure the title to that equipment.

[242] *United Security Bank v. First American Title Ins. Co.*, 2009 WL 3561618 (M.D.Ga.) (unpublished) (insured lender may not demand payment of policy limits in lieu of action to clear title of prior mortgage).

[243] *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916, 920-1 (S.C.App. 1994).

[244] *McFarland v. First American Title Ins. Co.*, 595 F.Supp. 630 (D.Mont. 1984).

[245] In *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d 596 (Cal.App. 6 Dist. 2011), the court held that the insured had not pled and could not prove detrimental reliance on the title clearance actions, and that Chicago Title had not waived its coverage defenses. Waiver requires proof of the intentional relinquishment of a known right. California follows the rule that an insured may not expand policy coverage by estoppel or waiver.

[246] *Mississippi Valley Title Ins. Co. v. Odom*, 624 So.2d 1012 (Ala. 1993); *Elliott v. Chicago Title Ins. Co*., 123 Ill.App.3d 226, 462 N.E.2d 640 (1984); *Native Sun Invest. Group v. Ticor Title Ins. Co*., 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (Cal.App. 4 Dist. 1987); *Stewart Title Guar. Co. v. Greenlands Realty, L.L.C.*, 58 F.Supp.2d 360 (D.N.J. 1999) (insurer brought action to get court to issue deed confirming insured's title); *Buie v. Bluebird Landing Owner's*

also clear title by other means. These include the defense of a suit against the insured, when the effect of winning the suit will be to confirm the insured's title.[247]

The insurer may also clear title by action short of litigation, such as to remove an encumbrance, obtain a curative deed or release a lien.[248] If the insurer files an action to clear title, it may clear title and resolve the suit by purchasing the property for the insured.[249] If the insured rejects the tender of title to the property or money equal to its fair market value, the insurer has the right to withdraw from prosecution of the suit.[250]

The policy also permits the insurer to clear title without litigation or the retention of counsel for the insured. Condition 7(b)(i) of the 2006 ALTA Owner's policy states that the insurer has the right to "pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy." Other versions of the standard coverage ALTA policies contain the same provision. This provision is invoked when a title insurance claim administrator resolves a claim by removing a lien, buying an access right or taking other action to make title as insured. See §3.6 for a discussion of resolving a claim by paying an adverse party. Also see §3.7 on obtaining title for the insured without litigation.

Insureds have argued that the failure to disclose a defect in title is a breach of the policy by the insurer, for which its sole remedy is to indemnify the insured. Courts have rejected this theory as being contrary to the indemnity contract nature of title insurance.[251] See §9.1.2 regarding the characterization of the policy as indemnification rather than warranty. One decision rejected the warranty theory, because it would erase the insurer's right to clear title:

> We conclude that the latter view of what constitutes a "breach"--that the insurer is not immediately in breach simply because title is defective on the day the policy is

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Ass'n, Inc., 172 So.3d 519 (Fla.App. 1 Dist. 2015) (insurer quieted title in its own name as subrogee for its insureds).

[247] *Diversified Mortgage Investors v. U.S. Life Title Ins. Co.*, 544 F.2d 571 (2nd Cir. 1976).

[248] See *Wade v. Stewart Title Guar. Co*., 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), in which the insurer cleared title by obtaining the release of a mortgage.

[249] In *Soto v. First American Title Ins. Co.*, 2008 WL 3049982 (E.D.Mich.) (unpublished), title was subject to a mortgage when the insured owner purchased it. The insurer later purchased the property at the sheriff's sale conducted by the adverse lender and tendered title to the insured, who insisted that he was also owed money damages. The appeals court considered the tender of title to resolve the defect, but reversed summary judgment in favor of the insurer because the insured might be able to prove consequential damages: "Inherent in fee simple ownership is the right to quiet enjoyment and possession. … Defendant did not provide Plaintiff with possession for several months, the result of which ended in the property falling into foreclosure. It was foreseeable that the Property would go into foreclosure, and Plaintiff alleges that Defendant delayed curing the defect in title to secure a more desirable purchase price. … Because Defendant's actions to cure the title defect may have been too little too late, and did not make Plaintiff whole, Defendant is not entitled to Summary Judgment… ."

[250] *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 911 P.2d 209 (1996).

[251] See *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996); *Granelli v. Chicago Title Ins. Co*., 2012 WL 6096583 (D.N.J.) (unpublished); *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012).

> issued--is more in line with both title insurance law and the standard form title insurance policy that we have before us. As we have observed, a title insurer does not guarantee the state of the title. Instead, a title insurance policy is a contract of indemnity. The view that a title insurer is in breach simply because there are defects in the title at the time the policy is issued would turn the title insurer into the guarantor of the grantee's title.[252]

In keeping with the policy's system of creating alternate means of resolving a claim, the clearing of title is an option rather than a duty.[253] The oft-quoted maxim in this regard is that the policy is a policy of indemnity rather than of guaranty. In some cases, the insured simply cannot be proven to have good title. In other cases, the insurer has no duty to clear title because no affirmative action is required.[254] The policy also does not obligate the insurer to bring an action for the insured to enforce the insured's rights.[255] See §3.1 regarding the insurer's right to respond to certain claims by "watchful waiting."

The insurer also is not required to indemnify the insured or prosecute a lawsuit on its behalf to fix a defect in title that no third party is asserting, and that the insurer does not believe requires a curative lawsuit.[256] In such situations, the insurer is typically entitled to take the approach of

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[252] *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953, 961 (1996).

[253] *Childs v. Miss. Valley Title Ins. Co*., 359 So.2d 1146 (Ala. 1978); *Securities Service, Inc. v. Transamerica Title Ins. Co*., 20 Wash.App. 664, 583 P.2d 1217 (1978); *Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co*., 706 F.Supp. 477 (S.D. Miss. 1988); *George K. Baum Properties, Inc. v. Columbian Nat'l Title Ins. Co*., 763 S.W.2d 194 (Mo.App. 1988); *Pruitt v. Colonial Mortgage Co*., 548 So.2d 1039 (Ala. 1989); *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc*., 347 S.W.3d 582 (Mo.App. S.D. 2011) (insurer entitled to elect to pay loss rather than clear title); *U.S. Bank, N.A. v. Stewart Title Guar. Co*., 2014 WL 1096961 (D.Colo. 2014) (unpublished) (insurer not obligated to begin to clear title on learning that insured lien was attacked in litigation); *Osprey Landing, LLC v. First American Title Ins. Co.*, 157 A.3d 247, 2017 ME 46 (Maine 2017) (policy gives insurer right but not duty to clear title).

[254] *Eliopoulos v. Nations Title Ins. of New York*, 912 F.Supp. 28 (N.D.N.Y. 1996) (no duty to clear title of the perceived encumbrances of encroaching driveway and structures); *McGee v. Commonwealth Land Title Ins. Co.*, 2012 WL 263000 (M.D.Fla.) (unpublished) (minor errors in condominium declaration asserted by insured unit owners as defects in their titles were moot because suit was brought after any defect had been cured by passage of time, as provided by curative statute).

[255] See *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. Jul 23, 2009) (no duty to enforce excepted restrictions against violating neighbor). Also, in *Thurlow v. Ticor Title Ins. Co.*, 2009 WL 2358307 (Conn.Super.) (unpublished), the insureds alleged that a neighbor physically blocked their access, and sued their insurer to require it to prosecute a lawsuit to enjoin the blockage. The court ruled that the policy does not require the insurer to bring such an action. It noted that, when "a defect exists but there is no adverse action brought against its insured, the title insurer may elect not to bring affirmative litigation, but rather to pay the amount of the insured's loss."

[256] In *Castin, LLC v. First American Title Ins. Co.*, 2014 WL 576269 (Ohio App. 9 Dist.) (unpublished), the court held that a title insurer was not liable for the loss the insured owned claimed to have suffered due to a technical defect in the vesting deed, which defect was not asserted by any party other than the insured. Further, the insured asserted that it had been unable to close on a loan due to the deed issue, despite the fact that the insurer had agreed to insure the lender against the issue. The insurer had also issued a letter of indemnity to another insurer, which the insured told that insurer

watchful waiting as described in §3.1. For example, in *Schwartz v. Stewart Title Guar. Co.*,[257] the insured sued the developer-declarant, claiming, among other things, that the condominium declaration was defective because it was not signed by the record owner. The title insurer cured the defect with an affidavit and deed. No third party challenged the validity of the declaration. The insured sued the insurer for the attorney fees he incurred in prosecuting the action. The court found that there was no duty to clear title:

> Under the Policy, whether to take action to cure alleged title defects is a matter committed to the sole discretion of the insurer. … That an insurer may take certain action does not mean that it must do so. ... To trigger the duty to indemnify, the insured must have a claim asserted against the title by a third party because an "indemnity is a… collateral promise to make good a loss or injury suffered by a policyholder in consequence of the act of a third party." ... In the case herein, we find no loss was actually sustained by the plaintiff. …Without an adverse claim contending the title is unmarketable, the defendant has no duty to provide the plaintiff's attorney fees and costs.
>
> The wording is important--the policy's coverage here is not of the marketability of title, but of an "unmarketable" one. The negative wording is consistent with the indemnity nature of the policy. To cover marketability of the title insured would be to guarantee the title; to cover its unmarketability is to provide an indemnity against adverse claims asserted against it.[258]

However, an insurer may become obligated to clear title if it volunteers to do so, and the insured relies on that offer.[259]

The insurer is not required to attempt to clear title when, according to its best judgment, the

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not to accept. The court said: "The undisputed facts in this case establish that no party had made a claim against Castin's title. All of the damages alleged by Castin arose from its own actions in challenging its title, and from its own representations to Chase regarding the state of the title." The court said further that the insurer's right to bring a title clearance action was not a duty. In *Chorches v. Stewart Title Guar. Co*., 48 F.Supp.3d 151 (D.Conn. 2014), the court said that the policy did not obligate the insurer to pay to prosecute a lawsuit on behalf of its insured, the prosecution of which he tendered years after having filed it. The insured had sued his neighbors for alleged trespass; they claimed that he had consented to the placement of utility cables on his land. The court said that the lawsuit did not attack title, and "the title policy does not oblige defendant to bring suit on Coughlin's behalf, much less to compensate him years after the fact for costs of litigation that he unilaterally chose to pursue."

[257] 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999).

[258] 134 Ohio App.3d at 614, 731 N.E.2d at 1168.

[259] *Jarchow v. Transamerica Title Ins. Co*., 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975); *Stewart Title Guar. Co. v. Goldome Credit Corp*., 494 So.2d 10 (Ala. 1986); *Mississippi Valley Title Ins. Co. v. Odom*, 624 So.2d 1012 (Ala. 1993); *Ticor Title Ins. Co. v. University Creek, Inc*., 767 F.Supp. 1127 (M.D.Fla. 1991); *Busch v. Fidelity Nat'l Title Ins. Co*., 84 A.D.3d 1561, 923 N.Y.S.2d 280 (A.D. 3 Dept. 2011) (holding that, while the insurer generally has no duty to prosecute quiet title action for insured, it assumed that duty when there was imminent threat that insured would be sued, insurer agreed to pay a lawyer, and adverse parties filed counterclaims that invoked policy coverage).

attempt does not have a reasonable likelihood of success.[260] Sometimes the insurer believes there is not a sufficient legal basis for a successful attempt to clear title, but the insured is more optimistic and wants the attempt made. In such a case, the insurer is not obligated to accept the insured's view. The insurer may abandon an attempt to clear title when it learns of facts that suggest that the defense is not meritorious, and in fact may have a duty to do so.[261] The insured is required to come forward with information that will aid the insurer in clearing title, and especially when the insured seeks to convince the insurer of the likelihood of success in such an action. The insured's duty to cooperate in the clearing of title is discussed at §3.4.1.2.

A forced removal coverage does not convert the title clearance provision from an option to a duty. Thus, the insurer is not obligated to take affirmative action to clear title when the policy protects against the forced removal of structures and the insured learns that structures on the insured parcel encroach onto neighboring land.[262]

The insurer typically brings a title clearance action in the name of the insured. However, courts have found that the insurer or its agent have standing to bring litigation to clear title on behalf of the insured.[263] This approach can provide a solution for the insurer when the insured resists having

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[260] In *Regan v. First American Title Ins. Co*., 2016 WL 97899 (Cal.App. 4 Dist. 2016) (unpublished), a title insurer paid for a quiet title suit seeking to impose an easement over property owned by a neighbor. The neighbor went on the offensive, suing First American for having "slandered" his title by paying for the quiet title suit. The court dismissed the slander of title claim, saying that the suit was protected free speech under California's anti-SLAPP and litigation privilege statutes. However, the decision illustrates the fact that even a good faith title clearance action can create exposure for the title insurer, which is one reason why title insurers carefully evaluate the legitimacy of such actions before they are filed.

[261] In *Anastasi v. Fidelity Nat'l Title Ins. Co*., 137 Hawai'i 104, 366 P.3d 160 (Hawaii 2016), the Hawaiian Supreme Court ruled that a title insurer defending under a reservation of rights has an "enhanced" duty of good faith, which it can breach if it continues to defend the insured in litigation after it determines there is no meritorious defense, and that defense delays payment to the insured. The court did not find that Fidelity acted in bad faith, but only that there was a genuine issue of material fact "as to whether Fidelity met the enhanced standard of good faith." Thus, it sent the case back down to the trial court.

[262] In *Manneck v. Lawyers Title Ins. Corp*., 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771, 777 (1994), the insured obtained an ALTA Residential owner's policy that insured against enforced removal of encroaching structures. The court rejected the argument that the implied covenant of good faith and fair dealing required the insurer to take affirmative action when notified that some of the insured's structures encroached, saying: "to hold that the insurer here was required to act under notions of an implied covenant of good faith, even in the absence of forced removal of the improvements encroaching on the adjacent property, would improperly add a new obligation to the title insurance policy. … It is not the role of the courts effectively to make new agreements for the parties by creating coverage where none was intended by the clear and explicit language of the contract."

[263] In *Thorntons, Inc. v. Chicago Title Ins. Co.*, 2009 WL 175044 (C.D.Ill.) (unpublished), the insured sued the insurer to demand payment for the loss caused by the existence of an unexcepted lease. The insurer joined the lessee in the action, to quiet title for the insured. The lessee objected, arguing that the insurer had no standing. The court said: "Chicago Title contracted for the right to bring a quiet title action on [insured] Thorntons' behalf. The Court is aware of no authority prohibiting such a contractual agreement. Pursuant to Chicago Title's contractual right to bring a quiet title action on Thorntons' behalf, the Court finds that Chicago Title has standing here--as Thorntons--to bring its Count I and Count II claims to declare the parties' rights to Tract 2." However, the court ruled that Chicago Title had no standing to sue the seller for misrepresentation, because that claim belonged only to the insured. In *In re County Treasurer*, 2013 IL

its title cleared.

One court ruled that an insurer had no duty to defend an insured in a lawsuit the insured provoked after the insurer had informed the insured that it would resolve the covered matter without litigation. In *Sabatino v. First American Title Ins. Co.*,[264] the title insurer was found not to be obligated to defend insureds' alleged "deliberate, wrongful and intentional" disruption of an easement by necessity. Before the tender was made, the insurer had notified the insureds of its election to settle the dispute with the plaintiff neighbor or, in the alternative, pay the insureds the diminution in value resulting from the claimed easement. The court found the lawsuit excluded by the post-policy exclusion. It went on, however:

> Finally, even if we were to find defendant had a duty to defend, the title insurance policy provides alternatives in lieu of accepting a tender of defense. The policy provides that defendant's duty to defend is subject to the option "to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy" or "to pay or otherwise settle with the insured claimant the loss or damage provided for under the policy." Here, the facts reveal that defendant first elected to settle the underlying litigation. When it failed to settle, defendant then offered plaintiffs the alternative option to establish a value for their property reflecting the impact of the unrecorded easement on the property. The policy further provides that it limits the extent of the damage to title according to the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien, or encumbrance insured by the policy. Therefore, in this case, defendant's liability is limited to only those claims against plaintiffs that reflect the diminished value of the unrecorded easement on plaintiffs' property. Defendant had the right to elect this option according to the terms of the policy.
>
> Plaintiffs contend that, by exercising its option to establish a value for their property, defendant unilaterally established a dollar amount for an unrecorded easement that has not yet been determined by the trial court to exist. ... [T]he amount that defendant tendered ... has no bearing on the trial court's ruling regarding whether defendant has a duty to defend.

The court at least impliedly found that the insureds refused to accept a diminution payment, either of which would have avoided the filing of the lawsuit that the insurer was asked to defend.

3.4.1 Reasonable Diligence In The Clearing Of Title

Condition 5(b) of the 2006 ALTA Owner's policy states that, "[i]f the Company exercises its

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App (3d) 120999, 999 N.E.2d 748, 376 Ill.Dec. 573 (Ill.App. 3 Dist. 2013), the court found that a title agency had standing to attack the validity of a tax deed that threatened the insured owner's title.

[264] 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999).

rights under this subsection [to clear title], it must do so diligently."[265] The diligence statement has been viewed by some courts as a covenant made by the insurer, the breach of which can lead to damages not based on diminution in value.[266] Some courts have interpreted the diligence statement as meaning that the insurer must elect to clear title within a reasonable time, and must prosecute that action with reasonable diligence.[267] However, other states have said that the diligence statement means only that the title insurer must be diligent in making the election to clear title, and that its

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[265] Condition 5(b). The 1970, 1987, 1990 and 1992 ALTA policy forms used nearly identical language. The Residential and Homeowner's policies do not contain a similar mandate, however.

[266] *Jarchow v. Transamerica Title Insurance Co.*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975), held that an earlier form of California Land Title Association policy created an affirmative duty to clear title, and that the insurer's slow response to the claim supported an award of punitive damages for emotional distress. *Jarchow* has been distinguished and at least partially overruled by later California decisions (see §16.1.4.1). A later court held that *Jarchow* did not create a duty to establish title diligently when the issue was encroachments of the insured's improvements and the Residential owner's policy insured only against forced removal of those encroachments, in *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771 (1994). Further, in *Childs v. Mississippi Valley Title Ins. Co.*, 359 So.2d 1146 (Ala. 1978), the court reviewed the *Jarchow* policy provision and distinguished it from the 1970 ALTA Owner's policy form at issue in that case. The *Childs* court said the 1970 ALTA policy created an option to clear title, not a duty: "Here, no such affirmative duty [to clear title] was required of Mississippi Valley. A careful reading of [the policy provision] reveals Mississippi Valley was not required to take any action to establish the title as insured." 359 So.2d at 1152. However, *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Fla., Inc*., 2011 WL 2313206 (S.D.Tex.) (unpublished) held that the final determination provision and the diligent title clearance statement are "conflicting." The court said that the insurer had a duty to make the election to clear title promptly, and that the insurer was liable for the decline in the property's market value during the year between the claim submittal and the date on which the insurer elected to clear title, which it did successfully. In *First Alliance Bank v. Mississippi Valley Title Ins. Co. (In re Evans)*, 2012 WL 2374237 (Bkcy.S.D.Miss.) (unpublished), the court found that the obligation to act diligently was a separate contractual undertaking, and that the insurer violated that duty and the implied covenant of good faith and fair dealing by delivering title to the insured lender without first obtaining approval for the subdivision of the larger parcel from which it was derived. In *Bank of Sacramento v. Stewart Title Guar. Co*., 2011 WL 6396533 (9th Cir. (Cal.)) (unpublished), the court held that "[t]he obligation imposed in section 8(a) for the title insurer to proceed in 'a reasonably diligent manner' applies even when litigation is filed," and was not negated or limited by the final determination clause. Thus, it said, the insurer has a duty to prosecute a title clearance action diligently, the breach of which duty can result in loss payable. In this case, the court said, the loss payable was the carrying cost on the property during the time the lien issues were being litigated. The *Premier Tierra* and *Bank of Sacramento* decisions were very similar in their holdings that there is a tension between the diligence covenant and the final determination provision.

[267] *Ticor Title Ins. Co. v. University Creek, Inc*., 767 F.Supp. 1127 (M.D.Fla. 1991); *Willow Ridge Ltd. v. Stewart Title Guar. Co*., 706 F.Supp. 477 (S.D. Miss. 1988); *Davis v. Stewart Title Guar. Co*., 726 S.W.2d 839 (Mo.App. 1987); *Baker v. Cambridge Chase, Inc*., 725 A.2d 757 (Pa.Super. 1999) (fact question as to whether or not three years was a reasonable time to cure). In *Bridgeview Bank Group v. Stewart Title Guar. Co*., 2011 WL 3022307 (N.D.Ill.) (unpublished), the court said that the policy "does not explicitly give Stewart Guaranty a 'reasonable time' to act, but that term is implicit. Otherwise, Stewart Guaranty's 'right' would be meaningless." It held that three weeks was not enough time to clear title. In *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996), the insured sued the insurer claiming that the policy was breached by the fact that the land had no right of access. The insurer was in the act of obtaining an access agreement when suit was filed. The court found that the policy was not breached by the existence of a title defect, and that the insurer had a reasonable time in which to clear title. However, the trial court was instructed to find a breach if it determined that a reasonable time had already expired before the insurer sought the easement.

conduct in the title clearance action is not reviewed based on a diligence standard.[268]

The provision permitting the insurer to clear title is closely linked to the policy term stating that no loss is payable until there is a final determination in the title clearance action, and that no loss is payable if the insurer succeeds in clearing title. See §3.4.5 for a discussion of the final determination clause.

The courts agree that the diligence statement means that an insurer must make the election to clear title within a reasonable time after the completion of its claim investigation, and that it loses that right if it does not make the election within a reasonable period of time.[269] The policy does not prescribe a specific time period for making that election. As a result, some courts have set a deadline for clearing title based on Condition 12 of the 2006 ALTA Owner's policy, which states that the insurer will make a claim payment within 30 days "[w]hen liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions... ."[270] One court gave this rationale

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[268] In *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175 (M.D.Fla.) (unpublished), the court said that Florida has long accepted the principle that, "if a final determination by a court cures title defects, the claim [for lack of diligence] is precluded as a matter of law." It relied on *Cocoa Properties, Inc. v. Commonwealth Land Title Ins. Co*., 590 So.2d 989 (Fla.App. 2 Dist. 1991) and *Lawyers Title Ins. Corp. v. Synergism One Corp*., 572 So.2d 517 (Fla.App. 4 Dist. 1990), which both so held. *Kahama* also said that Florida has adopted the principle that the ALTA policy bars any claim that the title insurer that clears title may still be sued for its supposed failure to do so "diligently," because the final determination clause has been construed to mean that, when the insurer succeeds in clearing title to a final determination, "the claim only lies once a court speaks, and not before, and not if the court's judgment is favorable." In *Stewart Title Guar. Co. v. Machado Family Limited Partnership No. 1*, 2018 WL 1877465 (M.D.Fla. 2018) (unpublished), relying on *Kahama*, the court held that no loss was payable for an error in a legal description that was fixed in a lawsuit filed by the insured but for which the insurer reimbursed the legal fees paid, and that in Florida there is no valid cause of action for lack of diligence when a title clearance action is successful. The court rejected the insured's argument that *Kahama* should be distinguished on the grounds that, in that case, the title insurer filed the title clearance action and controlled that litigation, while in *Machado* the insured filed the action and did not ask Stewart Title to get involved until it was finished. The court said: "But the relevant Policy provision does not require that Stewart Title itself conduct the litigation. It also allows for litigation conducted with the title insurer's 'consent.' ... Stewart Title had no opportunity to express its consent (or lack thereof) at the outset of this litigation, which had been underway for several years before Stewart Title was notified. But the fact that Stewart Title promptly paid for that litigation is sufficient, for present purposes, to show (at least) implicit consent."

[269] *Ticor Title Ins. Co. v. University Creek, Inc*., 767 F.Supp. 1127 (M.D.Fla. 1991). See *Granelli v. Chicago Title Ins. Co.*, 2012 WL 6096583 (D.N.J.) (unpublished) (finding that insurer cleared title diligently and did not breach the covenant to do so). In *Granelli*, through several successive claim administrators, the company spent considerable time negotiating with the neighbors to try to resolve the boundary disputes, which did not work. Then it assigned an in-house litigator to bring a quiet title action, and that litigator also tried to resolve the disputes before filing suit. The lawsuit was resolved several years after the claim was submitted. Chicago Title twice offered to pay diminution, which the insured rejected. On appeal, the Third Circuit reversed the grant of summary judgment to the insurer, because the insured had presented some evidence that the insurer had taken longer than was reasonable to file the quiet title suit. *Granelli v. Chicago Title Ins. Co*., 569 Fed.Appx. 125, 2014 WL 2724459 (3rd Cir. (N.J.)) (unpublished). The Third Circuit relied primarily on *Stewart Title Guar. Co. v. Greenlands Realty, L.L.C*., 58 F.Supp.2d 370 (D.N.J. 1999), in which the court found a lack of reasonable diligence because the insurer took about 16 months after the claim notice was received before it filed a quiet title action. In *Granelli*, however, the insurer was not doing nothing before it filed suit; it was seeking to clear title without litigation, and resorted to litigation when those efforts failed.

[270] *Ticor Title Ins. Co. v. University Creek, Inc*., 767 F.Supp. 1127 (M.D.Fla. 1991); *Jefferson Federal Savings & Loan Ass'n v. Berks Title Ins. Co*., 472 A.2d 893 (D.C.App. 1984); *Cocoa Properties, Inc. v. Commonwealth Land Title*

for its use of the claim payment provision to set a deadline for making the title clearance election:

> Indeed ... two alternatives are open to the insurer under the policy when presented with a claim of an adverse interest to an insured property: (1) to pursue a quiet title action without unreasonable delay, or (2) to pay damages within thirty days after determination.[271]

If the insurer is found to have unreasonably delayed in making the election to clear title, some courts have permitted the insured to sue for breach of contract or bad faith conduct, and to seek the damages resulting from the delay.[272] When an insurer cleared title only after being sued by the insured for breach, and after having refused to defend or clear the title when the insured was sued, the insurer was found not to have acted within a reasonable time.[273]

Several courts have addressed whether or not an insurer is liable to the insured for a decline in the property's value or for carrying costs for the time in which the insurer was investigating the claim but had not yet taken action to clear title, or while it was clearing title.[274] A title insurance

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Ins. Co., 590 So.2d 989 (Fla.App. 1991).

[271] *Davis v. Stewart Title Guaranty Co.,* 726 S.W.2d 839, 845 (Mo.App. 1987).

[272] See, for example, *Caro v. Sharp*, 2003 WL 21023933 (Tex.App.-Austin) (unpublished), in which an appellate court upheld a jury verdict finding bad faith delay in clearing title, based on expert testimony that an heirship suit could have been started earlier. In *Stewart Title Guar. Co. v. Tilden*, 110 P.3d 865, 2005 WY 53 (Wyo. 2005), an arbitrator determined that the insurer took too long to clear title, but also held that the insured had suffered no damages, because the action had been successful. The state supreme court nonetheless held that the insured was entitled to attorney fees under a state penalty statute, based on the arbitrator's determination that the time spent in clearing title was "unreasonable." However, *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Fla., Inc*., 2011 WL 2313206 (S.D.Tex.) (unpublished) held that the final determination provision and the diligent title clearance statement are "conflicting." The court said that the insurer had a duty to make the election to clear title promptly, and that the insurer was liable for the decline in the property's market value during the year between the claim submittal and the date on which the insurer elected to clear title, which it did successfully. In *Bank of Sacramento v. Stewart Title Guar. Co*., 2011 WL 6396533 (9th Cir. (Cal.)) (unpublished), the court held that "[t]he obligation imposed in section 8(a) for the title insurer to proceed in 'a reasonably diligent manner' applies even when litigation is filed," and was not negated or limited by the final determination clause. Thus, it said, the insurer has a duty to prosecute a title clearance action diligently, the breach of which duty can result in loss payable. In this case, the court said, the loss payable was the carrying cost on the property during the time the lien issues were being litigated. The *Premier Tierra* and *Bank of Sacramento* decisions were very similar in their holdings that there is a tension between the diligence covenant and the final determination provision.

[273] *McFarland v. First American Title Ins. Co.,* 595 F.Supp. 630 (D.Mont. 1984). The court said: "[t]he insurer stubbornly refused every request by the insured to bring an action to quiet title, despite the protestations that the subsistent cloud rendered the property unmarketable. The insurer responded, merely, with the opinion of counsel that the recorded easement was invalid and with the assurance: "we will, of course, stand behind our policy as written." In *Stewart Title Guar. Co. v. Goldome Credit Corp.,* 494 So.2d 10 (Ala. 1986), the court held that the insurer's penalty for not having cleared title after it promised to do so was to pay policy limits. *Goldome* has been criticized in several subsequent decisions. *Youngblood v. Lawyers Title Ins. Corp.,* 923 F.2d 161 (11th Cir. 1991); *Mississippi Valley Title Ins. Co. v. Odom,* 624 So.2d 1012 (Ala. 1993).

[274] In *Wade v. Stewart Title Guar. Co.*, 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), the court refused to award the insured the decline in value of the property or the insured's carrying costs while the

policy does not insure the value of the property, or protect against the market risk of a decrease in its value, as fully discussed at §3.2.4.2 and §3.4.9.5.

Some courts also apply the "reasonable diligence" provision to analyze the insurer's conduct in seeking to clear title after it makes the election to resolve the claim in that manner.[275] The amount of time it takes to clear title depends on a variety of factors, and each situation is different. Thus, diligence in the clearing of title cannot be measured based on the passage of some uniform period of time.[276] Also, the insurer's diligence in the clearing of title can be judged only by those matters

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insurer was clearing title without litigation. It relied on prior Illinois decisions in saying that "... title insurance does not provide coverage of the loss of value to the land itself. *Rackouski v. Dobson*, 261 Ill.App.3d 315, 318, 199 Ill.Dec. 875, 634 N.E.2d 1229 (1994). 'If the value of the property appreciates or depreciates, the title policy is not affected.' *McLaughlin v. Attorneys' Title Guaranty Fund, Inc*., 61 Ill.App.3d 911, 916, 18 Ill.Dec. 891, 378 N.E.2d 355 (1978)." The *Wade* court said that the policy itself "evinces an intent by the parties to preclude defendant from liability from the loss in value to plaintiff's property," citing the final determination provision, which says the insurer owes no loss payment if it clears title. In *De Paz v. First American Title Ins. Co.*, 2010 WL 2856089 (Cal.App. 2 Dist.) (unpublished), which involved an owner's policy, the court said that market decline *may* be compensable: "[f]urthermore, plaintiff presented evidence the property lost all its value until the defect was actually removed. … [T]here is no evidence plaintiffs suffered *no* losses because defendant acted with reasonable diligence to remove the title defect." In *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Fla., Inc*., 2011 WL 2313206 (S.D.Tex.) (unpublished), the court ruled that the insurer was liable for the decline in the property's market value during the year or so after the claim was submitted but before the insurer took action to clear title, although it was *not* responsible for market value decline during the time in which it was clearing title. The court said: "if a title insurer *diligently* establishes the title (or insured mortgage) as insured, then it has fully performed its duty in Paragraph 4(b), and is not liable for breach under Paragraph 8(a). However, if the insurer establishes the title (or insured mortgage) as insured *without diligence,* it has breached its self-imposed duty in Paragraph 4(b), and Paragraph 8(a) does not shield it from liability." 2011 WL at *5. In *Bank of Sacramento v. Stewart Title Guar. Co.*, 2010 WL 3784096 (E.D.Cal.) (unpublished), the insured bank claimed that the property's value declined by more than half, or $6.5 million, while the insurer was clearing title. It argued that the insurer should be tagged with the market loss because it did not clear title with sufficient diligence. The court rejected the bank's theory. The decision was vacated by the Ninth Circuit, which found that the complaint survived the motion to dismiss. However, the appeals court said it did not reach the validity of the damage theories asserted by the bank. 2011 WL 6396533 (C.A.9 (Cal.)) (unpublished). In *Neikes v. Ticor Title Company of Oregon*, 291 Or.App. 720, 423 P.3d 102 (Or.App. 2018), the title insurer obtained the release of a deed of trust, after which the insured suffered no loss, including a claimed lost sale, lost rent or an alleged decline in the property's value while its title was in jeopardy.

[275] In *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 331 P.3d 491 (Idaho 2014), the court held that the insurer had been diligent in defending the insured lender and defeating the attack on its deed of trust. In *Bar-K, Inc. v. Security Title Corp.*, 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished), the court found that the insurer had cleared title by dogged determination, although it took several years, and thus was not required to pay the insured any amount in addition to what it had paid to clear title.

[276] In *Nebo v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 222, 98 Cal.Rptr. 237 (1971), the court said: "[w]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case." 98 Cal.Rptr. at 241. In *National Loan Investors, L.P. v. Chicago Title Ins. Co.*, 1999 WL 195819 (Conn.Super.) (unpublished), a title insurer successfully defended the lien of the insured mortgage against a mechanic's lien claimant which had alleged superiority. The action took seven years to finish. In the meantime, back taxes and other liens piled up on the property. The court found that the insurer had performed its contractual obligations, quoting the final determination clause, and refused to award any "delay" damages to the lender. In *Michigan Properties, L.L.C. v. Chirco Title Co.*, 2012 WL 11000 (Mich.App.) (unpublished), the insured bought the property to flip it but it took two years for the insurer to clear a prior mortgage in litigation. The court held that the insured was not entitled to delay damages, stating that "[w]hile the policy requires defendants to provide legal defense

within its control; the slow pace of the court system may not be counted against the insurer.[277] Delays imposed by the insured's own failure to cooperate in the clearing of title must be offset in the

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'without unreasonable delay,' it does not dictate a reasonable length for the litigation." See also, 9 Appleman, *Insurance Law and Practice*, §§5213-5214. In *Wade v. Stewart Title Guar. Co.*, 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), the court found that the insurer was diligent in removing a mortgage from the property when the lien was paid off and released about 18 months after the claim notice was submitted. The court said there was no bright line test for diligence. It rejected the insured's argument that the insurer lacked diligence because it refused to immediately pay the lienholder "the full face value of the lien." During the intervening time, the lender did not threaten the insured's title, and the insured did not prove that she was hampered in selling or using the property. The building was condemned and razed, but not due to the mortgage. The court also rejected the insured's claim based on Section 155 of the Insurance Code, which allows for the recovery of punitive damages in the event an insurance company is liable for the unreasonable delay in settling a claim where the court deems the delay "vexatious and unreasonable." 215 ILCS 5/155 (West 2012). The court said the law does not apply to the clearing of title.

[277] For example, in *Lawyers Title Ins. Corp. v. Synergism One Corp.*, 572 So.2d 517 (Fla.App. 1990), a lawsuit which took 33 months was found to be a reasonable time for the clearing of title. *Synergism* was applied in the later Florida case of *Huntleigh Park, Inc. v. Stewart Title Guar. Co.*, 717 So.2d 1037 (5 Dist. 1998), in which the insurer brought suit to remove restrictions about eight months after the claim was tendered, and the action was completed successfully in about six more months. The case, which resulted in a per curiam decision, is discussed in Rader, *The Interpretation of §§7(a) and 7(b) of Title Policies Under Florida Law: Synergism Revisited*, The Florida Bar Journal, January, 1999, p. 46. In *National Loan Investors, L.P. v. Chicago Title Ins. Co.*, 1999 WL 195819 (Conn.Super.) (unpublished), a title insurer successfully defended the lien of the insured mortgage against a mechanic's lien claimant which had alleged superiority. The action took seven years to finish. In the meantime, back taxes and other liens piled up on the property. The court found that the insurer had performed its contractual obligations, quoting the final determination clause, and refused to award any "delay" damages to the lender. In *Michigan Properties, L.L.C. v. Chirco Title Co.*, 2012 WL 11000 (Mich.App.) (unpublished), the insured bought the property to flip it but it took two years for the insurer to clear a prior mortgage in litigation. The court held that the insured was not entitled to delay damages, stating that "[w]hile the policy requires defendants to provide legal defense 'without unreasonable delay,' it does not dictate a reasonable length for the litigation." In *Hatch v. First American Title Ins. Co.*, 895 F.Supp. 10 (D.Mass. 1995), an insured owner claimed policy limits damages even though title had been cleared by the insurer. The title clearance action took five years to conclude. The insurer was denied summary judgment on its argument that there could be no loss because title had been cured. The trial court was instructed that the insureds "may prevail on their claim if they can demonstrate that First American failed to cure the title defect in question within a reasonable time after its discovery." In *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095 (Maine 1997), a judgment was obtained clearing title after 18 months. The foreclosing lender resold the property at a loss while the lawsuit was pending. The trial court permitted the lender to recover the reduction in sale price claimed to result from the title defect, which was upheld as not being "clearly erroneous." In *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757 (Pa.Super. 1999), the appellate court sent the matter back for trial on the question of whether or not three years was a reasonable time in which to procure a limited warranty deed vesting title in the insured. The decision is based on the false premise that the insurer was required to get a warranty deed to the insured, and did not cure title when it got a quit claim deed from the adverse party within a short time after receiving the claim. In *First American Bank v. First American Transportation Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014), the court found that the insurer had acted with reasonable diligence. There were delays. Still, the court found that "FATTIC fulfilled most of its obligations under the policies to the Bank, and …did so in as timely a fashion as could be expected in a case as complex as this." The appeals court especially noted that FATTIC promptly hired counsel to represent the bank, that the counsel negotiated to reduce the lien claims and the insurer paid that amount to the bank. The payments on two pieces of collateral "took longer, but that delay was due to the greater factual and legal uncertainty regarding the extent of coverage." In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co*., 883 F.3d 1038 (8th Cir. (Mo.) 2018), the court held that the insurer had removed mechanic's liens diligently, and that a claimed lack of diligence did not support a claim for tortious interference with a business expectancy.

insurer's favor.[278] It is not uncommon for an insured to obdurately delay or impede the insurer's effort to clear title, particularly when the insured wants to shunt the insurer toward the alternative of paying money to the insured.

When the title insurer clears title without litigation, the insurer's diligence is evaluated based on the number of tasks undertaken by the insurer and their complexity. The diligence statement does not impose on the insurer a duty to clear title in the shortest possible time, regardless of the cost. Rather, the insurer is permitted to investigate and negotiate, and is not penalized for time the insurer spends waiting for others to respond.[279]

See § 3.4.1.2 on the subject of the insured's duty to cooperate in the clearing of title. Also, if the counsel performing the clearance action is the insured's privately-retained counsel, operating at the direction of the insured, that counsel's delays should not be held as penalty against the insurer. Finally, the insured's desire to sell or otherwise use the property quickly should not impose a special limitation on the insurer's time period for clearing title.[280]

3.4.1.1 Choice Of Counsel To Clear Title

When the insurer elects to clear title on behalf of the insured, by bringing a lawsuit or otherwise employing counsel, it has the right to select and control that counsel. This right to control counsel is found in Condition 5 of the 2006 ALTA policies.[281]

Although the insurer's election to clear title is not the defense of the insured in litigation, the same tripartite relationship exists between counsel, insurer and insured.[282] If the insurer makes a

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[278] See *Bar-K, Inc. v. Security Title Corp.*, 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished) for an example of an insured that sought to block and frustrate the insurer in its efforts to clear title.

[279] See *Wade v. Stewart Title Guar. Co.*, 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), in which the insurer cleared title by obtaining the release of a mortgage. The court rejected the insured's suggestion that the insurer should have paid off the loan in full in order to immediately obtain a release of the mortgage. The insurer spent about 18 months negotiating for the release of the lien in exchange for payment based on the property's value. The court found that the insurer had cleared title diligently.

[280] See *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994), quoted and discussed in §3.4. In *Granelli v. Chicago Title Ins. Co.*, 2012 WL 6096583 (D.N.J.) (unpublished), the court refused to award damages based on two sales the insured allegedly lost while title was being cleared. However, in *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), when the insurer declined to take action to clarify a legal description, the court awarded damages to the insured of policy limits, based partly on the profit the insured would have earned from a claimed lost sale. In *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095 (Maine 1997), the foreclosing lender resold the property at a loss while title was being cleared. The court permitted the lender to recover the reduction in sale price claimed to result from the title defect even though title was cleared 18 months after the claim was tendered.

[281] Conditions 5(a) of the 2006 ALTA policies says: "[t]he Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel." Conditions 5(b) states: "The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured."

[282] The attorney-client privilege for communication between the insurer and retained counsel that applies when the insurer hires counsel to defend an insured also applies when the title insurer retains a lawyer to prosecute a lawsuit to

reservation of rights in retaining counsel to clear title, the same rules regarding selection of counsel to defend an insured under a reservation of rights apply.[283] See §4.9 regarding defense under a reservation of rights. An insurer will normally specify the actions that it agrees to take in order to clear title. However, such a limitation is not normally a reservation of rights but a statement of the scope of the appointed counsel's representation of the insured.

By retaining counsel to clear title, the insurer does not assume a duty to pay fees incurred by the insured for the same purpose or to monitor that retained counsel's actions.[284] An insurer seeking to clear title does not owe duties to parties other than its insured.[285]

3.4.1.2 Insured's Duty To Cooperate In Clearing Of Title

When the insurer brings an action to clear title, the insured has a duty to cooperate in the action. This obligation is laid out in some detail in the policy.[286] The insured is obligated to consent

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clear title. *Bank of America, N.A. v. Superior Court of Orange County*, 212 Cal.App.4th 1076, 151 Cal.Rptr.3d 526 (Cal.App. 4 Dist. 2013).

[283] *Bank of America, N.A. v. Superior Court of Orange County*, 212 Cal.App.4th 1076, 151 Cal.Rptr.3d 526 (Cal.App. 4 Dist. 2013). In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co*., 883 F.3d 1038 (8th Cir. (Mo.) 2018), the court held that the insurer had the right to manage the defense of mechanic lien litigation conducted under a reservation of rights, and that the insured had failed to prove its claim that the insurer tortuously interfered in the relationship between insurer-appointed counsel and the insured, when the coverage issue had no bearing on the way the mechanic lien defense should be conducted.

[284] In *Halfmoon Professional Offices v. American Title Ins. Co.*, 652 N.Y.S.2d 390 (A.D. 3 Dept. 1997), an insured instructed its counsel to clear title, but also notified the insurer of the defect in title. The insurer retained new counsel, who cleared title. The insurer was not responsible for fees incurred by the insured's separate counsel. The *Halfmoon* decision is premised in part on language in the New York policy which stated that the insurer "shall not be liable for and will not pay the fees of any counsel or attorney employed by the insured." In *Breaux v. Cozy Cottages, LLC*, 151 So.3d 183 (La.App. 3 Cir. 2014), the court found that the insured's election to retain counsel of its own choice after the insurer cleared title and reached a settlement with the adverse party did not violate its duty to cooperate with the insurer. The court accepted the insured's assertion that the insurer-retained counsel had a "substantial" conflict of interest, which it did not identify. However, the court did not hold directly that the insurer was required to pay for the new counsel. In *Marcantel v. Stewart Title Guar. Co.*, 2017 WL 5991734 (D. Utah 2017) (unpublished), the insured sought payment of the attorney fees incurred in submitting the claim. The court held that the insurer did not owe those fees, because they were not incurred in the clearing of title or defense of the insured in litigation.

[285] *U.S. Bank, N.A. v. McBride*, 2017 IL App (1st) 152341-U, 2017 WL 2218861 (Ill.App. 1 Dist.) (unpublished) held that a title insurer seeking to cure a claimed defect in a mortgage was not a debt collector, and no claim could be brought against it by the borrower premised on the federal Fair Debt Collection Practices Act.

[286] Condition 6(a) of the 2006 ALTA policies states: "In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter

to be named as a party in an action to clear title, and to assist the company in quieting title to the insured property.[287]

Policy coverage terminates if the insurer is harmed by the insured's failure to cooperate. Harm is measured as the extent to which the insured limits or frustrates the insurer in its efforts to cure the title defect on the insured's behalf .[288] The insured's failure to cooperate in the clearing of

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or matters requiring such cooperation."

[287] In *Elliott v. Chicago Title Ins. Co.*, 123 Ill.App.3d 226, 462 N.E.2d 640 (1984), the court found the insured's lawsuit for damages premature because the insurer was prosecuting an action to clear title. In *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 235 P.3d 387 (Idaho 2010), the insured accused the insurer of jeopardizing his access rights by contacting the neighbor to seek a quit claim deed that would assure those rights. The neighbor refused to give the deed. The insured argued that the insurer acted in bad faith by failing to warn him in advance that it would contact the neighbor. The court found no such duty. "The policy language permits Stewart Title to do whatever it deems necessary to protect Mortensen's easement provided it acts diligently. Acting diligently does not require infallibility. 'Diligence' is defined as '[c]are; caution; the attention and care required from a person in a given situation.' … Although it might have been advantageous for Stewart Title to inform Mortensen that it intended to contact the Akerses about the easement, it had no obligation to do so under the contract, which permitted Stewart Title to take any actions it deemed necessary. There is no reason to believe that contacting the Akerses to seek an amicable settlement was an inappropriate response to Mortensen's demand that Stewart Title obtain access to his land." *Emigrant Mortgage Co., Inc. v. Washington Title Ins. Co.*, 78 A.D.3d 1112, 913 N.Y.S.2d 251 (N.Y.A.D. 2 Dept. 2010) held that the mere filing of a lawsuit by the insured against the insurer was not a failure to cooperate with the insurer. However, when an insured sued the title insurer for breach and to quiet its title a month after submitting a claim and before the insurer had determined how to resolve the claim, its failure to cooperate breached the policy and terminated coverage. In *All State Properties, LLC v. Old Republic Nat'l Title Ins. Co*., 95 A.D.3d 1049, 944 N.Y.S.2d 310, 2012 N.Y. Slip Op. 03790 (N.Y.A.D. 2 Dept. 2012), the court distinguished *Emigrant*, saying "the plaintiff's noncooperation was established by the fact that it also precipitously brought its own action on the claim, instead of affording Old Republic a reasonable time within which to investigate the claim and determine how to proceed."

[288] In *Chicago Title Ins. Co. v. Bristol Heights Associates, LLC*, 142 Conn.App. 390, 70 A.3d 74 (Conn.App. 2013), cert.den. 309 Conn. 909, 68 A.3d 662 (Conn. June 20, 2013), the court ruled that an insured lost its policy coverage for a real estate tax issue by paying the taxes after submitting a claim but without the insurer's written consent, and then refusing to turn over requested documents about that decision and refusing for seven months to allow its representatives to sit for examinations under oath. The court found that the insurer was within its rights to examine the insured's representatives about possible policy defenses, not just its claimed losses, and that the insured delaying the insurer in forming a conclusion as to coverage and adjusting the claim if covered. In *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 911 P.2d 209, 212 (1996), an insurer agreed to pay for a quiet title suit. It later purchased the property for the insured, but the insured rejected title. The insurer then tendered a diminution payment, which the insured also refused. Then the insurer withdrew from prosecution of the quiet title action and sued for a declaratory judgment. The court found that the insurer had fully performed its obligations. "TRW presented McDonald with the offer of two acres, or the fair market value of the two acres. However, McDonald refused TRW's offer. Once TRW tendered this offer and McDonald refused, TRW determined that it had satisfied its obligations under the policy." The court agreed with the insurer. An extreme example is found in *James v. Chicago Title Ins. Co.*, 2014 MT 325, 339 P.3d 420 (Mont. 2014), in which the insureds claimed that they had no right to travel over their neighbors' land to a public street despite an easement grant, because the easement did not set the path of the private drive. The insurer obtained and recorded acknowledgments signed by the neighbors agreeing that the easement was valid and that the path was at the location of the existing drive. The insureds retorted, in their lawsuit asserting that they had no right of access, that "Chicago Title unfairly changed the legal status of their access rights without consulting them" by obtaining the neighbors' statements, that the insurer's actions only "minimally complied" with its policy duty, and also, inconsistently, that the statements did nothing to cure the supposed lack of access. The court found that the insurer had properly confirmed the access right, which had never

title typically results in the forfeiture of all policy rights, an extreme penalty. Not every refusal or delay by the insured in assisting the insurer triggers the voiding of coverage under the cooperation clause.[289]

3.4.2 Proof That Title Has Been Cleared

FORM 12, Appendix A
Notice of insurer's intent to clear title—2006 ALTA policy

FORM 13, Appendix A
Notice of insurer's intent to clear title—Residential policy

FORM 64, Appendix A
Measure of loss payable if title clearance unsuccessful

The type of action that the insurer takes to clear title varies widely from case to case. In general, title may be considered cleared when the defect or lien has been removed. The ALTA title insurance policies all clearly state that the insurer has cleared title and satisfied all of its obligations when the insured receives title to the property as insured.[290] Title is fully cleared when it is restored to the status as described in the policy.[291]

A Pennsylvania court incorrectly ruled that a title insurer had not cleared title until it obtained a deed from the adverse claimed owner containing the same warranties of title as the seller had contracted to provide. In *Baker v. Cambridge Chase, Inc.*,[292] the seller conveyed defective title by

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been lacking. However, in *James*, the insurer did not seek to void coverage due to a lack of cooperation.

[289] In *Breaux v. Cozy Cottages, LLC*, 151 So.3d 183 (La.App. 3 Cir. 2014), the insured hired new counsel after the lawyer hired by the insurer worked out a settlement with the adverse neighbor. The new lawyer said the insured did not like the settlement because the payment would reduce the policy amount, leaving less coverage available to resolve other potential title defects. The court said that the insured's refusal to consent to the settlement did not void coverage because the insurer was not required to seek the insured's consent. The court said that the policy permitted Chicago Title to defend the lawsuit, pay the insured or cure the title dispute, and that "[a]ll of these options are still available to Chicago Title."

[290] 2006 ALTA policies Condition 9(a); 1992 ALTA Owner's Policy Conditions & Stipulations 9(a); 1992 ALTA Loan Policy Conditions & Stipulations 8(a); ALTA Residential Policy Condition 6(b); ALTA Homeowner's Policy Condition 6(c)(1).

[291] In *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175 (M.D.Fla.) (unpublished), the court held that title had been cleared to the state in which it had been insured. In that case, the court in the title curative lawsuit held that the property was burdened by a "common law" right of the public to walk along that portion of the property that was on the shore of the Atlantic Ocean. The court in the coverage action said that this common law right did not make title less than as insured, however, because the public rights are not an interest in the title and do not disrupt the economic value of the property. The public rights also fell under Exclusion 1.

[292] 725 A.2d 757 (Pa.Super. 1999).

the contracted-for limited warranty deed. The title insurer obtained a quit claim deed from the true owner to the insureds, but they insisted that the insurer get a limited warranty deed from the true owner. The insurer eventually obtained that deed. The court found that title was not cured until the limited warranty deed was tendered. The *Baker* decision was based on the notion that the insurer was required to get the insureds "the benefit of the bargain into which they entered"—that is, a warranty deed rather than a quit claim deed. However, the title insurance policy is an indemnity contract and not a guarantee of the seller's performance under the purchase contract. Full title was conveyed by the quit claim deed. The policy terms do not require the insurer to obtain warranties of title running to the insured.

The Utah Supreme Court made the appropriate analysis under similar facts, in *Holmes Development, LLC v. Cook*.[293] In that case, a title insurer discovered that the deed to its insured was executed by the wrong party. It obtained a corrective special warranty deed from the true owner. The true owner gave a second deed to a speculator shortly thereafter, who brought suit seeking to divest the insured of title. The insurer successfully defended the insured. The insured made a claim against the insurer for delay damages, bolstered by the argument that the curative action would not have been necessary had the insurer obtained a full warranty deed rather than a limited warranty deed. The insured argued that the special warranty deed was not "appropriate action" under the title clearance provision. The court rejected the argument, holding that the use of the word "appropriate" in the title clearance provision does not set a standard of conduct to which the insurer is bound.[294]

3.4.3 Clearing Of Title Negates Abstractor Liability Claim

When an insurer has established the insured's title as insured, the insurer negates both policy liability and any extra-contractual claims.[295] However, an older Alabama decision permitted an insured to pursue an abstractor liability claim against the insurer even though the insurer had cured the lack of access to the property.[296]

[293] 2002 UT 38, 48 P.3d 895 (Utah 2002).

[294] "We need not address whether First American took 'appropriate action' because the policy did not require 'appropriate action.' The plain language of section 4(b) of the policy provides that First American '*may* take any appropriate action under the terms of this policy.' (Emphasis added.) The plain, ordinary, and accepted meaning of the word 'may' is 'permissive' or 'discretionary,' generally indicating that an individual is either 'permitted' or '[h]as a possibility' to do something. *Black's Law Dictionary* 993 (7th Ed.1999). The parties use the word 'may' in section 4(b) of the policy to set forth their intention that First American has the option to take appropriate action, but is not required to do so. … Inasmuch as 'appropriate action' is not mandated by the policy, the need to determine if First American took appropriate action is obviated." 48 P.3d at 902-3.

[295] In *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432, 443 (Tex.App.--Houston [14th Dist.] 1994), a cause of action based on the Texas Deceptive Trade Practices Act was struck on summary judgment, because the insurer had cleared title. "Tri-Legends' claims against appellees [insurer] must fail based on the court's holding in *McDaniel*. The only duty imposed on appellees was the duty to indemnify Tri-Legends against losses caused by defects in title. ... First, there was no title defect and second, appellees successfully defended Tri-Legends' title... ."

[296] *Soutullo v. Commonwealth Land Title Ins. Co.*, 646 So.2d 1352 (Ala. 1994). Claims for abstractor liability under title insurance policies were later negated by statute in Alabama, as discussed at §15.12.

3.4.4 Insuring Title And Other Measures While Title Is Being Cleared

In certain cases, an insurer that has elected to take action to clear title is also willing to insure a purchaser or a mortgage granted by the insured, or to take other action to preserve the insured's position in the property.[297] By taking such measures, the insurer may help the insured avoid delay or lost profit or income. Still, such losses are not compensable under the policy except in very limited circumstances, as discussed at §3.4.9.

The insurer will typically encourage or require the insured to take certain actions to preserve its interest. For example, in many states, a construction lien may be bonded off to permit the sale of land while the validity or amount of the lien is being contested.[298] The insurer may also wish to assist the insured. For example, it may wish to avoid having a prior mortgagee's lien foreclose out the insured lender while the insurer is trying to remedy the defect. The insurer could elect to cure a default on the senior lien holder's loan, or help to arrange the purchase of the senior lien by the insured.[299]

On rental property, the insurer may wish to assist the insured in getting or preserving rental income. The insurer may agree to pay for a request to have a receiver or property manager appointed by a court, or for an escrow of the rentals if there is a dispute over who is entitled to them. If the property is losing rental income because of some needed capital expenditure which the owner is not making, the insurer may consider assisting in arranging or financing such a purchase so that there is a rental stream while the project is in litigation or negotiation.

When the title defect is discovered in the course of a pending sale or mortgage, the insurer may elect to issue a policy for the new party protecting against the covered matter.[300] The insurer

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[297] The policy does not state that the insurer has any duty to take such actions, whether or not it is clearing title. However, one unpublished decision said that the insurer should make certain accommodations to the insured when it elects to clear title by litigation that will tie up the property for months or years. Without any authority to back the statement, the court said that "the right to establish the title as insured 'is a right coupled with a duty—that is, a duty to provide some form of suitable relief to an insured, using prudent judgment and reasonable diligence.'" *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Florida, Inc*., 2011 WL 2313206 (S.D. Tex.) (unpublished). In another unpublished decision, *Feduniak v. Old Republic Nat'l Title Ins. Co*., 2014 WL 6603253 (N.D.Cal.) (unpublished), the court relied on that statement from *Premier Tierra* as the primary basis for its ruling that an insurer that elected to clear title for the insured in a dispute over a California Coastal Commission easement might be liable for fines assessed by the government for the insured's failure to remove their golf course from the coastal dunes while the dispute was in progress.

[298] See *Gram v. Davis*, 128 N.C.App. 484, 495 S.E.2d 384 (N.C.App. 1998), for example, which is not a case about title insurance. There, the court found that a construction lien did not render title unmarketable, and property could have been sold despite its existence, because the lien could have been bonded off or paid.

[299] In *Nalker v. Transamerica Title Ins. Co.*, 65 Wash.App. 399, 828 P.2d 621 (1992), the insured second deed of trust contained no legal description. The first deed of trust was foreclosed, and the insured did not bid at sale, thereby losing her interest in the property. The issue before the court was framed as whether or not the insured had a duty to mitigate damages by making a bid. The court found she did not, since the insurer had an equal opportunity to do so, and bidding in would not have preserved an invalid lien. The court rejected the insurer's argument that the title defect was not the proximate cause of the loss, since the insured would have lost her lien in any event.

[300] See *Granelli v. Chicago Title Ins. Co*., 569 Fed.Appx. 125, 2014 WL 2724459 (3rd Cir. (N.J.)) (unpublished), in which the insurer offered to issue a policy to a lender to the insured owner and also issued a letter of indemnity to another insurer while it cleared title, both of which measures the insured refused to accept. The court found that there

may also be willing to indemnify another insurer to induce it to issue a policy to a buyer or lender.[301] An insurer's agreement to omit the item on a current policy may be appropriate and a service to the insured. The issuance of a new policy may or may not be coupled with actions to seek to remove the defect, lien or encumbrance. One court found that an insurer's agreement to issue a policy for a purchaser extended the insurer additional time to remove the matter pursuant to its obligation to the seller-insured.[302] An insured may not make a claim based on the alleged loss of a sale or loan due to a title issue, while the insurer is clearing title, when the insured failed to request insurance or an indemnity to a new title insurer.[303]

An insurer's willingness to insure over an enforceable or valid title defect, lien or encumbrance does not, by itself, clear title of the matter.[304] In some cases at least, a lien is not deemed to have been cured by an opinion of counsel that it may be considered discharged.[305]

The insurer is not obligated to issue a new policy or a letter of indemnity, and in many circumstances it would be imprudent to do so.[306] There can be a risk factor in the new transaction

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was still a question of fact as to whether or not the insurer had cleared title with reasonable diligence.

[301] See *Granelli v. Chicago Title Ins. Co*., 569 Fed.Appx. 125, 2014 WL 2724459 (3rd Cir. (N.J.)) (unpublished), in which the insurer issued a letter of indemnity to another insurer while it cleared title, which the insured refused to accept. Also, in *Wade v. Stewart Title Guar. Co*., 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), the insurer said it would have issued an indemnity to another insurer but the insured did not ask for one.

[302] *Mississippi Valley Title Ins. Co. v. Odom,* 624 So.2d 1012, 1016 (Ala. 1993).

[303] In *Wade v. Stewart Title Guar. Co*., 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), the insured asserted that she was prevented from obtaining a loan secured by the property while the title insurer was seeking a release of an existing lien. The court rejected the argument, crediting testimony by the title insurer that it had not been asked to insure, and would have issued an indemnity to another insurer if it had been asked.

[304] *Shada v. Title & Trust Co. of Florida*, 457 So.2d 553 (Fla.App. 1984); *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981); *De Paz v. First American Title Ins. Co.*, 2010 WL 2856089 (Cal.App. 2 Dist.) (unpublished).

[305] *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839 (Mo.App. 1987).

[306] In *Fidelity Nat'l Title Ins. Co. v. Centerpoint Mechanic Lien Claims, LLC,* 238 Ariz. 135, 357 P.3d 170, 720 Ariz. Adv. Rep. 7 (Ariz.App. 1 Div. 2015), the insureds contracted to sell the parcel while a complicated, high-stakes mechanic's lien foreclosure action was pending that the insurer was paying to defend, and demanded that the insurer issue a policy to the buyer. The insurer balked at insuring over the liens after losing a summary judgment motion that would have disposed of most of the lien risk. The insureds settled the lien claims without the insurer's written consent. The court found that the insurer was not obligated to insure the buyer's title, and that the insureds negated policy coverage by making the voluntary settlement. The court also rejected the insureds' argument that they had to sell the property to avoid suffering the loss caused by any further decline in the property's value due to general market conditions, saying: "... Fidelity's title policies insured only against loss stemming from the priority of the mechanics' liens over ML Investors' interest in Centerpoint. The policies did not otherwise guaranty the value of the property or that the insureds could complete the sale of Centerpoint in February 2011 (even accepting that it was in the insureds' interests generally to do so)." In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.*, 883 F.3d 1038 (8th Cir. (Mo.) 2018), the insured sought to sell property while the insurer was paying to resolve filed mechanic's liens. The insured asked the insurer to insure over those liens, despite the seeming lack of coverage for them. The insured terminated the purchase contract before the insurer made a decision on the request. The court refused to find that title was rendered

that would cause the new policy liability to be materially greater than for the existing policy. For example, if the new policy would be in a larger amount, the risk would be greater. Also, if the proposed insured wanted an affirmative coverage, that specific assurance might create a greater risk than is found in the existing policy. Further, the existing insured may have the status of a bona fide purchaser without knowledge of the defect, a status that the new insured almost certainly would not possess. Also, events that have occurred since the first policy date might have made the title rights less defensible, or the insured might already have failed in an attempt to clear title. When there has been such a change in circumstances or risk factors, the insurer is not required to issue a new policy in order to honor its existing policy obligations.

Also, the insurer may not be doing a service to a purchaser in agreeing to insure over the title issue. For example, one court stated:

> By the time they first notified the Title Company of the problem concerning the easement, the Enrights were already aware of it for some six weeks; yet they expected the Title Company to evaluate the situation and rectify it or to issue a title policy after being made aware of the problem with the Bailey survey. They would have the Title Company compound the error with the Lubows by issuance of a title insurance policy for $182,000 to the Lubows and thereby increasing a known risk from $137,000 after it had been alerted to a probable error in the location of the easement. The Title Company owed a duty to the Lubows to apprise them of the actual facts which it was investigating rather than perpetuating and compounding the error by placing the Lubows in the same predicament as the Enrights found themselves.[307]

Thus, in many cases, the insurer acts appropriately by declining to issue a policy to a purchaser while it is clearing title.

When a title defect is purely technical, the real question is whether or not title is defective or unmarketable at all. See §§3.1 and 3.4.7 for a discussion of those instances in which purported defects in title are not valid or have been cured, such as by passage of time. In such cases, the insurer will typically inform the proposed insured that it is willing to issue a policy with no exception for the claimed title defect because the matter is extinguished, terminated, barred by a statute of limitations or otherwise unenforceable, not because the insurer views itself as "insuring over" the matter.

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unmarketable due to the fact that the insurer did not instantly agree to insure over the liens, or that the insurer had breached a duty to the insured.

[307] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288, 1300 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987).

3.4.5 No Loss Payable Until Final Determination; No Loss If Title Cleared

When the insurer accepts a tender of defense or elects to cure title, whether by litigation or otherwise, there is no loss payable until the litigation is concluded or the title clearance effort has been completed. This policy provision is fundamental to the preservation of the insurer's options in solving a covered claim. If the insurer could be made to pay a loss to the insured before the title clearance action was concluded, the insurer would be precluded from exercising its option to clear title, or to present valid defenses on the insured's behalf in litigation. As explained further below, no loss is payable if the title clearance establishes title as insured.[308] Only if the insured loses the lawsuit or the insurer is unable to otherwise clear title does the loss become fixed and ripe for payment.

The final determination provision is clearly spelled out in two places in the policy. It is stated first in Conditions 5(c) of the 2006 ALTA policies:

> Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.[309]

Also, Conditions 9(a) and (b) of the 2006 ALTA policies state that no loss is payable if title is cleared, and that in any event loss is not payable until the title clearance action is concluded:

> (a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.
> (b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.[310]

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[308] *E.C.I. Financial Corp. v. First American Title Ins. Co. of New York*, 121 A.D.3d 833, 995 N.Y.S.2d 100, 2014 N.Y. Slip Op. 06937 (N.Y.A.D. 2 Dept. 2014) (insurer owed no loss payment to insured after defending insured mortgage and settling lien claims, giving insured first lien as assured in policy).

[309] Conditions & Stipulations 4(c) of the 1992 ALTA Owner's policy, similarly, states: "Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order."

[310] Conditions & Stipulations 9(a) and (b) of the 1992 ALTA Owner's policy [¶¶ 9(a) and (b) of the 1992 ALTA Loan policy] contain very similar language, and similar provisions are found in Conditions 6(c)1 of the ALTA Homeowner's policy and Conditions 6(b) of the ALTA Residential policy.

The final determination clause applies both when the insurer brings an action to clear title and when it is defending the insured, as explained by one court:

> No final, nonappealable judgment has been entered in the BMB litigation. Thus, under the express terms of the Stewart policy, no claim has arisen. [footnote omitted] The fact that Stewart has undertaken defense of the BMB litigation, as is its right under the policy, does not alter this determination. Stewart's assumption of defense does not, by the terms of the policy, transform an unmatured claim into a compensable insurance claim.[311]

The final determination clause also applies when the insured has brought an action to clear its own title. In *Cohn v. Commonwealth Land Title Ins. Co.*,[312] the insured sued to quiet title and also sued the insurer for indemnity. The court found that the insurer's duty to indemnify would not be triggered until there was a final determination that title was in fact defective:

> there is no evidence showing that a court of competent jurisdiction issued a "final determination" as defined in the insurance policy such as would trigger the insured's obligation to pay for a loss for a defect which is not excluded from coverage under the terms of the policy. Accordingly, any summary determination with respect to the [duty to indemnify] is premature... .

Thus, the final determination clause applies whenever there is litigation pending regarding the status of title, and does not apply only to actions brought by the insurer to clear title.

A lawsuit by the insured for breach of contract or for declaration of the insured's rights under the policy is premature if brought before the underlying title clearance action has been brought to its final determination.[313] In *American Title Ins. Co. v. East West Financial*,[314] a lender-insured chose to

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[311] *Stewart Title Guar. Co. v. National Enterprises, Inc.*, 133 F.3d 929 (Table), 1997 WL 800294 (9th Cir. (Cal.)) (unpublished).

[312] 254 A.D.2d 241, 678 N.Y.S.2d 268, 1998 N.Y. Slip Op. 08497 (N.Y.A.D. 2 Dept. 1998).

[313] The leading case remains *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990). See also *Centrum Financial Services, Inc. v. Chicago Title Ins. Co.*, 2010 WL 936201 (D.N.J.) (unpublished) (lender insured's lawsuit seeking payment of loss dismissed as premature because insurer was still litigating priority of insured mortgage under action filed ten years earlier); *Elliott v. Chicago Title Ins. Co.*, 123 Ill.App.3d 226, 462 N.E.2d 640 (1984); *Minnwest Bank, N.A. v. Chicago Title Ins. Co.*, 2010 WL 4791918 (D.Minn. 2010) (unpublished) (identical ruling as in *Centrum* and in reliance on that decision); *Lawyers Title Ins. Corp. v. Synergism One Corp.*, 572 So.2d 517 (Fla.App. 1990); *Bridgeview Bank Group v. Stewart Title Guar. Co.*, 2011 WL 3022307 (N.D.Ill.) (unpublished) (lawsuit against insurer premature when insurer was still defending foreclosure of prior liens and had right to clear title); *Branch Banking & Trust Co. v. Nevada Title Co.*, 2011 WL 1399810 (D.Nev.) (unpublished); related decision, 2011 WL 1399833 (D.Nev.) (unpublished) (insured's action against title insurer for breach of contract and bad faith was premature because insurer was still paying for insured's appeal from a decision holding that insured deed of trust was junior and successful appeal would moot coverage case); *Countrywide Home Loans, Inc. v. Commonwealth Land Title Ins. Co.*, 2011 WL 666188 (W.D.Pa.) (unpublished) (suit for breach of contract premature while quiet title action still pending that would

try its case against the insurer while its suit against the borrower was still pending. The lender argued that it was not required to prove a loss because the other suit had not been finally determined. The insured was found not to be excused from proving a loss, however, which it could not do until the title clearance action was completed:

> *Falmouth* was not intended to afford an insured-mortgagee second and third opportunities to prove something that it had otherwise been unable to prove. Once Bay Loan made its position clear and proceeded full steam ahead on all of its claims, it was incumbent upon the district court to adjudicate each claim on the merits.[315]

The court found that the insurer had the right to waive the final determination condition. Once it did so, the clause was moot.[316]

No loss is payable to the insured if the insurer succeeds in clearing title.[317] For example, in

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decide if mortgage was defective); *Wagner World, LLC v. Commonwealth Land Title Ins. Co.*, 2012 WL 14403 (E.D.La.) (unpublished) (lawsuit by insured against title insurer for loss premature while insurer was defending title, and insurer had no duty to pay for other lawsuits filed by insured about its title in addition to litigation insurer was defending). However, in *CitiMortgage, Inc. v. Absolute Title Services, Inc*., 2012 WL 1108249 (N.D.Ill.) (unpublished), although the court allowed that "[t]he title insurance defendants' interpretation of the 'definitely fixed' language is plausible and finds some support in" the *Falmouth* decision, it ruled that the clause was ambiguous (without identifying the ambiguity), and refused to dismiss the lender's action on the policy brought while the insurer was defending its lien priority in a separate action. The court said it was relying on *Citicorp Savings of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988), even though that case did not interpret the final determination clause. The court also did not address or distinguish the *Elliott* case, also from Illinois, which barred a premature suit based on the final determination provision. In *JFK Enterprises, LLC v. Old Republic Nat'l Title Ins. Co.*, 2015 WL 556952 (M.D.Fla. 2015) (unpublished), the court held that an action brought by the insured claiming that the title insurer breached the policy because it has taken too long to clear title was premature, because the title clearance action was ongoing and the final determination provision barred the filing of an action until that suit was finished.

[314] 16 F.3d 449 (1st Cir. 1994).

[315] 16 F.3d at 459.

[316] Id.

[317] *Darbonne v. Goldberger*, 31 A.D.3d 693, 821 N.Y.S.2d 94 (N.Y.A.D. 2 Dept. 2006) (no loss payable when insurer was successful in having restrictions omitted from policy declared invalid); *Michigan Properties, L.L.C. v. Chirco Title Co.*, 2012 WL 11000 (Mich.App.) (unpublished); *E.C.I. Financial Corp. v. First American Title Ins. Co. of New York*, 121 A.D.3d 833, 995 N.Y.S.2d 100, 2014 N.Y. Slip Op. 06937 (N.Y.A.D. 2 Dept. 2014) (insurer owed no loss payment to insured after defending insured mortgage and settling lien claims, giving insured first lien as assured in policy); *Amzak Capital Management v. Stewart Title of Louisiana (In re West Feliciana Acquisition, L.L.C.)*, 744 F.3d 352 (5th Cir. (La.) 2014) (insured mortgage recorded without legal description but corrected by insurer caused no loss payable by insurer, including large business operation losses suffered by lender). The *Amzak* court relied on *First State Bank v. American Title Ins. Co.*, 91 F.3d 141, 1996 WL 400322 (5th Cir. 1996) (per curiam) (unpublished), which held that, when the insured's title was cleared, "it is impossible for any loss to be attributed to a failure of title and thus be covered by the policy." The *Amzak* court specifically rejected the rationale of *Citicorp Savings of Illinois v. Stewart Title Guar. Co*., 840 F.2d 526 (7th Cir. (Ill.) 1988), which held that a void lien could not be cured by the tender of title to the lender, and that the insurer owed the lender policy limits because the insured mortgage was defective when recorded, despite the insurer's tender of title to the insured. In *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175 (M.D.Fla.)

First Federal Savings Bank v. Stewart Title Guar. Co.,[318] the title insurer brought a successful action to clear title shortly after the insured submitted a claim notice, but the insured sued the insurer for a claimed reduction in the value of the land during the pendency of the title clearance action. The appeals court reversed an award of attorney fees and for the reduction in land value, saying:

> Stewart Title did what it was permitted to do under the insurance contract, namely, it elected to pursue litigation to clear the title defects in issue. The litigation resulted in both title problems being cured. ... Having cleared the title defects in question, Stewart Title fulfilled its contractual obligations to the policy holders.[319]

The court confirmed that, when title is cured, the insurer has fulfilled its policy obligations. Citing Conditions 9(b) and *Falmouth*, the court stated:

> By clear and unambiguous language, then, Stewart Title had the option to establish by litigation the title as Stewart Title insured it in each case and Stewart Title had no liability for loss or damage where litigation ensued until a court determined the title was not as it was insured to be. … Absent a finding adverse to the title or to the lien [of the mortgage insured], as the case may be, no claim arose or loss occurred for which Stewart Title could be held responsible under its policies. ... Indeed, to hold otherwise would rob Stewart Title of its right under each policy to institute litigation to cure a defect in a title or lien and thus would convert each policy from one that indemnifies the insured's state of title into one that guarantees it.[320]

If there is litigation, the "final determination" is the final order in the lawsuit. Suit by the

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(unpublished), the court said that Florida has long accepted the principle that, "if a final determination by a court cures title defects, the claim is precluded as a matter of law." It relied on *Cocoa Properties, Inc. v. Commonwealth Land Title Ins. Co*., 590 So.2d 989 (Fla.App. 2 Dist. 1991) and *Lawyers Title Ins. Corp. v. Synergism One Corp*., 572 So.2d 517 (Fla.App. 4 Dist. 1990), which both so held. *Kahama* also said that Florida has adopted the principle that the ALTA policy bars any claim that the title insurer that clears title may still be sued for its supposed failure to do so "diligently," because when the insurer takes action to clear title "the claim only lies once a court speaks, and not before, and not if the court's judgment is favorable." In *RA Southeast Land Company LLC v. First American Title Ins. Co.*, 2016 WL 4591740 (D.Nev.) (unpublished), the court held that a title insurer that successfully defended the insured's title fully performed its policy duties, and the insured had no basis for claims based on the loss of the ability to construct a shopping center while title was being confirmed. Also, the court held that the fact that coverage emanated from an endorsement rather than a covered risk did not negate the application of the final determination clause. In *Stewart Title Guar. Co. v. Machado Family Limited Partnership No. 1*, 2018 WL 1877465 (M.D.Fla. 2018) (unpublished), the court held that no loss was payable for an error in a legal description that was fixed in a lawsuit filed by the insured but for which the insurer reimbursed the legal fees paid. The court also held that, in Florida, there is no valid cause of action for lack of diligence in clearing title when the title clearance action is successful.

[318] 451 S.E.2d 916 (S.C.App. 1994).

[319] Id. at 919.

[320] Id. at 920-1.

insured for payment of loss was premature, when filed immediately after the title clearance action had been remanded by the appellate court to the trial court "for reconveyance and for such other proceedings as were necessary" to unwind a conveyance of the insured property. The court said:

> This construction of the "final determination" provision in Ticor's policy is consistent with those cases addressing the issue of when a judgment is final for appeal purposes. The United States Supreme Court has held that a final decision is one that ends litigation and leaves the court with nothing to do but execute the judgment. Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). Thus, a determination of liability is not a final decision where the issue of damages remains unresolved.[321]

A bankruptcy court's order refusing to lift an automatic stay was not a final determination adverse to the insured lender for which immediate payment of loss was owed.[322]

The insurer has the right to pursue the title clearance action through the appellate process, as discussed at §3.4.8. When the insurer has elected to appeal, the trial court ruling is not the final order, and the duty to pay has not yet been triggered.[323] Conversely, when the insurer elects not to appeal an adverse ruling, the trial court order becomes the final determination and the time limit for paying the insured begins to run.[324]

When the insurer clears title but not through litigation, the final determination clause applies with the same effect, barring the insured from demanding payment until the insurer has completed its actions to clear title. The insurer should take action promptly if it intends to clear title without litigation. See §3.4.1 regarding the diligent clearing of title.

The insured may not demand that the insurer resolve the claim in another manner while the insurer is pursuing an action to clear title. An insurer has the right to complete the title clearance action, and is not required to obey a command by the insured to pay off or remove the encumbrance that the insurer is seeking to defeat or subordinate in such action.[325] Thus, in *Securities Service Inc.*

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[321] *Falmouth Nat'l Bank v. Ticor Title Ins. Co*., 920 F.2d 1058, 1065 (1st Cir. 1990).

[322] *Gibraltar Savings v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203 (8th Cir. 1990).

[323] *People ex rel. Cheadle v. Chicago Title & Trust Co.*, 37 Ill.App.3d 950, 346 N.E.2d 168 (1976).

[324] *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962).

[325] *Falmouth Nat'l Bank v. Ticor Title Ins. Co*., 920 F.2d 1058 (1st Cir. 1990); *Darbonne v. Goldberger*, 31 A.D.3d 693, 821 N.Y.S.2d 94 (N.Y.A.D. 2 Dept. 2006). In *Lawler v. Fidelity Nat'l Title Ins. Co.*, 2011 WL 5221261 (N.D.Tex.) (unpublished), the court dismissed an action by an insured owner demanding that the insurer stop defending the foreclosure of a missed deed of trust and pay it off or pay the insured policy limits. The court said: "Where a policy of title insurance gives the insurer the right or duty to defend its insured against adverse claims to title, the insurer may take the opportunity to prosecute the action on the insured's behalf before paying the claim. … The Policy afforded defendant a number of choices when plaintiff filed her claim, including the choice to '[p]rosecute or defend a court case related to the claim.' Defendant exercised its contractual right… . Notably, under the Policy defendant is not required to pay plaintiff's claim 'until [her] case is finally decided.'" In *Branch Banking & Trust Co. v. Fidelity Nat'l Title Ins. Co.*, 2011 WL 3841655 (M.D.Tenn.) (unpublished), the court refused to dismiss the insured's declaratory judgment action on

v. Transamerica Title Ins. Co.,[326] the court found that the insurer was not obligated to pay off an adverse lien claimant or tender policy limits to the insured during the time that it was defending the insured against the lien in a foreclosure action. As another court explained, an insurer was not required to abandon litigation over lien priority based on the insured's demand that it immediately pay the liens instead:

> [U]nder these circumstances, where not only the insurer but also the insured denied the validity of the liens, it was not incumbent upon Stewart Title to pay the amounts claimed by the lienors without a determination of the liens' validity. In fact, under the clear terms of the policy, a claim did not arise and was not maintainable and hence Stewart Title's obligation to pay did not arise "until there has been a final determination by a court of competent jurisdiction ... adverse to the title, as insured."[327]

Also, an insurer was not required to reimburse an insured for a reduction in the price on a sale of the property that closed, when the insurer was actively engaged in removing the restriction and succeeded in doing so after closing.[328] However, several courts have permitted insureds some form of loss payment when the courts have determined that the insurer did not act with diligence in clearing title or in electing to clear title, or because the insured was stymied in its use of the property while the title clearance action was pending, as discussed at §3.4.9.

The insurer's diligence in the prosecution of title clearance litigation is measured by its persistence and doggedness; there is no bright line test as to the amount of elapsed time that represents diligence, because the amount of time it takes to clear title will vary widely from cases to case. See §3.4.1 for a complete discussion of the insurer's reasonable diligence in the clearing of title.

If the title clearance action is unsuccessful, loss is payable within 30 days.[329] Conditions 12 of the 2006 ALTA Owner's policy comes into play, which says: "[w]hen liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days."[330] In some states, a law or regulation prescribes the number of days an insurer

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indemnification while the lien litigation was pending, saying that dismissal "would leave the parties in ongoing limbo." However, the court agreed with the insurer that it could not rule on the contract breach claim until the underlying litigation was concluded.

[326] 20 Wash.App. 664, 583 P.2d 1217 (1978).

[327] *Willow Ridge Ltd. v. Stewart Title Guar. Co.*, 706 F.Supp. 477, 482 (S.D. Miss. 1988) (footnotes omitted).

[328] *Huntleigh Park, Inc. v. Stewart Title Guar. Co.*, 717 So.2d 1037 (Fla.App. 5 Dist. 1998) (per curiam).

[329] *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc.*, 347 S.W.3d 582 (Mo.App. S.D. 2011) (loss payable within 30 days after settlement between insured lender and borrowers that compromised the debt).

[330] Conditions & Stipulations 9(b) of the 1992 ALTA Owner's Policy (8(b) of the loan policy) states: "In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all

has to pay a loss once liability has become reasonably certain, which can be different from 30 days, as discussed in §2.5.

Under the 2006 ALTA policies, if the insurer is unsuccessful in clearing title, the insured receives two benefits. First, the policy amount is increased by ten percent.[331] Second, the insured is entitled to select one of two alternate dates on which loss will be measured.[332] Conditions 5(b) of the 2006 policies states:

> (b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,
>
> (i) the Amount of Insurance shall be increased by 10%, and
>
> (ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

If the insured makes the date-of-loss election after the final determination in the action, the loss is not payable until the election is made and the diminution in value can be measured. See §3.2.3.4 for a discussion of the owner's policy date of loss, and §3.2.4.2 for a discussion of the loan policy date of loss.

Occasionally, the result of the title clearance action will be that the title defect is limited but not eliminated. In such cases, a loss payment to the insured is calculated as the amount of the diminution in the value of the land due to the covered matter as so limited.[333] The insurer does not

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appeals therefrom, adverse to the title as insured." Conditions & Stipulations 12(b) of the 1992 ALTA Owner's Policy (11(b) of the loan policy) states: "When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter."

[331] See *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), in which a bank that was a $50,000 participant in a $1.3 million loan, which was later assigned to it for no additional consideration, was able to turn its $50,000 investment into $1,430,000 after a judgment was entered declaring that title had reverted and its lien was extinguished. The final kicker was the court's order adding 10% to the policy amount after it declared that the lender was entitled to policy limits.

[332] The decisions in *In re Evans* found at 2011 WL 6258473 (Bkcy.S.D.Miss.) (unpublished) and 2011 WL 6258881 (Bkcy.S.D.Miss.) (unpublished) held that, when the title insurer attempted to obtain a valid lien for the insured lender and failed, loss was measured as of one of the dates stated in the 2006 ALTA Loan policy: the claim date or the date payment is made. The court said loss was not measured as of the policy date, the interpretation that the insured sought. However, in an earlier decision stemming from the same bankruptcy, the same court found that loss should be measured as of the date of policy when the insurer does not take action to clear title. *G&B Investments, Inc. v. Henderson (In re Evans)*, 460 B.R. 848 (Bkcy.S.D.Miss. 2011). The key difference between the two cases, according to the court, was that the title insurers attempted to cure the title defects in one case but not the other. Thus, the court said, the unsuccessful cure provision of the 2006 policy applied. The decision setting the policy date as the date of loss was based on *Citicorp Svgs. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir.1988), which found that loss should be measured as of the date of policy because the insured mortgage was void from inception. *Citicorp* has since been rejected by a number of other courts. However, in each of those decisions, the insurer admittedly took action to establish title as insured, or to impose an equitable lien on behalf of the insured lender. See the discussion of those cases at §3.4.6.2.

[333] In *Miller v. Ticor Title Ins. Co.*, 194 Or.App. 17, 93 P.3d 88 (Or.App. 2004), when an adverse possession suit was

owe policy limits as a form of punishment for having failed to entirely clear title.[334] However, when the insured rather than the insurer clears title, the insurer may or may not be entitled to value the diminution effect based on title as cleared or partially cleared by the insured.[335]

3.4.6 Clearing Title For A Lender

The loan policy gives the insurer the right, at its own election, to bring an action or "do any other act which in its opinion" will perfect title in the borrower or "establish ... the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured."[336] The insurer may thus seek to cure a defect in the lien of the insured mortgage or in the title to the property. When meritorious arguments exist for establishing the mortgage as insured, the insurer will often elect to use its rights under the title clearance provision to assert those arguments on behalf of its insured.

When the insured has submitted prompt notice of the title defect, and absent prejudice by the insured's actions or inaction, the insurer may not deny coverage based on the insured's own failure to protect the lien of the insured mortgage based on those meritorious defenses.[337] The final

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settled by an agreement under which the insureds obtained title, but which subjected the property to a restriction on its use, the measure of loss was the diminution in value to the property due to the restriction. When the disputed easement's path was limited, the court gave no clear-cut answers as to the measure of loss, if any, but it instructed the trial court to consider on remand whether or not the insured suffered a loss because, as a condition to the narrowing of the easement path, the easement holder insisted that the insured indemnify it against damage to its pipeline. *Bender v. Kansas Secured Title and Abstract Co., Inc*., 34 Kan.App.2d 399, 119 P.3d 670 (Kan.App. 2005).

[334] *Linder v. Ticor Title Ins. Co. of Calif.*, 647 N.E.2d 37 (Ind.App. 4 Dist. 1995).

[335] In *Kasco, L.P. v. Chicago Title Ins. Co*., 2011 WL 4984741 (Cal.App. 2 Dist.) (unpublished), the insured limited the path of an easement covered by the policy. The insurer cited *Linder* to support the argument that the limitation of the easement should offset the diminution in value claim. The court refused, saying that such an offset might encourage the title insurer to delay as long as possible "in the hope that the problem is going to solve itself" and allow it to "escape liability for its breach of contract," and that in clearing title the insured "did what [Chicago Title] should have done long before." However, if the insurer reimburses the insured for the cost of a title clearance suit that the insured conducts without first giving notice to the insurer, the insurer is entitled to assert the policy provision stating that no loss is payable when title has been cleared. In *Stewart Title Guar. Co. v. Machado Family Limited Partnership No. 1*, 2018 WL 1877465 (M.D.Fla. 2018) (unpublished), the court held that no loss was payable for an error in a legal description that was fixed in a lawsuit filed by the insured but for which the insurer reimbursed the insured. The court rejected the insured's argument that Condition 9 should not apply because the insured conducted the title clearance action and did not ask Stewart Title to get involved until it was finished. The court said: "But the relevant Policy provision does not require that Stewart Title itself conduct the litigation. It also allows for litigation conducted with the title insurer's 'consent.' ... Stewart Title had no opportunity to express its consent (or lack thereof) at the outset of this litigation, which had been underway for several years before Stewart Title was notified. But the fact that Stewart Title promptly paid for that litigation is sufficient, for present purposes, to show (at least) implicit consent."

[336] Condition 5(b), 2006 ALTA policies; Conditions & Stipulations 4(b), 1992 ALTA policies.

[337] In *Fidelity Nat'l Title Ins. Co. v. Matrix Financial Services Corp.*, 255 Ga.App. 874, 567 S.E.2d 96 (Ga.App. 2002), the insurer asserted Exclusion 3(a) as a coverage defense, based on the insured lender's failure to assert certain arguments as to why its lien had priority over mortgages recorded in the gap. The court rejected the argument, saying: "Nothing in the policy's terms, however, required Matrix to prosecute a quiet title action or to otherwise commence litigation challenging the Haygoods' adverse claim. Instead, the policy gave *Fidelity* the right to establish Matrix's superior interest or cure the title defect through litigation or other action. Matrix was merely obligated to *aid* Fidelity in

determination clause does not apply to suspend the insured's right to seek payment from the insurer for a title matter, when the only litigation pending is the lender's action against the borrower seeking recovery of the debt.[338] According to the final determination clause, the insurer is not liable to the insured for any claimed reduction in the value of the property that occurs while title is being cleared. However, courts have taken different positions on the issue, as fully discussed in §3.4.1.

The insurer will typically make an effort to preserve the insured lender's rights versus a lien against which there is policy coverage, while it is taking action to clear title. In *Transamerica Title Ins. Co. v. San Benito Bank & Trust Co.*,[339] the mortgage was insured as a second lien when, in fact, it was third. All three mortgages went into default and the lenders brought parallel foreclosure actions. The insurer obtained a release of the second lien. However, the insured lost the chance to purchase the first mortgage because the second-position lender did so while the insurer was clearing title. The senior lienholder then foreclosed the first mortgage and wiped out the insured's lien. The court ruled that the insured's lien was not established as insured, because the insured did not have the second-position creditor's right to redeem the first mortgage and thus preserve its security.

An insurer that fails to take action promptly to clear title may lose the right to take such action.[340] See §3.4.1 concerning the covenant to clear title diligently.

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this effort. And this 'aid' provision cannot reasonably be understood to require the insured to institute legal action, particularly when the policy expressly gives Fidelity the right to bring--at its own expense--such an action. Given the clear policy terms, and construing the policy exclusions against Fidelity, we refuse to find that Matrix created, suffered, assumed, or agreed to the adverse title claims by not instituting a quiet title action or otherwise challenging those claims in court. Furthermore, since the policy did not require Matrix to commence litigation, we cannot find that Matrix failed to mitigate its damages by declining to do so." (emphasis in original).

[338] In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co*., 320 P.3d 406 (Colo.App. 1 Div. 2014), the court quoted 2 Gregory J. Notarianni, *Colorado Practice Series: Methods of Practice* § 63:3, at 271 (Cathy S. Krendl ed., 6th ed., 2012), which says: "An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee its loan amount, then there is no damage compensable under the loan policy." However, the court found that the insured lender was not premature in bringing suit against the insurer for payment based on its defective lien, although it was still litigating with the defaulted borrower and might obtain some payment from it. The court held that the final determination clause did not stay the coverage suit, since the insurer was not paying for the lawsuit against the borrower, and that action would not clear title.

[339] 756 S.W.2d 772 (Tex.App. 1988).

[340] In *Stewart Title Guar. Co. v. Goldome Credit Corp.*, 494 So.2d 10, 12 (Ala. 1986), the insurer agreed at closing to obtain a release of a prior mortgage, but failed to do so. The loan went into default, and the insured gave the insurer two options: pay policy limits or buy the loan. Shortly thereafter, the lender filed suit. The insurer attempted to obtain the release, and then filed suit to remove the lien. The court barred the insurer from pursuing its title clearance action, and granted summary judgment for policy limits, holding that the insurer "has had reasonable and adequate time to cure the defects in the subject title." *Goldome* was limited by the Alabama high court in *Mississippi Valley Title Ins. Co. v. Odom*, 624 So.2d 1012 (Ala. 1993). The Eleventh Circuit Court of Appeals distinguished *Goldome* in *Youngblood v. Lawyers Title Ins. Corp.*, 923 F.2d 161 (11th Cir. 1991).

3.4.6.1 Tendering Title To Lender To Satisfy Policy Duties

A lender does not suffer a compensable loss under a title insurance policy if it is able to foreclose the insured mortgage and take title to the property. The lender's ability to successfully foreclose establishes the lack of a defect in title, even when the property was the subject of loan fraud.[341] The lender also does not suffer a compensable loss if it succeeds in taking a deed in lieu of foreclosure that conveys title to the lender subject to the matters excepted from coverage and any post-policy matters.[342]

Likewise, the insurer fulfills its policy duties when it gives the lender title to the property.[343] The lender may prefer to be paid money than to receive title to the property, but it is not entitled to insist on that election.[344] The policy gives the insurer the right, but not the obligation, to purchase the loan, as discussed in §3.8.

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[341] *Home American Credit, Inc. v. Investors Title Ins. Co*., 199 F.R.D. 563 (E.D.N.C. 2001); *Brucha Mortgage Bankers Corp. v. Nations Title Ins. of New York, Inc*., 712 N.Y.S.2d 151, 2000 N.Y. Slip Op. 07395 (A.D. 2 Dept. 2000); *Mortgage Associates, Inc. v. Fidelity and Deposit Co. of Maryland*, 2002 WL 31863341 (Cal.App. 2 Dist.) (unpublished). In *DLJ Mortgage Capital, Inc. v. Kontogiannis*, 726 F.Supp.2d 225 (E.D.N.Y. 2010), the court held that a lender was not entitled to skip the step of trying to foreclose on 95 mortgages that it claimed were phony or forged in order to first proceed on a RICO conspiracy claim against the alleged perpetrators, including title companies.

[342] In *Crupi v. Newell and Talarico Title Agency, Inc*., 14 Misc.3d 1225(A), 2007 WL 292296 (N.Y.Sup.), 2007 N.Y. Slip Op. 50171(U) (unpublished), a title insurer was not liable for failing to record an agreement "spreading" a mortgage onto a second parcel, the title to which was not insured, when the insured lender was able to take title to the insured property in lieu of foreclosure.

[343] *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 725 F.Supp.2d 619 (E.D.Mich. 2010) ("by tendering the title to the Property to Chase, First American established the title; thereby fully performing its obligations under the Title Policy"); *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*, 793 F. Supp. 265 (D. Colo. 1992); aff'd 19 F.3d 528 (10th Cir. 1994) (tender of fee simple title satisfied policy duties after mortgaged leasehold estate was declared invalid). In *First Alliance Bank v. Mississippi Valley Title Ins. Co. (In re Evans)*, 2012 WL 2374237 (Bkcy.S.D.Miss.) (unpublished), the insurer tendered title to the insured lender, which the court approved other than its mandate that the insurer also obtain approval for subdivision of the property from which the insured parcel had been carved. However, in a related case, the same court held that the insurer was liable for policy limits after it obtained title to the insured parcels for the lender and put it in title. The court refused to credit the value of the property against the debt, excused the insured from proving a diminution in value by labeling the loss provision an "exclusion," and judicially rescinded the conveyances. *In re Evans*, 492 B.R. 480 (Bkcy.S.D.Miss. 2013). In *Premier Community Bank v. First American Title Ins. Co*., 2015 WL 3949327 (W.D.Wash. 2015) (unpublished), the insurer obtained an equitable lien on the property and converted it to title, which it tendered to the lender insured. The lender demanded to be paid the amount by which the property had declined in value from the policy date to the day on which title was tendered to it. The court rejected that claim, and found that the insurer owed no money to the lender for the decline in value. It rejected the *Citicorp* analysis that an equitable lien is not title as insured, because *Citicorp* had ignored the insurer's right to tender title to the insured in full satisfaction of its policy duties.

[344] In *Bayrock Mortgage Corp. v. Chicago Title Ins. Co.*, 286 Ga.App. 18, 648 S.E.2d 433, (Ga.App. 2007), the court held that an insured lender was not entitled to sue the title insurer for policy limits and bad faith damages while refusing the insurer's offer to convey the property to the lender. BayRock Mortgage made a loan secured by a deed of trust. The United States took the property by forfeiture a short time later. BayRock demanded policy limits from its insurer, Chicago Title. When Chicago Title did not pay the claim within 60 days, BayRock sued for breach of policy and bad faith. Chicago Title then arranged for the United States to convey the property to BayRock, but the lender declined the tender. Chicago Title moved for summary judgment, which the trial court granted and the court of appeals affirmed.

3.4.6.2 Establishment of Equitable Lien As Clearing Of Title

The policy permits the insurer to clear title in order to "establish ... the lien of the insured mortgage, as insured." In some cases, the insured mortgage cannot be enforced, but the lender is entitled to an equitable lien. The equitable lien may be based on equitable subrogation, to prevent unjust enrichment or as a good faith improver lien.[345]

Two older Illinois decisions held that an insurer did not establish the lien of the insured mortgage by obtaining a judicial declaration of an equitable lien in favor of the insured. In *Citicorp Savings of Illinois v. Stewart Title Guar. Co.*,[346] a court found that a title insurer did not establish the lien of the insured mortgage by obtaining an equitable lien, because the insured was precluded from collecting interest secured by the lien. The court said that "no action by Stewart Title could have established the mortgage lien *as insured*... ." [emphasis in original] It awarded the lender insured policy limits, on the rationale that the lender would not have lent the money in the first place "but for" the assurance that the lien was enforceable. An Illinois appeals court decision followed *Citicorp* in 1989.[347]

Citicorp, which was decided by the Seventh Circuit about Illinois property, was overturned by the Illinois Supreme Court, which held that a title insurance policy is an indemnity contract and not a guaranty.[348] In addition, the *Citicorp* rationale is flawed because the policy does not insure the debt, or the right to enforce the note. Interest is a component of the debt. The promissory note and the mortgage have been termed two different species, and the policy protects only the mortgage.[349] By analogy, when a lender makes a full credit bid for the property on foreclosure, the lender is deemed to have made an election to take the land in full satisfaction of the debt.[350] Generally, when the lender takes title free of covered title defects, its full credit bid also extinguishes any policy claim.[351] See §7.9 for a discussion of the full credit bid as a payment that terminates a loan policy.

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[345] Most states follow the rule that a party who builds an improvement on the land of another is entitled to an equitable lien equal to the value of the improvement. See *Equitable Real Estate Investments, Inc. v. United States Dep't of Housing and Urban Development*, 14 F.Supp.2d 1058 (N.D.Ill. 1998), for example, in which a lender was denied an equitable lien because it "had constructive and inquiry notice" that the borrower was not the owner of the property on which the improvement was built. Equitable subrogation is discussed at §3.4.7.3.

[346] 840 F.2d 526 (7th Cir. 1988).

[347] *McHenry Savings Bank v. Pioneer Nat'l Title Ins. Co.*, 186 Ill.App.3d 238, 540 N.E.2d 357 (1989) (holding that the lender was entitled to be paid its entire debt, including interest, because the insurer delivered to the insured an equitable lien on which no interest accrued after the insured mortgage was found to be void).

[348] *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill.2d 326, 300 Ill.Dec. 69, 843 N.E.2d 327 (2006). In *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp*., 282 F.R.D. 423 (N.D.Ill. 2012), a federal court in Illinois found *Citicorp* distinguishable, because the ALTA Residential Limited Liability Junior Loan policy at issue does not assure the validity or enforceability of the insured's lien.

[349] See §3.2.4 for a complete discussion of this principle.

[350] *Cornelison v. Kornbluth*, 15 Cal.3d 590, 125 Cal.Rptr. 557, 542 P.2d 981 (1975).

[351] See *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 44 Cal.Rptr. 352, 900 P.2d 601 (Cal. 1995).

The *Citicorp* holding that an insured lender is entitled to be paid policy limits if its lien is defective on the policy date has been rejected by numerous other courts.[352] In *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*,[353] the policy insured a mortgage on a leasehold estate securing a loan of about $3 million. The leasehold estate was later determined to be void. The insurer cleared title by having the owner deed the entire fee simple estate to the lender. The land was worth less than the loan amount, due to falling land values. The lender later resold the property for $775,000, and then sued the insurer for policy limits plus attorney fees, based on *Citicorp*. The Tenth Circuit held that "this reasoning 'ignores the nature of title insurance.'" The court ruled:

> Generally, title insurance policies allow an insurer to cure an alleged defect within a reasonable time after receiving notice of such defect before an insured may bring suit on the policy. … First Federal's attorneys, as agents of Transamerica, established title within a reasonable time. Therefore, Transamerica never breached the agreement.[354]

The *First Federal* court found that tender of the deed established title as insured. The *First Federal* decision accurately states that, if title is cured by the insurer, no loss lies.

Citicorp was also rejected in *Bar-K, Inc. v. Security Title Corp.*[355] That case also involved a defective mortgage on a leasehold estate. The insured, Bar-K, Inc., argued that First American Title was barred from hiring a lawyer to try to clear title, because it would be impossible to establish the mortgage liens against the true leasehold estate holder. Therefore, it claimed, First American should have been required to just pay policy limits to the insured, based on *Citicorp*. The court rejected that argument, saying that the policy gave First American "broad discretionary authority to pursue litigation or other means to resolve title issues," and that even if the insurer would be unable to establish the mortgage as insured, it had the right to mitigate the insured's own loss by clearing title:

> The [policy] language is straightforward and the discretion is considerable. Also, the undisputed facts are that First American acted diligently pursuant to this

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[352] In *Amzak Capital Management v. Stewart Title of Louisiana (In re West Feliciana Acquisition, L.L.C.)*, 744 F.3d 352 (5th Cir. (La.) 2014), the court noted that the Illinois Supreme Court has since rejected the *Citicorp* premise, as have *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993); *Gibraltar Savings & Loan Ass'n v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203 (8th Cir. 1990); and *JP Morgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 725 F.Supp.2d 619 (E.D.Mich. 2010). In *Premier Community Bank v. First American Title Ins. Co.*, 2015 WL 3949327 (W.D.Wash. 2015) (unpublished), the insurer obtained an equitable lien on the property and converted it to title, which it tendered to the lender insured. The lender demanded to be paid the amount by which the property had declined in value from the policy date to the day on which title was tendered to it. The court rejected that claim, and found that the insurer owed no money to the lender for the decline in value. It rejected the *Citicorp* analysis that an equitable lien is not title as insured, because *Citicorp* had ignored the insurer's right to tender title to the insured in full satisfaction of its policy duties.

[353] 793 F. Supp. 265 (D.Colo. 1992); aff'd 19 F.3d 528 (10th Cir. 1994).

[354] 19 F.3d at 531.

[355] 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished).

> authority. Once notified by Bar-K of a foreclosure dispute, it promptly retained Damon Kay to represent Bar-K, and Damon Key promptly pursued litigation based upon a theory that might well have established the lien of the mortgage "as insured" if the litigation had been completed, i.e., that under alter ego law, Airlines's mortgages applied to Air's leasehold interest.
>
> Furthermore, assuming arguendo that First American had been unable to literally establish the lien of the mortgage "as insured," the policy nonetheless gave it the discretionary authority to pursue litigation "to prevent or reduce loss or damage to the insured." If First American's pursuit of litigation ultimately enabled Bar-K to obtain title to the leasehold estate, it would have succeeded in preventing or reducing loss or damage to Bar-K.[356]

A Michigan federal court also rejected the *Citicorp* "title as insured" argument. In *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co*.,[357] the court found that a title insurer was entitled to solve a lender's claim by giving it the title to the property. It ruled that the lender was not entitled to insist on cash instead, on the pretext that the mortgage was defective and that tender of title was not the same as establishing the lien of the mortgage as insured. The court specifically held that *Citicorp* was wrongly decided in that it "mistakenly treated title insurance as a guarantee of title" rather than a contract of indemnity. The *JP Morgan* court adopted the reasoning of the *First Federal* case instead. It concluded that "tendering full title to the Property to the Insured 'establishes the Title' under the Title Policy's Limitation of Liability Provision."

However, the *Citicorp* holding that a lender's loss should be measured as of the date of policy was adopted in a case in which the insured's mortgage was void and the insurer did not take action to clear title.[358]

3.4.7 Establishing Priority Over Competing Liens

Numerous legal doctrines or remedies may be asserted to establish the priority of the insured mortgage over a competing lienholder. Most depend on state law and are beyond the scope of this treatise. Several such doctrines are sufficiently universal or national so as to warrant inclusion in this text. The following sections discuss the principles that apply to federal tax liens, the doctrines of equitable subrogation and of purchase money mortgage and related principles.

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[356] Id. at *9.

[357] 725 F.Supp.2d 619 (E.D.Mich. 2010).

[358] *G&B Investments, Inc. v. Henderson (In re Evans)*, 460 B.R. 848 (Bkcy. S.D. Miss. 2011). The date of loss ruling was the only facet of *Citicorp* that the court adopted. The same court held in two related decisions that the date of loss is either of the dates recited in the unsuccessful cure provision of the 2006 policy when the title insurer has taken action to clear title. *In re Evans*, 2011 WL 6258473 (Bkcy.S.D.Miss.) (unpublished); 2011 WL 6258881 (Bkcy.S.D.Miss.) (unpublished).

3.4.7.1 Federal Tax Liens

Title insurers regularly encounter disputes regarding federal tax liens, including sometimes thorny issues concerning their attachment or priority. This section deals with some of the more common issues.

3.4.7.1.1 Perfection Of Tax Lien

The federal government obtains a lien against the taxpayer for unpaid taxes from the date on which the tax is assessed.[359] However, as to persons who purchase in good faith from the taxpayer, the lien attaches only on the recording of a federal tax lien in the office designated by state law for records intended to impart constructive notice to purchasers.[360] A protected purchaser is one who buys in good faith, for valuable consideration, and who imparts notice of his rights by recording of his deed.[361]

When a valid federal tax lien encumbers the property at the time the insured interest is created, the insured takes subject to the lien.[362] The purchaser's lack of actual knowledge of the lien is not a defense to its attachment ahead of the purchaser's interest, if the lien is perfected.[363] However, the IRS bears the responsibility for proper filing and indexing to achieve perfection of its lien.[364] See §3.4.7.6 regarding indexing defenses. The IRS is under no obligation to remove the lien as to an "innocent" purchaser, even if the taxpayer is making payments on the tax debt, because the lien serves as security for the payment of the obligation:

> Plaintiffs also claim that the United States should be required to extinguish the liens because payments are being made. This argument is meritless, as a secured party is entitled to hold a lien on property serving as security until the debt is paid in full. These debts have not been paid in full.[365]

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[359] 26 U.S.C. §6321 provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

[360] 26 U.S.C. §6323(f).

[361] 26 U.S.C. §6323(h)(6) defines "purchaser" as follows: "[t]he term 'purchaser' means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice."

[362] 26 U.S.C. §6321, 6323.

[363] 26 U.S.C. §6323(a),(f)(4),(i)(1); *Gallup v. United States*, 358 F.Supp. 776 (D.C.Neb. 1973); *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516 (E.D.Mich. 1993).

[364] 26 U.S.C. §6323(f)(4).

[365] *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516, 523 (E.D.Mich. 1993).

3.4.7.1.2 Wrongful Levy Claim

The IRS enforces its lien rights against property by levying on it.[366] It sells the property at a distraint sale.[367] The IRS levy may be wrongful because, for example, the insured's interest in the property has priority over the lien, as discussed above, or a bank account levied on is in fact an escrow account, and the funds are not the property of the taxpayer. The insurer may then seek to set aside the levy based on the defenses discussed below.

A person holding a prior claim to property on which the Service has levied may make written request for the return of the property.[368] To have a levy set aside, first, demand should be made on the IRS District Director for return of the property. The request is to be addressed to the District Director for the District in which the levy was made, to the attention of the Chief, Special Procedures Staff. The request is to contain:

1. The name and address of the person submitting the request,

2. A detailed description of the property levied on,

3. A description of the claimant's basis for claiming an interest in the property, and

4. The name and address of the taxpayer, the originating IRS district, and the date of lien or levy as shown on the Notice (Form 668), Notice of Levy (Form 668-A), or Levy (Form 668-B) or, in lieu thereof, a statement of the reasons why such information cannot be furnished.[369]

The District Director has 30 days from receipt to ask for more specific information. If no such request is made, the information provided is deemed sufficient. If a request for further information is made, the party has 30 days from receipt of the IRS request in which to provide same.

If the Director refuses, the party in interest must bring an action for wrongful levy. Note that the time restrictions are both tight and inflexible. The demand extends the time for filing a wrongful levy action. A wrongful levy action must ordinarily be brought within 9 months of the date of levy.[370] However, a demand for return of property extends the time for filing an action to 12 months from the date of filing the request, or 6 months from the date of mailing by the Director of a notice of disallowance of the request, whichever is shorter.[371]

[366] 26 U.S.C. 6331.

[367] 26 U.S.C. 6335.

[368] Reg. §301.6343-1(a)(b)(2).

[369] Reg. §301.6343-1(a)(b)(2).

[370] 26 U.S.C. 6532(c).

[371] 26 U.S.C. 6532(c)(2).

The District Director is obliged to return property that has been shown to have been levied on wrongfully. A request for return of the property extends the time period for filing an action for wrongful levy, as stated above. However, mere settlement discussions with the IRS do not extend the time period. The party claiming an interest in the property must bring the wrongful levy action within the time period, or it loses that right.

The District Director also has practical authority to release property when it appears that the Service's expenses of sale will be greater than the IRS's interest in the property.[372] This authority should be exercised when the Service's interest in the property is small, the legal situation is novel, or there are very large liens ahead of the IRS which the Service would be required to pay off after taking title.

A letter from an IRS agreeing to release property is a contract. However, the IRS challenged its obligations under one such contract with a variety of defenses, including lack of authority of the officer to bind the service, misrepresentation to the service as to the value of the property, and mistake. The Court of Federal Claims refused to grant the taxpayer equitable relief such as an order of specific performance. Based mostly on the allegations by the IRS that the taxpayer had lied to the Service, the court held that the taxpayer had the "heavy burden" of proving that the IRS could not renege on a release agreement.[373]

A party claiming priority over a tax lien must bring a wrongful levy action in U.S. District Court.[374] As stated above, suit must ordinarily be brought within 9 months of the date of levy.[375] A demand for return of property extends the time for filing an action to 12 months from the date of filing the request, or 6 months from the date of mailing by the Director of a notice of disallowance of the request, whichever is shorter.[376] A party must have strong equitable considerations to overcome this statute of limitations.[377]

The sole issue in the suit is whether or not the levy was wrongful. The validity of the assessment itself may not be disputed.[378] The burden of proof is on the plaintiff to prove an interest in the property superior to the lien, or that the lien does not attach.[379] The remedy for a prevailing plaintiff is the return of the property.[380]

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[372] 26 U.S.C. 6343; Reg. §301.6343-1.

[373] *Buesing v. United States*, 42 Fed.Cl. 679, 83 A.F.T.R.2d 99-543, 99-1 USTC P 50,246 (Fed.Cl. 1999).

[374] 26 U.S.C. 7426.

[375] 26 U.S.C. 6532(c).

[376] 26 U.S.C. 6532(c)(2).

[377] *Belton v. Commissioner*, 562 F.Supp. 30 (D.C. D.C. 1982); *Bank of Commerce and Trust Co. v. U.S.*, 86-1 USTC 9111 (Okla. 1985).

[378] 26 U.S.C. 7426(c).

[379] *Minges v. United States*, 47 AFTR2d 80-658 (D.C. N.H. 1979).

[380] 26 U.S.C. 7426(b)(2)(A).

Only a person "who claims an interest in or lien on" the property may file a wrongful levy action.[381] The wrongful levy action permitted under the Federal Tax Lien Act of 1966 is an exception to sovereign immunity. The law is strictly enforced in limiting the class of people who may bring such an action. A title agent that missed a lien because it was filed under an alias was not entitled to bring a wrongful levy action.[382] The title agent also had no standing to sue under the federal declaratory judgment action law or Administrative Procedures Act. Therefore, it had no forum in which to argue that the government had been unjustly enriched by levying on and reselling property based on a lien that provided no constructive notice.

3.4.7.1.3 Interest Existing Before Attachment Of Lien

If a purchaser's interest in the property comes into existence and becomes protected under state law before the tax lien attaches, the purchaser takes free of the tax lien.[383] The purchaser's interest must be created before the lien attaches. The purchaser must pay "adequate and full" consideration in "money or money's worth." Finally, the purchaser's interest must be valid under local law against subsequent purchasers without actual knowledge.[384]

The purchaser's interest is established by proof that a deed was executed, delivered and recorded. A purchaser may be found to have obtained priority over a federal tax lien when the deed is delivered before the tax lien is properly filed, and the purchaser's actual knowledge of an unfiled lien does not give the lien priority over the insured's interest.[385] Other decisions hold that if the conveyance is recorded after the tax lien is filed, the lien ordinarily takes priority even if the purchaser had no actual knowledge of it.[386] Also, a federal tax lien attaches to property conveyed by the taxpayer before the filing of the tax lien, when the conveyance is a sham intended to evade creditors.[387] A lessee's interest has been found to be perfected as of the date it takes possession, even

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[381] 26 U.S.C. 7426(a)(1).

[382] *Lawyers Title Ins. Corp. v. Phillips*, 108 F.Supp.2d 1382 (D.C.M.D. Ga. 2000).

[383] 26 U.S.C. 6323(h); Reg. §301.6323(h)-1(a)(2)(ii).

[384] 26 U.S.C. 6323(a). In *Hendry v. United States*, 2011 WL 2531400, 107 A.F.T.R.2d 2011-2704 (E.D.Mich. 2011) (unpublished), a divorcing spouse was found qualified as a "purchaser" and the transfer agreement that divided the spouses' assets qualified as sufficient consideration under the code section. In *Lauderdale v. United States*, 115 A.F.T.R.2d 2015-1819, 2015 WL 2238882 (E.D.Mo.) (unpublished), a buyer at a short sale who agreed to escrow enough money to pay off a federal tax lien, but did not ask the IRS to release the lien in advance of closing, was found to have no standing to contest the IRS's levy of the escrowed money.

[385] *United States v. Diamond*, 142 F.Supp. 441 (S.D.N.Y. 1956); *TKB International, Inc. v. United States*, 995 F.2d 1460 (9th Cir. 1993).

[386] *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516, 523 (E.D.Mich. 1993).

[387] *Veigle v. United States*, 873 F.Supp. 623 (M.D.Fla. 1994); *Thompson v. Adams*, 685 F.Supp. 842 (M.D.Fla. 1988); *Nelson v. United States*, 1991 U.S.App. LEXIS 20737, 932 F.2d 976 (Table) (11th Cir. 1991); *Roland v. United States*, 838 F.2d 1400 (5th Cir. 1988).

if that date is prior to the recording of the lease.[388] A federal tax lien was found superior to a prior mortgage that was mistakenly satisfied.[389] However, when a federal tax lien was properly filed a lien but the county clerk failed to post it to the records, one court held that the purchaser was bound by the lien even though it was not discoverable.[390] See §3.4.7.6 for a full discussion of the effect on constructive notice of improper indexing.

A buyer of the fee simple estate may also qualify as a "purchaser," under certain circumstances, even before it has obtained a deed. The Code specifically states that an interest in property shall include a "written executory contract to purchase or lease property."[391]

The IRS thus consents to the exercise of the doctrine of equitable conversion, which is law in some states.[392] Under this doctrine, after the purchase agreement is signed, the seller's interest "is in

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[388] Reg. 301.6323(h)-1(a)(2)(ii), example 2.

[389] *Bruder v. Bank One, Rockford, NA*, 207 B.R. 151 (N.D.Ill. 1997). In *Bruder*, First National Bank & Trust Company was the original mortgagee. It changed its name to Bank One, Rockford. No notice of change of name was recorded with the Recorder of Deeds. The mortgage was then assigned by Bank One, Rockford to Bank One Mortgage Corporation; the assignment did not mention the First National Bank name. Then the mortgage was mistakenly satisfied by Bank One Mortgage as attorney-in-fact for First National Bank n/k/a Bank One, Rockford. A federal tax lien and judgment were then filed against the borrower, who later filed bankruptcy. When the relative priorities of the mortgage and tax lien were contested in bankruptcy court, the lender attempted to use the mortgage chain of title to its advantage, arguing that the mistaken satisfaction was signed by the assignor only, and therefore invalid. The court rejected this argument, however, and instead used the gap in the chain of assignment against the lender. It held that the federal tax lien had priority over the claimed interest of Bank One Mortgage, because the mortgage assignment was a "wild" instrument and not notice by which a subsequent creditor is bound. Therefore, under IRS rules, the lender did not have a valid security interest which could take priority against the later tax lien.

[390] *Adams v. United States*, 420 F.Supp. 27 (S.D.N.Y. 1976).

[391] 26 U.S.C. 6323(f). An executory contract is one not fully performed. This includes purchase agreements. *Newnham v. United States*, 813 F.2d 1384 (9th Cir. 1987).

[392] See *Niagara County Savings Bank v. Reese*, 179 N.Y.S.2d 453 (1958). A variant is to consider the date of conversion to be the date on which the purchaser's obligation to buy becomes unconditional (*i.e.*, when all contingencies have been removed). See *Mueller v. Novelty Dye Works*, 273 Wis. 501, 78 N.W.2d 881 (1956); *Carefree Homes, Inc. v. Production Credit Ass'n of Madison*, 81 Wis.2d 541 (1978). In *State Farm Gen'l Ins. Co. v. Stewart*, 224 Ill.Dec. 310, 681 N.E.2d 625 (1997), the court held that "as between the parties and those claiming through them, when the owner of land enters into a valid and enforceable contract for its sale he continues to hold the legal title, but in trust for the buyer; and the buyer becomes the equitable owner and holds the purchase money in trust for the seller. The conversion takes place at the time of entering into the contract. It stems from the basic equitable principle that equity regards as done that which ought to be done. The doctrine of equitable conversion has been recognized in Illinois, as it has in practically every other jurisdiction since earliest times." [quoting *Shay v. Penrose*, 25 Ill.2d 447, 449, 185 N.E.2d 218, 219-20 (1962)]. On property closed through an escrow, title passes when the conditions to the escrow have been met. *Prochaska v. Midwest Title Guar. Co. of Florida*, 932 P.2d 172 (Wash.App. 1997). In a case involving a judgment which became a lien after delivery of the deed but before recording, a New Jersey court allowed the judgment creditor to assert its lien despite a prior transfer of title. *Lieberman v. Arzee Mid-State Supply Corp.*, 306 N.J.Super. 335, 703 A.2d 936 (N.J.Super.A.D. 1997). In *Lieberman*, however, the grantor conveyed to his brother one week before the judgment was docketed. The judgment creditor filed suit to enjoin a further sale of the property, and the title insurer took a secured indemnity to protect against the judgment. These facts appear to have influenced the court, which held that "had [the purchasers] or others acting on their behalf, including their title insurer, 'made reasonable and diligent inquiry' as required, they need not have closed without seeing to the satisfaction of Arzee's judgment." Id. at 4. In *Alford v. Chicago*

the purchase money, and he has a lien on the land as security for any unpaid balance of such money."[393] The fact that the insured purchaser has paid only part of the consideration for the property at the time the lien is filed does not make the insured's interest subordinate to the tax lien.[394]

If the insurer can show equitable conversion, it must also prove that the "purchaser" would have priority over any subsequent purchaser of the land. Again, this may be established if the purchaser comes into possession of the property.[395] Several cases are illustrative of the application of equitable conversion to federal tax liens. In *Niagara County Savings Bank v. Reese*,[396] a New York court held that a purchaser whose agreement was signed before the lien but whose deed came later had priority over the tax lien. The court first stated that New York follows the equitable conversion doctrine, giving the purchaser title as of the contract date. The court then held that the purchaser's interest was superior though unrecorded because he was in possession.

It is often stated that equitable conversion does not take place until a purchase agreement is unconditional. Thus, it may be necessary to establish that all contingencies under the agreement had been met or waived before the lien was recorded.[397]

In *Newnham v. United States*,[398] a purchaser who cancelled the sale after signing the purchase agreement was held to be a "purchaser." The court held that the purchaser "had an interest in the property by virtue of her written executory contract to purchase it."[399] In *Sodorff v. United States*,[400] a purchaser signed a purchase agreement to buy the taxpayer's property. A tax lien was recorded after the agreement but before either the full purchase price was paid or the deed was recorded. The purchaser's right was held to be superior to the Service's lien. In some cases, the key element is proof of possession. In *United States v. V & E Engineering & Const. Co., Inc.*,[401] the

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Title Ins. Co., 3 S.W.3d 164 (Tex.App.-Eastland 1999), the insured purchasers' possession of the property and the recording of their purchase money deed of trust were found to impart constructive notice; therefore, judgments against the seller did not attach and the insurer was not obligated to satisfy them.

[393] *Mueller v. Novelty Dye Works*, 273 Wis. 501, 505 (1956).

[394] *Engel v. Tinker Nat'l Bank*, 269 F.Supp. 199 (E.D.N.Y. 1967).

[395] In Wisconsin, for example, a purchaser has a duty to observe the property to discover anyone in possession, and to inquire further as to the exact nature of the interest claimed by any party in possession. Thus, a purchaser in possession has priority over a subsequent purchaser. *Bump v. Dahl*, 26 Wis.2d 607, 614-6 (1965); *Grosskopf Oil, Inc. v. Winter*, 156 Wis.2d 575, 584 (1990).

[396] 179 N.Y.S.2d 453 (1958).

[397] In *Lang v. Klinger*, 34 Cal.App.3d 987, 110 Cal.Rptr. 532 (Cal.App. 1 Dist. 1973), for example, a judgment was found prior to the purchaser's interest because the contingencies had not been cleared as of the date of docketing.

[398] 813 F.2d 1384 (9th Cir. (Cal.) 1987).

[399] 813 F.2d at 1385.

[400] 614 F.Supp. 74 (D.C. Wash. 1985).

[401] 819 F.2d 331 (1st Cir. 1987).

"purchaser" was not in possession. It therefore lost priority to the IRS lien.[402]

3.4.7.1.4 Lien Limited To Net Proceeds Of Sale

In some cases, the tax lien attaches to the insured property, but the amount due the IRS is more than the seller received at closing. In such a case, the extent of the lien against the real estate is limited to the seller/taxpayer's net proceeds of sale.[403] On proof of the net proceeds, and that the sale was an arm's length sale for value, the Service should provide a release.[404] The lien is not so limited if the sale price does not reflect fair market value.[405]

Several courts have refused to limit the IRS lien to the amount of the taxpayer's sale proceeds, however. For example, in *Han v. United States*,[406] the Ninth Circuit ruled:

> A tax lien "shall continue until the liability for the amount so assessed ... is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322 (1988). The IRS is authorized to seize liened property even if it has been sold to a third party. 26 D.F.R. 301.6331-1 (1990). Nowhere in the statutory or regulatory scheme is there a provision limiting the IRS's recovery. A lien continues unabated regardless of sale, so long as it is properly recorded. Because the lien is unaffected by sale, we see no basis for fixing the amount of the lien at the time of sale. We decline to legislate where Congress has failed to do so.[407]

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[402] See also *Rodkey v. United States*, 1987 WL 11314 (W.D.Okla.) ((unpublished) (Oklahoma law); and *Raimo v. United States*, 1987 WL 28361 (E.D.Pa.) (unpublished) (Pennsylvania law).

[403] A similar case involving a judgment is *First American Title Ins. Co. v. Casper*, 157 Cal.Rptr. 798 (Cal.App. 2 Dist. 1979) (unpublished). A seller had entered into an accord and satisfaction with a judgment creditor, under which he still owed $4,650. The judgment lien was still on file in the original amount of $50,045, and there was no public evidence of the accord and satisfaction. The insurer missed the judgment. At closing, the seller cleared $13,242.63. The creditor first agreed to settle with the insurer for $16,104.63, but then retracted and demanded the full judgment amount. The court pointed out that, had the lien been discovered, the creditor would have received only $4,650. The court affirmed judgment in that amount. In *Lang v. Klinger*, 34 Cal.App.3d 987, 110 Cal.Rptr. 532 (Cal.App. 1 Dist. 1973), however, a judgment creditor was found not to be required to accept payment of the net proceeds of sale. The court reasoned that "the value of the property is not established as against the creditors as that price at which the Klingers chose to sell. An execution sale, to which appellants were entitled, might have produced a larger sum." This ruling is probably dictum, since the court found it unnecessary to address the argument because it had not been properly raised on appeal. The court's reasoning also seems contrary to common wisdom, since an arm's-length sale ordinarily nets more, not less, than a distressed sale such as at execution. See also *United States v. Baran*, 996 F.2d 25 (2nd Cir. 1993). In that case, the lien attached to a life estate. The court noted that "the tax lien is not on the entire property, but only on the life estate. Indeed, the tax lien is for more than $260,000, but may be satisfied out of the proceeds of sale only to that extent because that is the value of the life estate."

[404] *Sodorff v. United States*, 614 F. Supp. 74 (1985).

[405] *Paul Rochester Investment Co. v. U.S.*, 692 F.Supp. 704 (D.C. Tex. 1988).

[406] 944 F.2d 526 (9th Cir. (Cal.) 1991).

[407] Id. at 528-9.

The *Han* court cited as precedent *Fidelity Nat'l Title Ins. Co. v. United States*,[408] in which the IRS recovered more on its lien after foreclosure by a lender than it would have received had the taxpayer sold the property. In *Han*, however, the court permitted the purchasers to assert equitable subrogation to the position of the taxpayer's mortgage lender paid off with the purchase funds. The court found that, by imposition of equitable subrogation, "[t]he IRS will not suffer any injustice ... , since it will recoup as much as if [the taxpayer] had still owned the property."[409] See §3.4.7.3 for a full discussion of equitable subrogation.

When the insurer has missed a lien, however, it can have a difficult time putting itself in a position to make the above argument to the IRS. In *Universal Title Ins. Co. v. U.S.*,[410] the insurer sought to limit a $31,000 lien to the $12,865.01 that the seller-taxpayer had collected as net proceeds at the sale. The IRS refused an outright offer of that amount, and convinced the insurer to put up the full value of the real estate in an escrow account in exchange for a release of the property from the lien. The parties then litigated the amount owed the IRS.

The court found that the insurer's only standing in the matter was as subrogee of the insured purchaser or the paid-off prior lienholders. The court went on to find, however, that the insurer had no right of subrogation, because it had not yet made its insured whole; that it had no right of equitable (legal) subrogation, because it had a special duty as a title searcher which it had breached; and that the government would not be unjustly enriched by receiving more than the net proceeds of sale. On the last point, the court said this:

> Universal's argument [about unjust enrichment] begs the question. Universal erroneously assumes that the conclusion to its argument is true--that is, that the IRS is limited to recovering $12,865.01, the seller's net proceeds, because of the IRS's past practice of releasing tax liens upon receipt of the seller's net proceeds. We also reject Universal's contention that denying it the right of subrogation will result in a windfall to the government. On the contrary, the government will simply receive that [sic] which it is entitled--full payment of the federal tax lien. The IRS properly recorded its tax lien, and the government is legally entitled to be paid the full amount of that lien. The fact that the IRS has, in the past, gratuitously released liens in exchange for payment of less than the full amount of the lien is immaterial. The government has the discretion to decide whether to insist upon full payment of its lien or to accept a lesser amount.[411]

The *Universal* court incorrectly ignored the fact that the IRS lien attaches only to the taxpayer's interest in the property. The full measure of the taxpayer's interest in land is the amount of

[408] 907 F.2d 868 (9th Cir. 1990).

[409] 944 F.2d at 530.

[410] 942 F.2d 1311 (8th Cir. 1991).

[411] 942 F.2d at 1319.

his or her equity. If the lien is for $1 million but the equity in a particular piece of land is $1,000, the lien as to that land is only $1,000. The IRS would obtain only that amount if it conducted a distraint sale. Therefore, the IRS must release the property (not satisfy the lien) on payment of the equity. The *Universal* court carelessly mischaracterizes the IRS "practice" of issuing releases as being gratuitous. Contrary to the court's statement, the IRS may not refuse to release real estate from a lien if it is paid the full amount of the taxpayer's interest in that land.

Universal illustrates that an insurance company has a difficult time persuading a court that the government has overstepped its bounds, when the controversy would not have existed but for the insurer's mistake. An insurer would be well advised not to enter into the kind of escrow arrangement suggested by the IRS in the *Universal* case. See §5.6 for further discussion of the *Universal* decision in regard to subrogation.

3.4.7.1.5 Subrogation Rights Against Taxpayer

When an insurer pays the tax debt of a seller or other party in order to obtain a satisfaction or release of the insured property, it will often wish to pursue the taxpayer for reimbursement. Such subrogation is "equitable" rather than "conventional." See §5.6 for a discussion of the difference between the two forms of subrogation. In short, conventional subrogation is the contractual right of an insurer to stand in the insured's shoes. Equitable subrogation permits one who has paid another's debt for the benefit of an innocent party to recover from the debtor.

The tax code acknowledges subrogation rights by stating that a lienholder junior to the IRS may gain priority over the Service by paying off a senior lienholder.[412] However, the Internal Revenue Service is often unwilling to recognize or cooperate with subrogation of its claim against a taxpayer. It sometimes takes the position that any payment of a tax debt by a party other than the taxpayer is made as a volunteer. This position has been accepted in some decisions.[413] See §3.4.7.3 below, discussing this defense to federal tax liens.

Thus, before paying off a federal tax lien on the insured's behalf, the insurer will want to negotiate for an assignment of rights by the Service to the insurer. If that is not possible, the insurer will want to seek an agreement that the Service will turn over at time of payment all information in its files regarding the present whereabouts of the taxpayer and the status of the debt, and that someone from the Service will testify if necessary to establish payment of the tax debt. In most jurisdictions, an insurer which pays the IRS on behalf of an insured lender may pursue the mortgagor in the name of the lender. The tax debt becomes a valid obligation of the mortgagor secured by the mortgage.[414]

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[412] 26 U.S.C. 6323(i)(2) states: "Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324." See *US Life Title Ins. Co. of Dallas v. Romero*, 652 P.2d 249 (N.M.App. 1982), discussing this section of the Code.

[413] See *Chicago Title Ins. Co. v. Eynard*, 84 Misc.2d 605, 377 N.Y.S.2d 895 (1975) and *Coy v. Raabe*, 69 Wash.2d 346, 418 P.2d 728 (1966). Also see §5.8.3 generally for a discussion of the volunteer defense.

[414] See *U.S. Life Title Ins. Co. v. Romero*, 98 N.M. 699, 652 P.2d 249 (App. 1982), in which the court stated: "There is a rather large body of case law that allows a mortgagee to subrogate to the rights of tax liens paid by the mortgagee to protect its mortgage. See Annot., 61 A.L.R. 587, 601-607 (1929); Annot., 106 A.L.R. 1212, 1217-1224 (1937); 73

When the taxpayer is the seller, the insurer may also assert the insured's rights under deed covenants. See §5.9 regarding subrogation rights against sellers. The insurer may pursue both sets of rights, make an election, or pursue only the warranty claim if necessary. The insurer should carefully evaluate the defenses to either claim before making such an election, because recovery may be allowed under one set of rights and denied under the other.

The seller may raise several defenses to recoupment by an insurer as subrogee of either the insured or the IRS.[415] If the insurer proceeds as subrogee of the IRS, its claim is based entirely on equitable subrogation. The seller may raise the insurer's failure to report the tax lien as a defense to recovery. This defense leads to a windfall and should not prevail. However, one court denied recovery based on this defense.[416]

The seller may also raise the volunteer defense, either in response to a claim under the IRS's rights or a claim based on the deed covenants. The volunteer defense may prevail if the IRS has not provided the documentation suggested above to assign its claim to the insurer. The volunteer defense is not an automatic defense to subrogation on the insured-purchaser's warranty claim.[417] Nonetheless, when the seller did not warrant title, a "volunteer" insurer was left with no rights against the seller.[418]

3.4.7.1.6 Release Or Subordination Of Federal Tax Lien

The insurer may seek a release of a federal tax lien from the insured parcel, under 26 U.S.C. 6325, on payment of less than the full amount of the tax debt. Under Section 6325(b)(1), the Service is authorized to issue a certificate of release of a particular parcel of real estate if:

> ... the Secretary finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority over such lien.

Am.Jur.2d Subrogation §§ 66, 122 (1974), and cases cited therein." Internal Revenue Code, 26 U.S.C. 6321 states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

[415] In *United States v. Hall Family Trust Dated June 8, 2001*, 2019 WL 1429572 (S.D.Cal. 2019) (unpublished), when the IRS pursued its tax lien against buyers from the taxpayer, who has since died, a California court later dismissed the title insurer's claim against one of his two heirs because she did not sign the purchase contract and had no privity with the buyers.

[416] *US Life Title Ins. Co. of Dallas v. Romero,* 652 P.2d 249 (N.M.App. 1982).

[417] *US Life Title Ins. Co. of Dallas v. Romero,* 652 P.2d 249 (N.M.App. 1982); *American Title Insurance Co. v. Coakley,* 419 So.2d 816 (Fla.App. 1982); *Realty Alliance of Texas, Ltd. v. Stewart Title Guar. Co.,* 1997 WL 13651 (Tex.App.-Houston) (unpublished) (discussed in full at §5.8.3).

[418] *American Title Insurance Co. v. Coakley*, 419 So.2d 816 (Fla.App. 1982).

Under Section 6325(b)(2)(B), the Secretary is permitted to issue a release if "the interest of the United States in the part to be so discharged has no value." In turn, in determining the value of the interest of the United States in the property, the Secretary "shall give consideration to the value of such part and to such liens thereon as have priority over the lien of the United States."

Thus, the insurer or other party may ask the Service to release its lien from a parcel on proof that the federal tax lien is subordinate to other liens, so that the equity to which the federal lien attaches is nominal or non-existent. The Service may require payment of some amount of money if its lien attaches to some equity in the property. When there is no equity in the property to which the lien can attach, the Service is authorized to issue a certificate of non-attachment for that parcel, under Section 6325(e).

The Service may also be asked to subordinate its lien to another lien, under Section 6325(d), when "there is paid over to the Secretary an amount equal to the amount of the lien or interest to which the certificate subordinates the lien of the United States."

3.4.7.2 Purchase Money Mortgages

Some states recognize the doctrine, which comes from English common law, that a seller has an implied equitable lien for the balance of the unpaid purchase price. In modern times, the purchase money mortgage doctrine followed in some states is that a mortgage granted by a purchaser of real estate takes priority over other liens that attach to the property once the purchaser acquires title, including federal tax liens.[419] This rule may be used to establish the priority of an insured mortgage over other liens attaching to the property.[420]

3.4.7.3 Equitable Subrogation

When a new lender that pays off an existing senior lien, a junior lien moves up in priority and ahead of the new lien, based on recording order. The doctrine of equitable subrogation is an equitable remedy, the primary use of which is to reorder the lien priorities so that the junior lien remains so, and the new lien obtains the priority position of the lien it paid off. If this doctrine were not employed, the intervening lien holder would receive a gift by the fortuity of the refinance of the senior debt.

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[419] See Joyce Palomar, *Patton and Palomar on Land Titles*, (3rd Ed.) § 568, for a more complete discussion of the purchase money mortgage doctrine.

[420] See, for example, *Estate of Skvorak v. Security Union Title Ins. Co.*, 140 Idaho 16, 89 P.3d 856 (Idaho 2004), which concerned the relative priorities of *two* purchase money mortgages, one given to the seller and the other to an institutional lender. The institutional lender's mortgage was recorded first. The court refused to reorder priority established by the order of recording to favor the seller-mortgagees. It reversed the trial court order, which had adopted *Restatement (Third) of Property (Mortgages)* § 7.2, which provides: "(c) A purchase money mortgage given to a vendor of real estate, in the absence of a contrary intent of the parties to it and subject to the operation of the recording acts, has priority over a purchase money mortgage on that real estate given to a person who is not a vendor." Comment (d) of the *Restatement* says that, when purchase money mortgages are granted to both a vendor and a third party, "if both lenders have notice of the other's mortgage, the vendor's mortgage will be superior to its third party counterpart." The Supreme Court refused to adopt the Restatement position, saying "[u]nder Idaho's recording statutes a purchase money mortgage recorded first in time has priority over a subsequent vendor purchase money mortgage." 140 Idaho at 23; 89 P.3d at 863.

Equitable subrogation is also used to impose an equitable lien in place of a defective mortgage, to avoid unjust enrichment to the borrower whose debt was paid, and in certain other situations when an equitable lien will avoid a windfall and protect a valid interest in property. The doctrine may be used to cure or partially cure a number of issues, such as when a mortgage on homestead property is deemed void because it was not signed by both spouses, the mortgagor lacked capacity to sign the instrument, or the mortgage was forged or was given by a borrower whose deed was forged.

Most states employ the doctrine of equitable subrogation, although it is sometimes referred to as conventional subrogation (as in Illinois) or the doctrine of equitable mortgage. The doctrine has received significant scholarly comment in recent years.[421] See the state-by-state summary of the cases applying the doctrine at the end of this section.

A common formulation of the doctrine of equitable subrogation is stated this way:

> Equitable subrogation is generally appropriate where (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt paid, (4) the subrogee paid off the entire encumbrance, and (5) subrogation would not work any injustice to the rights of the junior lienholder. ... Equitable subrogation is a broad equitable remedy, and therefore it applies not only when these five factors are met, but also "whenever 'one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.'"[422]

Under the doctrine of equitable subrogation, when a new lender pays off a lienholder having priority over the intervening lien, it steps into the senior lienholder's shoes to the amount of the paid-off debt.[423] The doctrine has also been applied when the debt paid by the new lender was something

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[421] Numerous cases involving mortgages and equitable subrogation are recited in Carol Vento, J.P., Annotation, *Discharge of Mortgage and Taking Back of New Mortgage As Affecting Lien Intervening Between Old and New Mortgages*, 43 A.L.R. 5th 519 (1996). The use of the doctrine by title insurers is discussed in Cox and Johnson, *State Equity Doctrine Helps Title Insurers*, National Law Journal February 7, 2000, p. B17. See also John C. Murray, *Equitable Subrogation: Is the Trend Toward the Restatement Approach?*, 21 Probate & Property No. 6 (November/December 2007), p. 18; Mr. Murray's article *Equitable Subrogation: Can a Refinancing Mortgagee Establish Priority Over Intervening Liens?*, 45 Real Property, Trust and Estate Law Journal (Summer 2010), p. 249; Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.Rev. 305; Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 10.6 (5th Ed. 2007) and Restatement (Third) of Property: Mortgages § 7.6.

[422] *Mort v. United States*, 86 F.3d 890 (9th Cir. 1996) (quoting from *Han v. United States*, 944 F.2d 526 (9th Cir. 1991).

[423] In the federal tax code, the federal government consents to the subordination of its tax liens, as discussed below in this section. The IRS Regulation on the application of equitable subrogation to a federal tax lien (§301.6323(i)-1(b)) elaborates that "[t]hus, if a tax lien imposed by section 6321 or 6324 is not valid with respect to a particular interest as against the holder of that interest, then the tax lien also is not valid with respect to that interest as against any person who, under local law, is a successor in interest to the holder of that interest." That regulation gives an example in which a

other than a consensual loan, such as real estate taxes or an income tax lien, as is further discussed below, this section. The purchaser or lender may, in some circumstances, be equitably subrogated to the full amount of the prior lien even if the new lender pays less than the balance of the debt.[424]

The subrogated party is entitled to receive interest on the subrogated amount at the rate which accrued on the loan which was paid off.[425]

The reordering of the priority of two competing liens is not the sole way in which the doctrine is employed.[426] Equitable subrogation may also be used to impose an equitable lien to replace a defective or unenforceable lien, or a mortgage that was not recorded.[427] The doctrine may

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first mortgagee (C) has priority over a tax lien and a second mortgagee (B) does not. The first mortgage is foreclosed. B "pays the amount of the principal and interest in default to C in order to protect the second mortgage against the pending foreclosure of C's senior mortgage. Under local law, B is subrogated to C's rights to the extent of the payment to C. Therefore, the tax lien is invalid against B to the extent he became subrogated to C's rights even though the tax lien is valid against B's second mortgage on the property." Equitable subrogation was used to subordinate a federal tax lien in, for example, *In re Allen*, 32 B.R. 93 (1983); *Pipola v. Chicco*, 274 F.2d 909 (2nd Cir. 1960); *Little v. United States*, 40 AFTR2d 77-5703 (1977); *Mort v. United States*, 86 F.3d 890 (9th Cir. 1996); and *First American Title Ins. Co. v. United States*, 848 F.2d 969 (9th Cir. 1988). In *ContiMortgage Corp. v. United States*, 109 F.Supp.2d 1038 (D.C.Minn. 2000), a lender was found equitably subrogated to the lien priority of mechanic's liens paid at closing. The court also held that the assignee of the loan could assert the equitable subrogation argument standing in the shoes of the original lender.

[424] *Dietrich Industries, Inc. v. United States*, 988 F.2d 568 (5th Cir. 1993).

[425] See *Pipola v. Chicco*, 274 F.2d 909 (1960).

[426] Section 7.6 of the *Restatement (Third) of Property: Mortgages* explains that equitable subrogation may apply in four different types of situations to impose an equitable lien. Thus, while the doctrine is used most commonly to reorder the priority of two liens, that is not its exclusive purpose. See the decisions reported below, this section, in the state-by-state review of the doctrine.

[427] See the later passage in this section for a state-by-state review of equitable subrogation decisions. The following are representative decisions: *Cooper v. Home Owners' Loan Corp.*, 197 Ark. 839, 126 S.W.2d 112 (Ark. 1939) (lender entitled to subrogation to valid mortgage paid off when its own mortgage was unenforceable against one owner who was not competent when she signed); *Woolfolk v. Countrywide Home Loans, Inc.*, 2014 WL 713599 (Cal.App. 2 Dist. 2014) (unpublished) (equitable subrogation used to replace deed of trust on which borrower claimed his wife's signature was forged, despite husband's objection that Countrywide should have discovered forgery by due diligence); *Tribeca Lending Corp. v. Real Estate Depot, Inc.*, 42 So.3d 258, 35 Fla.L. Weekly D1568 (Fla.App. 4 Dist. 2010) (lender entitled to equitable subrogation to stand in shoes of paid off lender when forged deed voided its mortgage); *DeGolyer v. Green Tree Servicing, L.L.C.*, 291 Ga.App. 444, 662 S.E.2d 141 (Ga.App. 2008) (remedy available to cure a defect in the mortgage); *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931) (mortgagee entitled to enforce paid-off lien against owner when mortgage invalid because borrower was insane); *Nesse v. GMAC Mortgage, LLC (In re Barnes)*, 2012 WL 1378449 (Bkcy.D.Md.) (unpublished) (lender entitled to use equitable subrogation when mortgage was not recorded, avoiding bankruptcy trustee's strong-arm powers); *Wells Fargo Bank, N.A. v. Yandoli*, 2013 WL 1489002 (Mass. Land Ct.) (unpublished) (court reformed mortgage to correct deficiency, and held that, if signature had been forged as asserted, court would have imposed lien by equitable subrogation in amount of loan payoff to prevent unjust enrichment, based on Restatement (Third) of Property (Mortgages) § 7.6, comment (d) (1997)); *Hare v. LPP Mortgage Ltd.*, 30 Mass.L.Rptr. 651, 2013 WL 951152 (Mass.Super.) (unpublished) (when wife forged husband's name on mortgage, lender entitled to subrogation through a chain of two paid-off mortgages that had also been forged, back to a valid lien, to impose an equitable lien, based on Restatement § 7.6(a)); *Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735 (6th Cir.(Mich.) 2005) (equitable subrogation does not save mortgage from bankruptcy late-recording preference action); *Avakian v. Citibank N.A.*, 773 F.3d 647 (5th Cir. (Miss.) 2014), reversed and remanded in 2014 WL 6915192 (December 9, 2014)

also be used to permit a buyer or purchase money lender to stand in the shoes of a prior lien.[428] It may also be used to impose a lien against the interest of an owner who did not sign the mortgage,[429]

(doctrine of replacement mortgage used to overcome mortgage of homestead that was void because it was not signed by both spouses, when both spouses evidenced desire to borrow money and grant security interest); *Ethridge v. TierOne Bank*, 226 S.W.3d 127 (Mo. 2007) ("drastic remedy" of equitable subrogation not applied to cure deed of trust invalid on entireties property due to lack of spouse's signature); *In re Day*, 443 B.R. 338 (Bkcy.D.N.J. 2011) (bankruptcy trustee exercising strong-arm powers as putative bona fide purchaser for value beats unrecorded mortgage given by person who never took title, and equitable subrogation not used to replace lien); *In re Project Homestead, Inc.*, 374 B.R. 193 (Bkcy.M.D.N.C. 2007) (doctrine used versus borrower's bankruptcy trustee to protect lenders whose deeds of trust were not recorded by closer); *BankUnited v. Klug*, 2013 -Ohio- 1599, 2013 WL 1707709 (Ohio App. 9 Dist.) (unpublished) (when borrower falsely stated on mortgage that he was unmarried and wife attacked mortgage based on dower interest after foreclosure was completed, lender might be entitled to equitable subrogation if it proves that it was not "guilty of culpable negligence" in accepting the mortgage despite fact that loan application listed borrower as married); *Metropolitan Life Ins. Co. v. Frick*, 61 S.D. 9, 245 N.W. 921 (S.D. 1932) (lender entitled to use the remedy to replace mortgage that was invalid because it was given by a minor); *Brattleboro Savings and Loan Ass'n v. Hardie*, 2014 VT 26, 94 A.3d 1132 (Vt. 2014) (homestead law did not defeat mortgage granted by husband who was in title because wife was not owner, did not live in house, and couple was divorcing; however, if mortgage had been void, concurring justice would have granted equitable subrogation under 27 V.S.A. § 107, which says that protected homesteads are still subject to "attachment and levy of execution"); *Calhoun v. Heidari*, 2003 WL 21804830 (Ohio App. 4 Dist.), 2003 Ohio 4156 (unpublished) (equitable subrogation permitted, overcoming lack of signature on mortgage); *Columbia Community Bank v. Newman Park, LLC*, 177 Wash.2d 566, 304 P.3d 472 (Wash. 2013) (lender tricked into making loan based on fake borrower entity authority documents given equitable lien based on Restatement rule that subrogation is available when lender is induced to pay off debt by "misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition").

[428] See, for example, *Mahfouz v. London*, 2005 WL 158389 (Mich.App.) (unpublished) (buyer entitled to equitable subrogation as to liens paid off by her grantor, to establish equitable lien ahead of gap mortgage; buyer's lien may also include value of improvements she made to property); *Spear v. United States*, 2013 WL 791282 (D.Ariz.) (unpublished) (purchaser and his lender entitled to equitable subrogation to gain priority over estate tax lien of seller estate; lender entitled to be subrogated to position of lien one link back in payoff chain, with court stating that the "fact that the transaction at issue occurred in two steps makes no logical or legal difference"); *Neu v. Gibson*, 928 N.E.2d 556 (Ind. 2010) (although purchasers stand in shoes of paid-off lender to claim priority over junior lien from seller, they do not have power foreclose and cannot extinguish junior mortgage; options are either to sell property and pay off lien or have title insurer pay off junior lien); *Roth v. Porush*, 281 A.D.2d 612, 722 N.Y.S.2d 566, 2001 N.Y. Slip Op. 02712 (N.Y.A.D. 2 Dept. 2001) (purchaser cannot jump ahead of lien by equitable subrogation; knowledge of title insurer bars use of doctrine also); *Bilden Properties, LLC v. Birin*, 165 N.H. 253, 75 A.3d 1143 (N.H. 2013), (purchasers and their lender had inquiry notice of mortgage granted by seller although it recited wrong name for borrower, and took subject to lien; however, they were granted equitable lien in amount of senior mortgages paid off at closing, thus permitting missed lien holder to foreclose, but only after paying buyers amount of paid-off senior lien); *Vogel v. Veneman*, 276 F.3d 729 (5th Cir.(Tex.) 2002) (equitable subrogation protects purchase money mortgage even though conveyance void as circumventing homestead law); *Reyes v. The Bank of New York*, 2009 WL 1942182 (Tex.App.-Dallas) (unpublished) (purchase money lender entitled to use doctrine).

[429] *HSBC Bank SA, N.A. v. D'Agostino*, 2015 WL 3797990 (Conn.Super.) (unpublished) (when only wife signed mortgage, equitable subrogation not used to impose lien on husband's interest under mistaken view that doctrine is limited to reordering priority of competing liens); *Lewallen Revocable Trust v. Fifth Third Mortgage Co.*, 2015 WL 3500462 (Ind.App. 2015) (unpublished) (doctrine used to impose equitable lien on half interest held by son of borrower, who claimed his signature was forged, because otherwise son would be unjustly enriched by lien-free title); *United Carolina Bank v. Beesley*, 663 A.2d 574 (Me. 1995) (lender that paid off prior mortgage entitled to subrogation against co-owners of property).

to secure an advance made by an owner or lender to protect its existing interest in the property, or in other circumstances in which the imposition of an equitable lien will aid justice and prevent a windfall.[430]

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[430] *Stephenson v. Grant*, 168 Ark. 927, 271 S.W. 974 (Ark. 1925) (one who pays off lien to preserve an interest in property is not a volunteer and is entitled to subrogation); *In re Stevenson*, 789 F.3d 197 (D.C.App. 2015) (doctrine employed to impose lien on half interest not mortgaged); *Iowa State Bank & Trust Co. v. Michel,* 683 N.W.2d 95 (Iowa 2004) (equitable mortgage not granted to cure lack of spouse's signature on homestead property); *National City Mortgage Co. v. Ross*, 34 Kan.App.2d 282, 117 P.3d 880 (Kan.App. 2005) (equitable subrogation applied to avoid unjust enrichment, though borrowers' title was no good and rightful owners were still in possession, because owners' mortgages were paid off); *In re Hensley,* 578 Fed.Appx. 530, 2014 WL 4251567 (6th Cir. (Ky.)) (unpublished) (lender barred by passage of time from seeking to impose lien on second parcel by equitable subrogation, although the debt it paid was secured by the parcel); *Washington Mutual Bank v. Smith*, 2006 WL 1506625 (Mich.App.) (unpublished) (equitable subrogation not permitted even to reform mortgage subordination agreement which mistakenly recited mortgage broker rather than lender as benefited party); *Stallings v. Erwin*, 148 Mont. 227, 419 P.2d 480 (Mont. 1966) (recognizing subrogation may be used to give lien on property to party who pays debt of owner); *Crispino v. Greenpoint Mortgage Corp.*, 304 A.D.2d 608, 758 N.Y.S.2d 367 (N.Y.A.D. 2 Dept. 2003) (lender not entitled to equitable subrogation because of unclean hands; loan was to bank officer, who forged wife's signature, causing mortgage to be invalid; assignee of mortgage took subject to equitable defenses); *Carney v. Gil*, 125 A.D.3d 559, 6 N.Y.S.3d 3, 2015 N.Y. Slip Op. 01590 (N.Y.A.D. 1 Dept. 2015) (equitable subrogation not used to grant equitable lien to lender that made loan to limited liability company to replace mortgage court had voided because not all of the LLC members had approved the loan, and not used to impose a lien on the interests of the LLC members who sought the loan and signed the mortgage, due to mistaken impression that doctrine may be used only to reorder priorities); *Deutsche Bank Nat'l Trust Co. v. Roberts*, 233 P.3d 805, 2010 OK CIV APP 47 (Okla.Civ.App. 2010) (assignee of forged mortgage entitled to be subrogated to mortgage paid off); *Fowler v. Rauso*, 425 B.R. 157 (Bkcy.E.D.Pa. 2010) (imposition of equitable lien to prevent unjust enrichment); *In re D'Angelo*, 505 B.R. 650, 59 Bankr.Ct.Dec. 37 (E.D.Pa. 2014) (state court order granting lender equitable subrogation lien not voidable in bankruptcy filed within claimed preference period because order granting lien was not transfer of property of estate); *Cullen, Inc. v. Capital Crossing Preferred Corp.*, 2004 WL 877634 (R.I.Super.) (unpublished) (lender entitled to subrogated lien on property for taxes paid); *Buhl v. McDowell*, 60 S.D. 22, 242 N.W. 638 (S.D. 1932) (co-owner who redeemed taxes entitled to be subrogated against ownership rights of co-owner and spouse); *Bank of New York Mellon v. Goodman*, 2014 WL 1516329 (Tenn.App. 2014) (unpublished) (equitable subrogation denied lender that recorded deed of trust in wrong county, as to two judgment liens that attached before mortgage recorded, despite fact that judgment creditors are not bona fide encumbrancers; court accepted judgment creditor's argument that falling land value would work prejudice if subrogation were permitted, an argument rejected in *Bank of America, N.A. v. Miranda*, 2014 WL 3529768 (Mass. Land Court 2014) (unpublished); *Bank of America, N.A. v. Southeastern Bldg. Corp*., 2015 WL 153701 (M.D.Tenn.) (unpublished) (property owner who agreed to pay for work on property as part of forbearance agreement with lender had no lien by equitable subrogation for value of payments because doctrine is not used to give a lien to one who pays a debt for which he is primarily responsible); *LaSalle Bank N.A. v. White*, 2006 WL 1152337 (Tex.App.-San Antonio) (unpublished) (equitable subrogation salvages home equity mortgage void Texas Constitutional prohibition); *Hulen v. Hamilton*, 2008 WL 553812 (Tex.App.-Fort Worth) (unpublished) (good Samaritan lender was not mere volunteer, and thus entitled to use doctrine to reorder priorities); *In re Kelly*, 2013 WL 6798894 (Bkcy.S.D.Tex.) (unpublished), supplemented in 2014 WL 1330897 (when second lien holder foreclosed and then borrowed money to pay off first deed of trust loan, after which borrower won suit to rescind foreclosure, lender that paid off first lien was granted equitable lien in amount of payoff); *Dees v. Dees*, 2014 WL 2538750 (Tex.App.-Ft. Worth 2014) (unpublished) (man who gave money to his brother to be used to pay off house loan not entitled to equitable subrogation because he did not directly pay off debt, which is required element of equitable subrogation in Texas; also, brother was truly a volunteer because he did not advance money under legal compulsion or to preserve his own right in property);); *Worden v. Smith*, 314 P.3d 1125 (Wash.App. Div. 3 2013) (equitable lien imposed in favor of junior lien holder who bid at sale and whose money was improperly applied to avoid unjust enrichment to party redeeming the foreclosed loan); *Sygitowicz v. United States*, 2007 WL 2496095 (W.D.Wash.) (unpublished)

The Internal Revenue Code recognizes rights by subrogation against a federal tax lien.[431] Section 6323(i)(2) of the Code states:

> Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.[432]

Section 6321 has to do with income tax liens; Section 6324 applies to estate and gift tax liens. A private party may also assert equitable subrogation against the federal government to subordinate the priority of a mortgage made or held by an arm of the federal government, although that waiver of sovereign immunity was not granted by Section 6323 of the tax code.[433]

Courts frequently recite that the priority of two mortgages will not be reordered by use of equitable subrogation when the remedy would work an injustice on the junior lien holder. In order not to cause a change in position to the junior lender, the subrogated party may claim a prior lien only in the amount of the debt secured by the lien that was paid off, plus interest at the paid-off lender's rate. By so limiting the remedy, the intervening lien holder "will be in the same position it was in at the time the [intervening] lien was filed," whereas if equitable subrogation were denied, the intervening lien holder would "receive a windfall, moving up to a better position that it originally had."[434]

(relative who lent money secured by deed of trust who did not know funds were used to pay off prior liens was not entitled to equitable subrogation to those liens to beat federal tax lien); *LaSalle Bank N.A. v. Vogtman,* 2010 WL 1981831 (Wash.App. Div. 1) (unpublished) (equitable subrogation not employed to place lien on half interest of tenant in common who did not sign deed of trust because larger loan amount would prejudice that owner); *Gaub v. Simpson,* 866 P.2d 765 (Wyo. 1993) (person who paid taxes to protect his property interest entitled to subrogation).

[431] This section of the Code applies only to an insured stepping into the shoes of another private party versus the government. It is not intended to establish a right to be subrogated to the Service on payment of a tax lien. To the contrary, when an insurer or insured pays off the IRS, the Service often treats the party as a volunteer. For a discussion of the insurer's right to stand in the IRS's shoes as the Service's subrogee, see §3.4.7.9.

[432] 26 U.S.C. §6323(I)(2). This section was found applicable to equitable subrogation by a lender to a prior lienholder's position, in *Mort v. United States*, 86 F.3d 890 (9th Cir. 1996).

[433] In *Boresek v. United States Dep't of Agriculture,* 2014 WL 4792587 (D.Or.) (unpublished), the court addressed what it believed to be "a matter of first impression in any court, state or federal." The question was whether or not the United States has waived sovereign immunity to permit a private party to assert priority by equitable subrogation over a mortgage held by the federal government. The court noted that many cases have found a waiver of sovereign immunity as to federal tax liens under 26 U.S.C. § 6323(i), because that provision specifically states that the subrogation doctrine may be asserted against such liens. However, in *Boresek,* the private party mortgage holder sued the Department of Agriculture, the holder of a mortgage, to reverse priorities. It sued under 28 U.S.C. § 2410(a)(1), which states that "the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter … to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien." No court had ever held that the quiet title law waived sovereign immunity to challenge a lien priority, but no case had ever held the opposite either. The court walked through the legislative history of the law and a long line of federal decisions to conclude that Congress intended to waive sovereign immunity.

[434] *Fidelity Nat'l Title Ins. Co. v. United States*, 907 F.2d 868, 895 (9th Cir. 1990).

There are a number of limitations on the doctrine that have been imposed by certain states. See the state-by-state review of the cases at the end of this section for a complete analysis of each jurisdiction. For example, some states find reasons to label a lender as a volunteer, which can bar the right to employ the remedy. Other jurisdictions follow the rule that a lender is not a volunteer if the lender intended to receive a first lien, or paid the debt by an agreement, which may be implied or inferred by the payoff of the prior lender.[435] Some courts will not employ the doctrine if the lender had actual knowledge of the intervening lien at the time it made the new loan.[436] However, the lender's knowledge of an intervening lien does not alter the windfall effect to that lien holder if it moves up in priority solely by the fortuity of a new loan that pays off the senior lien. Thus, a number of states have adopted the view that actual knowledge is not a bar, as has the Restatement (Third) of Property: Mortgages §7.6.[437] One court observed that "other jurisdictions have increasingly recognized the flaws in the actual knowledge prohibition, and although actual knowledge bars subrogation in the majority of jurisdictions, this dominant position is being rapidly eroded."[438]

Some states, notably Kentucky and Michigan, generally prohibit employment of equitable subrogation to aid a sophisticated commercial lender. Similarly, some states preclude the use of equitable subrogation when, in the court's determination, the new lender's title insurer has been negligent in performing its title search.[439] Other jurisdictions deny equitable subrogation on the

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[435] *United States v. Baran*, 996 F.2d 25 (2nd Cir. 1993).

[436] Cases holding that actual knowledge bars the new lender from asserting equitable subrogation include *Osterman v. Baber*, 714 N.E.2d 735 (Ind.App. 1999); *Dimeo v. Gesik*, 164 Or.App. 567, 993 P.2d 183 (Or.App. 1999); and *Ripley v. Piehl*, 700 N.W.2d 540 (Minn.App. 2005), rev.den. (Oct. 18, 2005) (equitable subrogation not permitted as to lien filed in recording gap because it imparts constructive notice, rejecting Restatement position). Other states require a lender "to offer an excuse for his failure to discover the intervening lien." See *Hieber v. Florida Nat'l Bank*, 522 So.2d 878 (Fla.App. 3 Dist. 1988), rev.den. 534 So.2d 399 (1988); *Universal Title Ins. Co. v. United States*, 942 F.2d 1311 (8th Cir. 1991); *Coy v. Raabe*, 69 Wash.2d 346, 418 P.2d 728 (1966); *ContiMortgage Corp. v. United States*, 109 F.Supp.2d 1038 (D.C.Minn. 2000); and *Citicorp Mortgage, Inc. v. BancorpSouth Bank*, 2004 WL 2715278 (NO. W2004-00332-COA-R3CV) (Tenn.App. 2004) (unpublished).

[437] Cases holding that actual knowledge does not bar the new lender from asserting equitable subrogation include: *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp.*, 208 Ariz. 478, 95 P.3d 542, 544 (2004); *Houston v. Bank of Am. Fed. Sav. Bank*, 119 Nev. 485, 78 P.3d 71 (2003); *Eastern Savings Bank, FSB, v. Pappas*, 829 A.2d 953 (2003); *Suntrust Bank v. Riverside Nat'l Bank of Florida*, 792 So.2d 1222 (2001); *United States v. Baran*, 996 F.2d 25 (2nd Cir. 1993); and *Dietrich Industries, Inc. v. United States*, 988 F.2d 568 (5th Cir. 1993). The Restatement (Third) of Property: Mortgages § 7.6(a) (1997), codifies equitable subrogation by a mortgagee as follows: "One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee."

[438] *Bank of America v. Wells Fargo Bank, N.A.*, 126 Wash.App. 710, 719-20, 109 P.3d 863, 868 (Wash.App. Div. 1 2005).

[439] See, for example, *Roth v. Porush*, 281 A.D.2d 612, 722 N.Y.S.2d 566, 2001 N.Y. Slip Op. 02712 (N.Y.A.D. 2 Dept. 2001) (knowledge of title insurer bars use of doctrine); *Centreville Car Care, Inc. v. North American Mortgage Co.*, 263 Va. 339, 559 S.E.2d 870 (Va. 2002) (equitable subrogation denied because title searcher for new lender missed intervening lien); *Indymac Mortg. Holdings, Inc. v. Kauffman*, 2001 WL 1683779 (Tenn.App.) (unpublished) (negligent title search bars equitable subrogation); and *Associates Home Equity Services, Inc. v. Franklin Nat'l Bank*, 2002 WL

closely-related grounds that the intervening lien imparts constructive notice, and recording priorities set by a race-notice statute cannot be overturned in aid of equity.[440] These positions completely misapprehend the doctrine, however. Equitable subrogation exists solely in order to reverse lien priority, in order to avoid unjust enrichment to the intervening lien holder that moves up in priority when a prior lien is paid off.

Some courts have considered as a factor that the lender seeking equitable subrogation has the benefit of a title insurance policy, as a reason why the doctrine need not be employed.[441] Other courts have rejected insurance as a factor, recognizing that equitable subrogation exists to prevent unjust enrichment, and insurance favoring one party does not negate the fact of a windfall to the other party. In *Mort v. United States*,[442] the IRS argued that the lender could not even assert the doctrine until it had first pursued its "legal remedies against the title insurer." The trial court agreed, but the Ninth Circuit reversed, holding flatly that "[t]he district court offered no authority in support of its decision not to exercise equity jurisdiction in this case, and we are unable to find any." The court acknowledged that equitable remedies may not be pursued until legal remedies against the same party are exhausted. However, since the lender had no legal remedy against the IRS, there was no bar to equitable relief. The court also rejected the claim by the IRS that the *title insurer* would be unjustly enriched if equitable subrogation were employed, and that the real party in interest in the case was the title insurer. The *Mort* rationale was adopted in *ContiMortgage Corp. v. United*

459007 (Tenn.App.) (unpublished) (equitable subrogation granted prematurely because valid defenses might exist of actual knowledge or negligent title search); *Alegis Group L.P. v. Lerner*, 2004 WL 2647607, 2004-Ohio-6205 (Ohio App. 5 Dist. 2004) (unpublished) (equitable subrogation denied because lender was negligent in not discovering recorded intervening lien).

[440] See for example, *Ripley v. Piehl*, 700 N.W.2d 540 (Minn.App. 2005), rev.den. (Oct. 18, 2005) (equitable subrogation not permitted as to lien filed in recording gap because that lien imparts constructive notice); *S.A. Harms v. Burt*, 40 P.3d 329 (Kan. 2002) (constructive notice of intervening lien precludes equitable subrogation); *Green Tree Credit LLC v. Hopkins*, 9 Misc.3d 1122(A), 2005 WL 2782579 (N.Y.Sup.), 2005 N.Y. Slip Op. 51729(U) (unpublished) (equitable subrogation denied because intervening lien was recorded and thus imparted constructive notice).

[441] In *Community Trust Bank of Mississippi v. First Nat'l Bank of Clarksdale*, 150 So.3d 683 (Miss. 2014), the Mississippi Supreme Court gave many reasons for not applying the doctrine, including that the refinancing lender had title insurance, that the search negligence that caused it not to know about the existing junior lien should be imputed to it as negligence, that the lender had constructive notice of the junior lien, and that the amount of the refinancing lender's debt had been paid down before the priority dispute erupted (which somehow prejudiced the junior lender). The court said: "Other courts have found that the principles of equity required consideration of the negligence of a title insurance company which bungled the transaction in the first place. After all, '[e]ither they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation.' *Lawyers Title Ins. Corp. v. Capp*, 174 Ind.App. 633, 369 N.E.2d 672, 674 (1977)." However, *Capp* involved policy subrogation rights, not equitable subrogation. Further, Indiana has codified the equitable subrogation doctrine by statute, and the law specifically states that insurer negligence is not a defense to the use of the doctrine. See the discussion of the Indiana statute in the state-by-state review at the end of this section. The title insurance argument was rejected in a lengthy and scholarly opinion in *Bank of America, N.A. v. Diamond Financial, LLC*, 88 Mass.App.Ct. 564, 42 N.E.3d 1151 (Mass.App. 2015), in which the court noted that the purpose of the doctrine is to prevent a windfall to a junior lender.

[442] 86 F.3d 890 (9th Cir. 1996).

States,[443] in which a lender paid off a mortgage and several construction liens in a refinance loan. A federal tax lien was filed in the recording gap just before closing. The borrower told the loan broker that he was negotiating with the IRS on some taxes. After foreclosure, the lender brought a quiet title action under 28 U.S.C. § 2410(a)(1) against the IRS to claim priority by equitable subrogation. The court rejected the argument by the IRS that the insurer was the real party in interest, and was not entitled to reorder priorities under equitable subrogation. However, in *First Federal Savings Bank of Wabash v. United States*,[444] also involving a lender's claim of equitable subrogation as to a federal tax lien, the Seventh Circuit accepted the government's argument that "the title insurer, and not First Federal, is the real party in interest here." The court held that a bank, "as a sophisticated lender with no use for the mortgage property other than as collateral, ... was able to obtain title insurance to contract against the risk of errors such as the one that occurred here." Thus, the court denied equitable subrogation because it viewed the case as merely "an attempt by the insurer to shift some of its expected payout cost to the public fisc."

The following is a state-by-state review of the cases that have considered the equitable subrogation doctrine.

Alabama

Shields v. Hightower, 214 Ala. 608, 108 So. 525 (1926); *Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co.*, 253 Ala. 54, 42 So.2d 829 (1949) (establishing five-element test for doctrine); *Whitson v. Metropolitan Life Insurance Co.*, 225 Ala. 262, 142 So. 564 (1932) (mere constructive notice does not bar use of doctrine); *Brooks v. Resolution Trust Corp.*, 599 So.2d 1163 (Ala.1992) (doctrine available when lender has no actual knowledge of intervening lien); *Stewart v. AmSouth Mortgage Co., Inc.*, 679 So.2d 247 (Ala.Civ.App. 1995) (lender's negligence bars imposition of lien against tenant in common); *Ex parte Lawson*, 6 So.3d 7 (Ala. 2008); *Lawson v. Brian Homes, Inc*., 6 So.3d 1 (Ala.Civ.App. 2006) (employing doctrine and Restatement position to subordinate mechanic's lien claims); *Foster v. Porter Bridge Loan Co., Inc.*, 27 So.3d 481 (Ala. 2009) (doctrine applies when lender has no actual knowledge of intervening lien, extensive discussion of doctrine and Restatement position).

Alaska

Rush v. Alaska Mortgage Group, 937 P.2d 647 (Alaska 1997) (holding that doctrine of equitable subrogation prevents unjust enrichment as a result of the inadvertent release of a security interest in land, and that unless the intervening creditor detrimentally relied on the release of the refinanced lien, it would be unjustly enriched if it obtained the senior lien by the fortuity of that release; also, the refinancing lender's actual knowledge of the intervening lien does not bar application of the doctrine).

Arizona

Peterman-Donnelly Engineers and Contractors Corp. v. First National Bank of Arizona, 2

[443] 109 F.Supp.2d 1038 (D.C.Minn. 2000).

[444] 118 F.3d 532 (7th Cir. (Ind.) 1997).

Ariz.App. 321, 408 P.2d 841 (1965); *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp.*, 208 Ariz. 478, 95 P.3d 542 (Ariz.App. Div. 2 2004) (adopting Restatement position on doctrine, and finding earlier decisions consistent with that formulation of rule); *In re Mortgages Ltd.*, 444 B.R. 585 (Bkcy.D.Ariz. 2011) (lender entitled to stand in shoes of deed of trust it paid off that had priority over mechanic's lien claimants); *In re Gutang*, 2011 WL 2457647 (Bkcy.D.Ariz.) (unpublished) (unrecorded mortgage entitled to priority over equity loan paid off but drawn on after closing); *Sourcecorp, Inc. v. Norcutt*, 229 Ariz. 270, 274 P.3d 1204 (Ariz. 2012) (Supreme Court grants equitable subrogation to buyers to let them stand in shoes of mortgage they paid off to defeat judgment lien junior to mortgage, rejecting argument that remedy should be denied a person having title insurance); *In re Mortgages Ltd.*, 482 B.R. 298, 57 Bankr.Ct.Dec. 19 (D. Ariz. 2012) (construction lender not entitled to equitable subrogation for priority over mechanic's liens because lender knew work had commenced before its deed of trust was recorded and protected itself with title insurance and indemnities); *Spear v. United States*, 2013 WL 791282 (D.Ariz.) (unpublished) (purchaser and his lender entitled to equitable subrogation to gain priority over estate tax lien of seller estate; lender entitled to be subrogated to position of lien one link back in payoff chain, with court stating that the "fact that the transaction at issue occurred in two steps makes no logical or legal difference"); *Brimet II, LLC v. Destiny Homes Marketing, LLC*, 231 Ariz. 457, 296 P.3d 993, 651 Ariz. Adv. Rep. 11 (Ariz.App. Div. 1 2013) (equitable subrogation denied lender seeking to beat option to purchase because it would have to go back two steps in payoff chain, and first leg was a replacement loan that did not qualify for subrogation because it did not have same terms as loan it paid off); *Weitz Company L.L.C. v. Heth*, 235 Ariz. 405, 333 P.3d 232014 (Ariz. 2014) (mechanic's lien has no special status that prohibits lender from obtaining priority over such lien by equitable subrogation under same principles applied to other lien priority disputes, declining to adopt the reasoning to the contrary by the Nevada Supreme Court in *Fontainebleau Las Vegas Holdings, LLC v. A1 Concrete Cutting & Demolition, LLC*, 289 P.3d 1199, 128 Nev. Adv. Op. 53 (2012)); *Estate of Perkins v. Perkins*, 2016 WL 3660237 (Ariz.App. 1 Div.) (unpublished) (court affirmed complicated balancing of equitable remedies, including lien by equitable subrogation and constructive trust, to balance rights of several owners in property owned jointly; one owner paid off loan secured by property); *Bank of America, N.A. v. Felco Business Services, Inc. 401(K) Profit Sharing Plan*, 243 Ariz. 150, 403 P.3d 150 (Ariz.App. 1 Div. 2017) (equitable subrogation claim not waived if lender does not object to trustee's sale of intervening deed of trust); *U.S. Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 398 P.3 118, 242 Ariz. 502 (Ariz.App. 1 Div. 2017) (refinance lender entitled to replacement lien up to balance of old first loan with priority over HELOC paid to zero, but no equitable subrogation for amount advanced to pay off HELOC); *2977 Camino Las Palmeras, LLC v. Deutsche Bank Nat'l Trust Co*., 2019 WL 2591565 (Ariz.App. 2 Div.) (unpublished) (court left in abeyance the question of whether a lender is entitled to first lien position based on equitable subrogation when first lien is paid off by lender's title insurer rather than lender, but provided a useful analysis).

Arkansas

Stephenson v. Grant, 168 Ark. 927, 271 S.W. 974 (Ark. 1925) (one who pays off lien to preserve an interest in property is not a volunteer and is entitled to subrogation); *Cooper v. Home Owners' Loan Corp.*, 197 Ark. 839, 126 S.W.2d 112 (Ark. 1939) (lender entitled to subrogation to valid mortgage paid off when its own mortgage was unenforceable against one owner who was not competent when she signed); *C & M Construction Co., Inc. v. Simmons First Nat'l Bank*, 261 Ark. N-310, 1977 WL 652 (Ark.) (unpublished) (subrogation granted); *Newberry v. Scruggs*, 336 Ark. 570, 986 S.W.2d 853 (1999) (right of equitable subrogation not defeated by claim that title insurer was lender's agent and its negligence in search should be imputed to lender); *In re Francis*, 2013 WL 773458 (W.D.Ark.) (unpublished) (when borrower alerted lender that legal description on mortgage was wrong and lender did not fix it, lender was not entitled to equitable subrogation to obtain priority over liens borrower put on property later).

California

Grant v. de Otte, 122 Cal.App.2d 724, 265 P.2d 952 (Cal.App. 4 Dist. 1954); *Employers Mutual Liability Ins. Co. v. Pacific Indemnity Co.*, 167 Cal.App.2d 369, 334 P.2d 658 (Cal.App. 1 Dist. 1959); *Smith v. State Savings and Loan Ass'n*, 175 Cal.App.3d 1092, 223 Cal.Rptr. 298 (Cal.App. 2 Dist. 1985); *California Land Title Ass'n v. Emslie*, 175 Cal.App.3d 1001, 221 Cal.Rptr. 332 (Cal.App. 4 Dist. 1986), petition for review granted, 714 P.2d 1283, 224 Cal.Rptr. 100, and dismissed as moot (May 29, 1986); *Lennar Northeast Partners v. Buice Revocable Living Trust*, 57 Cal.Rptr.2d 435 (Cal.App. 3 Dist. 1996); *Han v. United States*, 944 F.2d 526, 529 (9th Cir. (Cal.) 1991); *Holta v. Concorde Acceptance Corp.*, 2004 WL 2095625 (Cal.App. 4 Dist.) (unpublished) (equitable subrogation not denied on grounds that lender was negligent by allowing new loan documents to be forged, because intervenor would receive windfall); *In re Deuel*, 594 F.3d 1073 (9th Cir. (Cal.) 2010) (lender whose mortgage was not recorded when borrower filed bankruptcy did not beat trustee's strong-arm powers, but may have prevailed if reconveyance on paid-off loan had not been recorded on date of petition); *United States v. Jones*, 2011 WL 176752 (N.D.Cal.), 107 A.F.T.R.2d 2011-499, 2011-1 USTC P 50,167 (unpublished) (woman who got condo in divorce action, subject to federal tax lien against ex-husband, not entitled to equitable subrogation to reduce amount payable to IRS on sale of property); *Wachovia Mortgage, FSB v. Anyway Bail Bonds Inc.*, 2011 WL 17926 (Cal.App. 2 Dist.) (unpublished) (equitable subrogation granted; loan underwriting documents showed that lender expected to have first position; court rejected intervening lien holder's argument that lender had constructive notice of lien, noting that "the doctrine *always* presupposes a later recorded document having priority—for equitable reasons—over an earlier recorded one"); *Silva v. Bank of America, N.A.*, 2012 WL 6015945 (Cal.App. 6 Dist.) (unpublished) (lender not granted equitable subrogation to obtain priority over seller take-back trust deed because seller would be stiffed on sale proceeds if his lien was second); *Residential Credit Solutions, Inc. v. Adigwe*, 2013 WL 6325092 (Cal.App. 2 Dist.) (unpublished) (lender that refinanced existing senior debt during pendency of suit that culminated in order for transfer of title subject to old first lien was not entitled to have judgment reformed to state that title was subject to new lien, although effect was to give creditor title free of liens); *Citizens Business Bank v. Gevorgian*, 218 Cal.App.4th 602, 160 Cal.Rptr.3d 49 (Cal.App. 2 Dist. 2013) (commercial lender denied equitable subrogation to obtain priority over seller deed of trust, although seller had agreed to subordinate lien, because seller was not told of side agreement that contradicted and materially changed terms of construction loan agreement as disclosed to seller); *Woolfolk v. Countrywide Home Loans, Inc.*, 2014 WL 713599 (Cal.App. 2 Dist. 2014) (unpublished) (equitable subrogation used to replace deed of trust on which borrower claimed his wife's signature was forged, despite husband's objection that Countrywide should have discovered forgery by due diligence); *Branscomb v. JPMorgan Chase Bank N.A.*, 223 Cal.App.4th 801, 167 Cal.Rptr.3d 547, 14 Cal. Daily Op. Serv. 1206 (Cal.App. 1 Dist. 2014) (refinance lender granted equitable subrogation over third deed of trust lender not paid from refinance closing because escrowee accepted statement from its agent saying creditor would release deed of trust without payment; JPMorgan's actual knowledge of junior deed of trust did not bar use of equity, because it lent in reliance on promise of reconveyance; alleged negligence of escrowee not ascribed to JPMorgan to deny equity); *Kibby Road, LLC v. Northern Trust Co.*, 2015 WL 2198724 (N.D.Calif. 2015) (unpublished) (purchaser at trustee's sale could not use equitable subrogation to extinguish liens senior to the one foreclosed); *Nautilus, Inc. v. Chao Chen Yang*, 11 Cal.App.5th 33, 217 Cal.Rptr.3d 458 (Cal.App. 4 Dist. 2017) (holder of reverse mortgage had priority over judgment by equitable subrogation; remedy not denied because title insurer was funding lien priority lawsuit); *Francis v. JPMorgan Chase Bank, N.A.*, 2017 WL 432818 (Cal.App. 2 Dist.) (unpublished) (lender entitled to equitable subrogation to gain priority over second deed of trust despite junior lender's claim that lender has actual knowledge of its lien, because new lender expected to have first lien); *Bank of New York Mellon v. Citibank, N.A.*, 8 Cal.App.5th 935, 214 Cal.Rptr.3d 504 (Cal.App. 2 Dist. 2017) (equitable subrogation governed by statute of limitations in Civil Code § 882.020, which says deed of trust expires 10 years after note's maturity date, so correct bar date for foreclosing on equitable lien is ten years from maturity dates of secured note); *Ornstein v. Canites*, ___ F.Supp.3d ___, 2019 WL 2247778 (N.D.Cal. 2019) (not yet released for publication) (lender entitled to lien by equitable subrogation to stand in shoes of four deeds of trust paid off with loan, achieving superiority over federal tax liens and other liens against property owners).

Colorado

West Fed. Sav. & Loan Ass'n of Denver v. Ben Gay, Inc., 164 Colo. 407, 436 P.2d 121 (1967) (lender with actual knowledge of intervening lien still entitled to remedy when induced by mistake of fact to satisfy senior deeds of trust); *Hicks v. Londre*, 125 P.3d 452 (Colo. 2005) (equitable subrogation available to buyer and lender to prevent unjust enrichment of intervening creditor); *Land Title Ins. Corp. v. Ameriquest Mortgage Co.*, 207 P.3d 141 (Colo. 2009) (equitable subrogation denied when old mortgage satisfied several months before new mortgage was recorded, giving impression from records that property was free and clear); *Bank of New York Mellon v. Mulei*, 885 F.Supp.2d 1075 (D.Colo. 2012) (equitable subrogation denied when lender first claimed priority after competing mortgage had been foreclosed, not redeemed, and sold at auction to a third party bidder, who would be prejudiced by unwinding of sale).

Connecticut

Home Owners' Loan Corp. v. Sears, Roebuck & Co., 123 Conn. 232, 193 A. 769 (1937); *Connecticut Nat'l Bank v. Chapman*, 153 Conn. 393, 216 A.2d 814 (1966) (doctrine employed to avoid unjust enrichment); *Independence One Mortgage Corp. v. Katsaros*, 43 Conn.App. 71, 681 A.2d 1005 (1996) (doctrine applied when lender had no actual knowledge of intervening lien); *Rosenblitt v. Williams*, 57 Conn.App. 788, cert. denied, 254 Conn. 906 (2000) (lender subrogated to position of earlier mortgage holder when borrower took payoff money rather than making payoff); *EquiCredit Corp. of Conn. v. Kasper*, 2007 WL 1676805 (Conn.Super. 2007) (unpublished) (actual knowledge bars use of doctrine); *Deutsche Bank Nat'l Trust Co. v. DelMastro*, 133 Conn.App. 669, 38 A.3d 166, cert. denied, 304 Conn. 917, 40 A.3d 783 (2012) (actual knowledge bars use of doctrine); *Bank of America, N.A. v. Bertocki*, 2012 WL 2335280 (Conn.Super.) (unpublished) (doctrine not used to impose lien against interest of spouse who did not sign mortgage); *Interstate Advisor, LLC v. McCalla*, 2012 WL 5860389 (Conn.Super.) (unpublished) (actual knowledge not a bar to use of doctrine when refinancing lender paid off line of credit lender who agreed to release lien bit reneged); *Wells Fargo Bank, N.A. v. D'Occhio*, 2013 WL 1407197 (Conn.Super.) (unpublished) (equitable subrogation denied because bank failed to get husband's signature on mortgage despite title report showing husband as owner of record and junior lender advanced money *after* rather than before refinance loan closing and thus was not an intervening lender); *HSBC Bank SA, N.A. v. D'Agostino*, 2015 WL 3797990 (Conn.Super.) (unpublished) (when only wife signed mortgage, equitable subrogation not used to impose lien on husband's interest under mistaken view that doctrine is limited to reordering priority of competing liens); *AJJ Enterprises, LLP v. Jean-Charles*, 160 Conn.App. 375, 125 A.3d 618 (Conn.App. 2015) (actual knowledge of intervening lien does not bar remedy, because "[t]he object of subrogation is the prevention of injustice," and Restatement view adopted); *Eastern Savings Bank v. Chiavarini*, 2016 WL 3026680 (Conn.Super. 2016) (unpublished) (refinancing lender granted priority over home equity mortgage not released after lender was paid in full, and on which lender advanced new money; court found that revolving credit lender was more careless than refinancing lender, and that borrower's request for payoff letter "signified an intention on the borrowers' part to conclude the HELOC arrangement"); *Connecticut Community Bank, N.A. v. Kiernan*, 2018 WL 1769732 (Conn.Super.) (unpublished) (reiterating Connecticut stance that party entitled to reorder priority of liens only after balancing of "blame-worthiness" of respective parties' conduct; court refused to rule on summary judgment if prior lien should be subordinated because later lender relied on release of prior lien); *JPMorgan Chase Bank, N.A. v. Montanaro*, 66 Conn.L.Rptr. 218, 2018 WL 1936656 (Conn.App.) (unpublished) (lender not entitled to equitable subrogation because it did not prove that loan money was used to pay off prior valid lien; court quoted from Restatement (Third) Property, Mortgages § 7.6, but did not quote passage stating that lender is entitled to equitable lien to avoid borrower unjust enrichment).

<u>Delaware</u>

Ocwen Loan Servicing, LLC v. SFJV-1, LLC, 2011 WL 2175995 (Del.Super.) (unpublished) (equitable subrogation claim dismissed because remedy is available only in chancery court); *Travelers Cas. & Sur. Co. of Am. v. Colonial Sch. Dist.*, 2001 WL 287482 (Del. Ch.) *(quoting Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 137 (1962)) (describing equitable subrogation as a remedy under which "a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed").

<u>District of Columbia</u>

Burgoon v. Lavezzo, 68 App. D.C. 20, 92 F.2d 726, 113 A.L.R. 944 (D.C. 1937) (doctrine applied); *Eastern Savings Bank, FSB v. Pappas*, 829 A.2d 953 (D.C.App. 2003) (adopting equitable subrogation to avoid windfall, citing but not adopting Restatement position because no actual knowledge of lien); *HSBC Bank USA, N.A. v. Mendoza*, 11 A.3d 229 (D.C.App. 2010) (lender that paid off old loan entitled to intervene and assert subrogation rights in lawsuit brought by purchaser for breach of purchase contract); *OneWest Bank, FSB v. Marshall*, 18 A.3d 715 (D.C.App. 2011) (equitable subrogation granted); *In re Stevenson*, 789 F.3d 197 (D.C.App. 2015) (doctrine employed to impose lien on half interest not mortgaged).

Florida

Federal Land Bank of Columbia v. Godwin, 107 Fla. 537, 145 So. 883 (Fla. 1933) (approving remedy); *Palm Beach Savings & Loan Ass'n, F.S.A. v. Fishbein*, 619 So.2d 267 (Fla. 1993) (approving remedy); *Suntrust Bank v. Riverside Nat'l Bank of Fla.*, 792 So.2d 1222, 26 Fla.L. Weekly D2109 (Fla.App. 4 Dist. 2001), reh.den. (remedy approved, actual and constructive notice defense rejected); *Tribeca Lending Corp. v. Real Estate Depot, Inc.*, 42 So.3d 258, 35 Fla.L. Weekly D1568 (Fla.App. 4 Dist. 2010) (lender entitled to equitable subrogation to stand in shoes of paid off lender when forged deed voided its mortgage); *Brotheridge v. Option One Mortgage Corp.*, 67 So.3d 254, 35 Fla. L. Weekly D2519 (Fla.App. 2 Dist. 2011), reh.den. Jan. 20, 2011 (subrogation may be available, but case remanded due to irregularities in loan closing, and question of whether or not borrower signed paid-off mortgage); *Spikes v. OneWest Bank FSB*, 106 So.3d 475 (Fla.App. 4 Dist. 2012) (purchase money mortgage on homestead not signed by non-titled spouse, was valid; equitable subrogation not necessary to impose equitable lien in place of mortgage); *Amegy Bank Nat'l Ass'n v. Deutsche Bank Corp.*, 917 F.Supp.2d 1228, 24 Fla. L. Weekly Fed. D 95 (M.D.Fla. 2013) (equitable subrogation denied to lender that paid *down* a mortgage loan debt without paying it off in full, since Florida formulation of doctrine requires proof that lender "made a payment to pay off a debt"); *AG Group Investments, LLC v. All Realty Alliance Corp.*, 106 So.3d 950 (Fla.App. 3 Dist. 2013) (company that bought loan several days before foreclosure sale stepped into lender's shoes by equitable subrogation); *Nikooie v. JPMorgan Chase Bank, N.A.*, 183 So.3d 424, 39 Fla. L. Weekly D2562 (Fla.App. 3 Dist. 2014) (lender that refinanced its own existing debt entitled to equitable senior lien under replacement mortgage doctrine as stated in Section 7.3 of the Restatement); *Wells Fargo Bank, N.A. v. Clavero*, 201 So.3d 72, 40 Fla. L. Weekly D2056 (Fla.App. 3 Dist. 2015) (although equitable subrogation can be used to impose equitable lien in place of mortgage defective because not signed by all owners, remedy refused because new loan money did not pay off prior lien or benefit real estate); *Cone v. U.S. Bank Trust, N.A.*, 265 So.3d 698, 46 Fla. L. Weekly D575 (Fla.App. 4 Dist. 2019) (equitable subrogation used to grant valid lien to lender to replace mortgage on homestead signed only by husband; court rejected wife's claim that equitable subrogation should be used only when there is proof of fraud or egregious misconduct; doctrine used to prevent unjust enrichment).

Georgia

Merchants' & Mechanics' Bank v. Tillman, 106 Ga. 55, 31 S.E. 794 (1898) (doctrine recognized); *Davis v. Johnson*, 241 Ga. 436, 246 S.E.2d 297 (1978) (actual knowledge, but not constructive notice, may be bar to use of doctrine); *Gordon v. Novastar Mortgage, Inc. (In re Hedrick),* 524 F.3d 1175 (11th Cir. 2008) (equitable subrogation permitted unless new lender guilty of inexcusable neglect or intervening lien holder would be prejudiced); *Bankers Trust Co. v. Hardy*, 281 Ga. 561, 640 S.E.2d 18 (2007) (equitable subrogation permitted unless new lender guilty of inexcusable neglect or intervening lien holder would be prejudiced); *Greer v. The Provident Bank, Inc.,* 282 Ga.App. 566, 639 S.E.2d 377 (Ga.App. 2006) (buyer at nonjudicial sale not entitled to take free of subrogation when prior paid-off lien was still of record at time of sale); *Secured Equity*

Financial, LLC v. Washington Mutual Bank, F.A., 293 Ga.App. 50, 666 S.E.2d 554, 08 FCDR 2202 (Ga.App. 2008), recons.den. July 25, 2008, cert.den. Nov. 3, 2008 (lender not entitled to summary judgment of equitable subrogation when foreclosure sale already conducted and effect would be to extinguish now-junior lien, and new loan was for more money); *DeGolyer v. Green Tree Servicing, L.L.C.*, 291 Ga.App. 444, 662 S.E.2d 141 (Ga.App. 2008) (remedy available to cure mortgage deficiency, but mortgage reformed instead); *Byers v. McGuire Properties, Inc.*, 679 S.E.2d 1 (Ga. 2009); *Bayview Loan Servicing, LLC v. Baxter*, 312 Ga.App. 826, 720 S.E.2d 292, 11 FCDR 3919 (Ga.App. 2011) [earlier decision 301 Ga.App. 577, 688 S.E.2d 363 (2009)] (lender subrogated to payoff amount; competing party entitled to no more than difference between that amount and bid at foreclosure sale); *Chase Manhattan Mortgage Corp. v. Shelton*, 290 Ga. 544, 722 S.E.2d 743 (Ga. 2012) (when lien was invalid in part because minor children were in title, lender's "inexcusable neglect" in failing to have guardian appointed barred right to equitable subrogation, even though borrower got lien-free house due to his own duplicity or sloth); *Citifinancial Services, Inc. v. Varner*, 320 Ga.App. 170, 739 S.E.2d 477 (Ga.App. 2013) (lender entitled to equitable subrogation to trump deed from borrower to his mother recorded before mortgage, which mother admitted was a dodge to prevent foreclosure; lender's error in not locating the deed in public records before closing was not sufficiently egregious to thwart use of doctrine); *915 Indian Trail, LLC v. State Bank and Trust Co.*, 328 Ga.App. 524, 759 S.E.2d 654 (Ga.App. 2014) (equitable subrogation granted to give intended first lien holder priority; priorities reordered after foreclosure by junior lien holder); *Roberts v. Smith*, 341 Ga.App. 823, 801 S.E.2d 915 (Ga.App. 2017) (brother who bought house for benefit of himself and siblings not entitled to foreclose siblings by standing in shoes of lender by equitable subrogation, because payoff of loan was as borrower, not third party protecting its interest in property); *Bank of New York Mellon v. Edmondson*, 344 Ga.App. 823, 812 S.E.2d 299 (Ga.App. 2018) (lender that did not record security deed denied equitable subrogation, despite borrowers' admission that they got loan money, because borrowers denied having signed security deed; court said loan assignee had unclean hands and had failed to "avail itself of the proper legal remedies upon discovering the ... [s]ecurity [d]eed was not recorded, and therefore, is chargeable with inexcusable and/or culpable neglect"); *In re Greiner*, ___ B.R. ___, 2019 WL 1282911 (Bkcy.N.D.Ga. 2019) (not yet released for publication) (equitable subrogation lien ceases when paid-off security deed is satisfied of record, at least against bankruptcy trustee's powers).

Hawaii

Hawaiian Government v. Cartwright, 8 Hawai'i 697 (1890); *Peters v. Weatherwax*, 69 Hawai'i 21, 731 P.2d 157 (1987) (recognizing equitable subrogation); *Olson v. Coronel*, 106 Hawai'i 390, 105 P.3d 666, 2005 WL 333910 (Hawai'i) (Table) (unpublished); *Beneficial Hawaii, Inc. v. Kida*, 96 Hawai'i 289, 30 P.3d 895 (2001) (although subrogation doctrine is valid, it is not available to place lender in shoes of purchaser, who had no lien).

Idaho

Wilson v. Wilson, 6 Idaho 597, 57 P. 708 (1899) (volunteer not entitled to subrogation); *Peterson v. Hague*, 51 Idaho 175, 4 P.2d 350 (1931) (mortgagee entitled to enforce paid-off lien against owner when mortgage invalid because borrower insane); *Gerken v. Davidson Grocery Co.*, 57 Idaho 670, 69 P.2d 122 (1937) (explaining doctrine); *Hill v. Federal Land Bank*, 59 Idaho 136, 80

P.2d 789 (1938) (if foreclosure were set aside, lender would be entitled to subrogation); *Williams v. Johnston*, 92 Idaho 292, 442 P.2d 178 (1968) (subrogee may not be volunteer); *Metropolitan Life Ins. Co. v. First Security Bank of Idaho*, 94 Idaho 489, 491 P.2d 1261 (1971) (equitable subrogation recognized but not applied to give lender priority over mechanic's liens); *Cozzetto v. Wisman*, 120 Idaho 721, 819 P.2d 575 (Ct.App.1991); *Hoopes v. Hoopes*, 124 Idaho 518, 861 P.2d 88 (Idaho App. 1993); *Rowan v. Riley*, 139 Idaho 49, 72 P.3d 889, 50 UCC Rep.Serv.2d 1127 (Id. 2003).

Illinois

LaSalle Bank, N.A. v. First American Bank, 316 Ill.App.3d 515, 736 N.E.2d 619, 249 Ill.Dec. 425 (Ill.App. 1 Dist. 2000) (Illinois gives lender priority of paid-off mortgagee based on conventional, rather than equitable, subrogation); *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill.App.3d 700, 734 N.E.2d 493, 248 Ill.Dec. 565 (Ill.App. 2 Dist. 2000) (as in *LaSalle*, lender must show "express (though not necessarily written) agreement that [it] will then be in the position of the prior lienor"); *United Community Bank v. Prairie State Bank & Trust*, 2012 IL App (4th) 110973, 972 N.E.2d 324, 361 Ill.Dec. 839 (Ill.App. 4 Dist. 2012) (searcher error and title insurance coverage do not justify giving windfall to intervening lienholder); *Deutsche Bank Nat'l Trust Co. v. Payton*, 2016 IL App (1st) 160305-U, 2017 WL 716024 (Ill.App. 1 Dist. 2017) (unpublished) (purchase money lender subrogated to valid seller mortgage to defeat sellers' claim that deed was forged, because otherwise sellers would be unjustly enriched); *U.S. Bank, N.A. v. Placek*, 2018 IL App (1st) 172128-U, 2018 WL 2308751 (Ill.App. 1 Dist.) (unpublished) (lender granted equitable subrogation as to two liens paid off by loan proceeds and equitable lien on property; decision contains scholarly review of Illinois decisions on equitable subrogation); *Wilmington Savings Fund Society, FSB v. Zarkhin*, 2019 IL App (2d) 180439, 125 N.E.3d 470, 429 Ill.Dec. 764 (Ill.App. 2 Dist. 2019) (court applied conventional subrogation to place refinancing lender in lien position of two mortgagees it paid off, although one prior loan was also paid off with money from another loan; court reasoned that to "deny subrogation would provide a windfall to" the junior lender); *Lobo IV, LLC v. V Land Chicago Canal, LLC*, ___ N.E.3d ___, 2019 IL App (1st) 170955, 2019 WL 1332925 (2019) (not yet released for publication) (mortgage granted after signing of purchase contract takes priority over purchaser's interest to extent loan money used to pay off mortgage recorded before purchase contract, under both conventional and equitable subrogation); *Paliatka v. RJEM, LLC*, 2019 IL App (1st) 182436-U, 2019 WL 2850200 (Ill.App. 1 Dist.) (unpublished) (person related to owner who paid off prior loan not entitled to subrogation to defeat claims of buyer who was promised title free of liens).

Indiana

Indiana adopted a statute providing that equitable subrogation may not be denied a lender because of constructive notice of the intervening lien or the fact that the lender obtained a title insurance policy. Ind.Code § 32-29-1-11 was added by Pub.L. No. 2-2002, § 14 (eff. July 1, 2002), amended by Pub.L. No. 122-2003, § 1 (eff. July 1, 2003), Pub.L. No. 151-2003, § 2 (eff. July 1, 2003) and Pub.L. No. 2-2005, § 86. The current leading case is *Bank of New York v. Nally*, 820 N.E.2d 644, 651 (Ind. 2005), which permitted equitable subrogation despite notice of the intervening lien, finding the lender not guilty of "culpable negligence" due to its failure to discover the intervening recorded lien. *Nally* adopted the Restatement position. The statute overturned, and *Nally* distinguished, *Osterman v. Baber*, 714 N.E.2d 735 (Ind.App. 1999), which denied the use of equitable subrogation because the lender failed to update title before closing, and was thus "culpably negligent," and *Wilshire Servicing Corp. v. Timber Ridge Partnership*, 743 N.E.2d 1173 (Ind.App. 2001), reh.den. (equitable subrogation denied on assumption that lender's title insurer made mistake, relying on *Osterman*). See also *Liberty Mortgage Corp., Inc. v. National City Bank*, 755 N.E.2d 639 (Ind.App. 2001) (lender that paid off the borrower's equity loan but did not close account not entitled to equitable subrogation); *Gibson v. Neu*, 867 N.E.2d 188 (Ind.App. 2007) (doctrine may not be denied just because the person has title insurance, and extended doctrine to use by purchasers); *Neu v. Gibson*, 928 N.E.2d 556 (Ind. 2010) (although purchasers stand in shoes of paid-off lender to claim priority over junior lien from seller, they do not have power foreclose and cannot extinguish junior mortgage; options are either to sell property and pay off lien or have title insurer pay off junior lien); *JP Morgan Chase Bank v. Howell*, 876 N.E.2d 1171 (Table), 2007 WL 4126473 (Ind.App.) (unpublished) (doctrine used to give refinancing first lender priority over equity loan not quite paid off at closing); *Bank of America, N.A. v. Ping*, 879 N.E.2d 665 (Ind.App. 2008) (new lender's failure to tell revolving credit lender to close account was "culpable negligence" under *Wilshire* standard, barring use of doctrine); *McIntyre Brothers, Inc. v. Henderson*, 940 N.E.2d 862 (Table), 2010 WL 5536347 (Ind.App.) (unpublished) (lender entitled to priority over mechanic's lien; equitable subrogation statute is not read to *deny* remedy to lender who gets title insurance, as to mechanic's lien claimant); *Finance Center Federal Credit Union v. Brand*, 967 N.E.2d 1080 (Ind.App. 2012) (equitable subrogation used to give priority over revolving credit mortgage paid to zero at refinance closing); *Lewallen Revocable Trust v. Fifth Third Mortgage Co.*, 2015 WL 3500462 (Ind.App. 2015) (unpublished) (doctrine used to impose equitable lien on half interest held by son of borrower, who claimed his signature was forged, because otherwise son would be unjustly enriched by lien-free title).

Iowa

Gilbert v. Sanderson, 56 Iowa 349, 9 N.W. 293, 41 Am.Rep. 103 (Iowa 1881) (recognizing that doctrine has been employed in other states); *Home Owners' Loan Corp. v. Rupe*, 225 Iowa 1044, 283 N.W. 108 (1938) (refinancing lender entitled to lien by subrogation against interest of wife when attorney title opinion did not note deed putting wife in title); *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95 (Iowa 2004) (equitable mortgage not granted to cure lack of spouse's signature on homestead property); *Wells Fargo Bank, N.A. v. Hudson*, 742 N.W.2d 605 (Table), 2007 WL 3085791 (Iowa App.) (unpublished) (same facts and result as in *Iowa State Bank*); *Klotz v. Klotz*, 440 N.W.2d 406 (Iowa App. 1989) (party who paid off senior lien entitled to subrogation as to intervening lien, when not negligent and without actual knowledge, in apparent case of first impression in state).

Kansas

Bankers Trust Co. v. U.S., 25 P.3d 877 (Kan.App. 2001) (actual knowledge precludes assertion of remedy); *S.A. Harms v. Burt*, 40 P.3d 329 (Kan. 2002) (constructive notice of intervening lien precludes equitable subrogation); *National City Mortgage Co. v. Ross*, 34 Kan.App.2d 282, 117 P.3d 880 (Kan.App. 2005) (equitable subrogation permitted to avoid unjust enrichment, though borrowers' title no good and rightful owners were still in possession, because owners' mortgages were paid off).

Kentucky

Roberts v. Mortgage Electronic Registration Systems, Inc., 2009 WL 3486594 (Ky.App. 2009) (unpublished) (negligence barring use of doctrine when increased new debt made borrower insolvent); *Louisville Joint Stock Land Bank v. McNeely*, 102 S.W.2d 389 (Ky.App. 1937) (doctrine employed); *Louisville/Jefferson County Office for Economic Development v. Manufacturers And Traders*, 2004 WL 259083 (Ky.App. 2004) (unpublished) (actual knowledge of prior lien defeats equitable subrogation); *Commonwealth v. Central Bank of Jefferson County, Inc.*, 2008 WL 1991642 (Ky.App.) (unpublished) (holding doctrine does not subordinate state tax lien to later mortgage); *Commonwealth v. Central Bank of Jefferson County, Inc.*, 2008 WL 1991642 (Ky.App.) (unpublished) (equitable subrogation denied because of constructive notice of state tax warrants); *Wells Fargo Bank, Minnesota, N.A. v. Commonwealth of Kentucky., Finance and Admin., Dept. of Revenue*, 345 S.W.3d 800 (Ky. 2011), reh.den. (Aug 25, 2011), as corrected (Aug 25, 2011) (professional lender not entitled to equitable subrogation over general tax liens when title insurer failed to discover liens "easily discoverable" with due diligence); *WM Specialty Mortgage, LLC v. Community Trust Bank, Inc.*, 2011 WL 558655 (Ky.App.) (unpublished) (lender not entitled to subrogation because it was unaware of intervening lien due to "an error of the title examiner"); *In re Hensley*, 578 Fed.Appx. 530, 2014 WL 4251567 (6th Cir. (Ky.)) (unpublished) (lender barred by passage of time from seeking to impose lien on second parcel by equitable subrogation, although the debt it paid was secured by the parcel).

Louisiana

American Bank and Trust Co. v. Trinity Universal Ins. Co., 194 So.2d 164 (La.App. 1 Cir. 1967) stated: "Equitable subrogation does not exist in Louisiana. The only subrogation provided for in this state is that set forth in Articles 2159 et seq. of the Civil Code."

Maine

United Carolina Bank v. Beesley, 663 A.2d 574 (Me. 1995) (lender that paid off prior mortgage entitled to subrogation against co-owners of property).

Maryland

Rinn v. First Union Nat. Bank of Maryland, 176 B.R. 401 (D.Md. 1995) (applying doctrine to reorder priorities); *G.E. Capital Mortgage Servs., Inc. v. Levenson*, 338 Md. 227, 657 A.2d 1170 (1995) (doctrine available when lender does not have actual knowledge of intervening lien); *U.S. Bank Trust N.A. ex rel. Metropolitan Bank and Trust v. Nielsen Enterprises MD*, 232 F.Supp.2d 500 (D.Md. 2002) aff'd and vacated in part, 92 Fed.Appx. 948, 2004 WL 527827 (4th Cir.(Md.) 2004) (unpublished) (use of doctrine denied); *Nesse v. GMAC Mortgage, LLC (In re Barnes)*, 2012 WL 1378449 (Bkcy.D.Md.) (unpublished) (lender entitled to use equitable subrogation when mortgage not recorded in defense of bankruptcy trustee's strong-arm powers); *SunTrust Mortgage, Inc. v. United States*, 2013 WL 5566173 (D.Md.) (unpublished) (lender seeking equitable subrogation against intervening federal tax lien may do so in action framed as quiet title suit, despite United States' motion to dismiss on notion that federal government has not deigned to be sued to determine priority of its liens; merits of equitable subrogation claim not addressed); *CitiMortgage, Inc. v. Holmes*, 2014 WL 3055563 (D.Md. 2014) (unpublished) (refinancing lender with no actual knowledge of intervening criminal restitution judgment entitled to equitable subrogation in amount of loan paid off, but not debt above that amount); *In re Abell*, 2014 WL 4230814 (Bkcy.D.Md.) (unpublished) (although bankruptcy debtor took title through scam foreclosure rescue scheme, money borrowed from lender paid off valid debt on property and new lender entitled to superior lien by equitable subrogation); *James B. Nutter & Co. v. Black*, 225 Md.App. 1, 123 A.3d 535 (Md.App. 2015) (lender's making of reverse mortgage loan to incompetent person, without guardian's knowledge and consent, rendered mortgage void; equitable subrogation not available to impose equitable lien to replace mortgage, which was void rather than voidable); *Foster v. Bartlett*, 2017 WL 5565285 (Md.App.) (unpublished) (instructing trial court to use equitable subrogation to salvage mortgage whose only deficiency was lack of witnesses); *In re Zinn*, 2017 WL 262043 (Bkcy.Md.) (unpublished) (lender entitled to equitable lien on second parcel because new loan paid off loan secured by both parcels).

Massachusetts

East Boston Savings Bank v. Ogan, 428 Mass. 327, 701 N.E.2d 331 (1998) (applying doctrine as to purchase money mortgage, as opposed to refinance loan, for first time); *Wells Fargo Bank, N.A. v. National Lumber Co.*, 76 Mass.App. 1, 918 N.E.2d 835 (Mass.App. 2009) (lender's knowledge of intervening lien and failure to obtain a subordination may negate right to assert doctrine); *Sand Canyon Mortgage Corp. v. Flammia*, 2010 WL 5550670 (Mass. Land Ct.) (unpublished) (denying remedy when mortgage securing paid-off loan was discharged before competing mortgage was recorded); *Wells Fargo Bank, N.A. v. Yandoli*, 2013 WL 1489002 (Mass. Land Ct.) (unpublished) (court reformed mortgage to correct deficiency, and held that, if signature had been forged as asserted, court would have imposed lien by equitable subrogation in amount of loan payoff to prevent unjust enrichment, based on Restatement (Third) of Property (Mortgages) § 7.6, comment (d) (1997)); *Hare v. LPP Mortgage Ltd.*, 30 Mass.L.Rptr. 651, 2013 WL 951152 (Mass.Super.) (unpublished) (when wife forged husband's name on mortgage, lender entitled to subrogation through a chain of two paid-off mortgages that had also been forged, back to a valid lien, to impose an equitable lien, based on Restatement § 7.6(a), to prevent unjust enrichment); *Bank of America, N.A. v. Miranda*, 2014 WL 3529768 (Mass. Land Ct. 2014) (unpublished) (neither drop in property's value nor fact of title insurance created injustice to junior intervening lien holder warranting refusal to allow refinancing lender to be equitably subrogated to lien of paid off lender); *Bank of America, N.A. v. Diamond Financial, LLC*, 88 Mass.App.Ct. 564, 42 N.E.3d 1151 (Mass.App. 2015) (existence of title insurance does not bar use of remedy, purpose of which is to prevent windfall to junior lender); *BAC Home Loans Servicing, L.P. v. Savankham*, 2016 WL 3618665 (Mass. Land) (unpublished) (lender that paid off prior loan secured by valid mortgage denied reformation of new mortgage to add borrowers who did not execute it; court had suggested equitable subrogation, which it said would apply, but court noted that lender never sought that remedy); *CitiMortgage, Inc. v. Matterazzo*, 2017 WL 4251255 (Mass. Land Ct. 2017) (unpublished) (lender that refinanced its earlier loan but put new mortgage on only one of two parcels entitled to add parcel by reformation and use equitable subrogation to gain priority over mortgage on second parcel that borrowers granted after mistake, since later lender expected a second mortgage); *Wells*

Fargo Bank, N.A. v. Comeau, 87 N.E.3d 577, 92 Mass.App.Ct. 462 (Mass.App. 2017) (equitable subrogation not available to make surviving spouse liable to pay note signed only by deceased husband-borrower); *Ditech Financial, LLC v. Kennedy*, 93 Mass.App.Ct. 1102, 103 N.E.3d 767 (Table), 2018 WL 1371094 (Mass.App.) (unpublished) (lender not entitled to be equitably subrogated to prior lien despite payoff of that loan, obtained by same borrower, because borrower had conveyed property to her children and lender did not seek mortgage grant from them); *Bank of America, N.A. v. Barnes Hill LLC*, ___ F.Supp.3d ___, 2019 WL 2085996 (D.Mass. 2019) (permanent citation not yet available) (in Massachusetts, equitable subrogation claim falls under twenty-year statute of limitations for actions for recovery of an interest in land as set forth in Mass. Gen. L. c. 260, § 21, and equitable subrogation granted against intervening home equity lien).

Michigan

In re Lewis, 270 B.R. 215 (Bkcy.W.D.Mich. 2001) (equitable subrogation may not be employed as defense to action to avoid mortgage as preference); *Deutsche Bank Trust Company Americas v. Spot Realty, Inc.*, 2005 WL 3439716 (Mich.App.) (unpublished) (sophisticated commercial lenders not entitled to protection of equitable subrogation); *Washington Mutual Bank, F.A. v. ShoreBank Corp.*, 267 Mich.App. 111, 703 N.W.2d 486 (Mich.App. 2005) (sophisticated commercial lenders not entitled to protection of equitable subrogation); *Washington Mutual Bank v. Smith*, 2006 WL 1506625 (Mich.App.) (unpublished) (equitable subrogation not permitted even to reform mortgage subordination agreement which mistakenly recited mortgage broker rather than lender as benefited party); *Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735 (6th Cir.(Mich.) 2005) (equitable subrogation does not save mortgage from bankruptcy late-recording preference action); *Mortgage Electronic Registration Systems, Inc. v. Church*, 423 Fed.Appx. 564 (Table), 2011 WL 1885975 (6th Cir. (Mich.)) (unpublished) (sophisticated lender that recorded mortgage in wrong county not entitled to subrogation against intervening federal tax liens); *Residential Funding Co., L.L.C. v. Fifth Third Bank*, 2011 WL 192385 (Mich.App.) (unpublished) (lender was "mere volunteer" in making $1,015,000 loan and not entitled to remedy, despite proof that borrowers lied about prior lien on affidavit); *CitiMortgage, Inc. v. Mortgage Electronic Registration Systems, Inc.*, 295 Mich.App. 72, 813 N.W.2d 332 (Mich.App. 2011) (court cautiously adopted Restatement (Third) of Property: Mortgages § 7.3, which says that lender that replaces its own prior mortgage loan obtains priority over intervening lien in same way as equitable subrogation is applied when new lender refinances a debt; the Restatement labels this doctrine the replacement mortgage doctrine, and does not merge its discussion of the doctrine into the section of the Restatement covering equitable subrogation, which is found at §7.6); *CitiMortgage, Inc., v. FMM Bushnell, LLC*, 2014 WL 7338876 (Mich.App. 2014) (unpublished) (court reiterated mistaken position that lender may *only* obtain equitable subrogation if it refinances its own prior debt, under replacement mortgage doctrine, but reached correct conclusion that lender is not a bona fide encumbrancer entitled to benefit of race-notice recording law when it makes a loan with full knowledge of the competing lien; because both loans were made on the same day, priority question could only be settled by determining which loan closed first).

Minnesota

Wentworth v. Tubbs, 53 Minn. 388, 55 N.W. 543 (1893) (doctrine "is a favorite one with the courts, but its application is regulated by certain well-defined rules"); *Elliott v. Tainter*, 88 Minn. 377, 93 N.W. 124 (1903) ("equitable doctrine of subrogation is well established"); *Carl H. Peterson Co. v. Zero Estates*, 261 N.W.2d 346 (Minn. 1977) (party seeking subrogation must prove that it "acted under a justifiable or excusable mistake of fact"); *Ripley v. Piehl*, 700 N.W.2d 540 (Minn.App. 2005), rev.den. Oct. 18, 2005 (professional lender, such as a bank, held to higher standard, and negligence may bar use of doctrine); *Citizens State Bank v. Raven Trading Partners, Inc.*, 2009 WL 1515585 (Minn.App.) (unpublished) (following *Ripley* over dissent); *Universal Title Ins. Co. v. United States,* 942 F.2d 1311 (8th Cir. 1991); *Infinity Trading Inc. v. Rukamp*, 2013 WL 490762 (Minn.App.) (unpublished) (denying subrogation to refinancing lender because of its supposed negligence in not recording mortgage immediately after closing, allowing subordinate lien to intervene).

Mississippi

Ramoneda Bros. v. Loggins, 89 Miss. 225, 42 So. 669 (Miss. 1907) (doctrine not invoked and mortgage not revived when person who paid off loan was a volunteer and stranger to the parties, and true intent was to pay off the debt and not take an assignment of it); *Prestridge v. Lazar*, 132 Miss. 168, 95 So. 837 (Miss. 1923) (announcing the principles that the doctrine requires a "factual determination of each particular case with consideration of fairness and justice as its guiding principles," and that the doctrine "is one of equity and benevolence; its basis is the doing of complete, essential, and perfect justice between the parties, without regard to form, and its object is the prevention of injustice. It does not rest on contract, but upon principles of natural equity.") In *Avakian v. Citibank N.A.*, 773 F.3d 647 (5th Cir. (Miss.) 2014), husband and wife signed separate deeds of trust for their homestead. The federal trial court held the deeds of trust were void because the spouses needed to sign the same instrument to create a valid lien on a homestead and refused to grant equitable subrogation on the theory that it has no authority to impose "equitable liens in cases where a statute declares that the lien is not valid or binding." It also held that the lender was barred from asserting equitable subrogation because it missed the general statute of limitations for subrogation claims. The Fifth Circuit Court of Appeals reversed and remanded in 2014 WL 6915192 (December 9, 2014), finding that the spouses had shown their joint intent and consent to grant a lien on the homestead; the court did not need to resort to equitable subrogation. In *Community Trust Bank of Mississippi v. First Nat'l Bank of Clarksdale*, 150 So.3d 683 (Miss. 2014), the Mississippi Supreme Court gave many reasons for not applying the doctrine, including that the refinancing lender had title insurance, that the search negligence that caused it not to know about the existing junior lien should be imputed to it as negligence, that the lender had constructive notice of the junior lien, and that the amount of the refinancing lender's debt had been paid down before the priority dispute erupted (which somehow prejudiced the junior lender). The court thus gutted the statement it quoted from *Prestridge v. Lazar*, 132 Miss. 168, 95 So. 837 (Miss. 1923), that the doctrine "is one of equity and benevolence; its basis is the doing of complete, essential, and perfect justice between the parties, without regard to form." About the existence of a title insurance policy, the court said: "Other courts have found that the principles of equity required consideration of the negligence of a title insurance company which bungled the transaction in the first place. After all, '[e]ither they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation.' *Lawyers Title Ins. Corp. v. Capp,* 174 Ind.App. 633, 369 N.E.2d 672, 674

(1977)." The court did not acknowledge that *Capp* involved policy subrogation rights, not equitable subrogation, and that Indiana has codified the equitable subrogation doctrine by statute, which law specifically states that insurer negligence is not a defense to the use of the doctrine to avoid unjust enrichment. See also *U.S. Bank, N.A. v. U.S. Small Business Administration*, 2017 WL 3496217 (S.D.Miss.) (unpublished) (suspect ruling that lender could not sue SBA to claim equitable subrogation based on waiver of sovereign immunity in 28 U.S.C. § 2410, the federal quiet title act).

Missouri

Thompson v. Chase Manhattan Mortgage Corp., 90 S.W.3d 194 (Mo.App. S.D. 2002) reh.den. (Nov 20, 2002) (doctrine not applied because lender failed to discover intervening lien); *Ethridge v. TierOne Bank*, 226 S.W.3d 127 (Mo. 2007) ("drastic remedy" of equitable subrogation requires proof of fraud, not applied to cure deed of trust invalid on entireties property due to lack of spouse's signature); *United States v. Tolin*, 2015 WL 1456980, 115 A.F.T.R.2d 2015-1203 (E.D.Mo.) (unpublished) (court denied lender equitable subrogation versus a federal tax lien on mistaken notion that new loan was not "simultaneous" with payoff of old loan, based only on fact that old mortgage was released of record shortly before new mortgage was recorded; court did not compare closing date to date of old mortgage release; court appeared to apply tougher stance on doctrine because lender asserted priority over lien held by federal government).

Montana

McCarthy v. State Bank of Townsend, 54 Mont. 319, 170 P. 15 (Mont. 1918) (discussing but not applying subrogation as to prior lien paid); *American Surety Co. of New York v. Clarke*, 94 Mont. 1, 20 P.2d 831 (Mont. 1933), reh.den. April 15, 1933 (recognizing surety's right to equitable subrogation on payment in full of obligation; *McKenzie v. Evans*, 96 Mont. 1, 29 P.2d 657 (Mont. 1934) (granting subrogation as to prior lien paid); *Stallings v. Erwin*, 148 Mont. 227, 419 P.2d 480 (Mont. 1966) (recognizing subrogation may be used to give lien on property to party who pays debt of owner).

Nebraska

Rice v. Winters, 45 Neb. 517, 63 N.W. 830 (1895); *State v. Holdrege State Bank*, 110 Neb. 814, 195 N.W. 120 (1923); *Hoagland & Co. v. Decker*, 118 Neb. 194, 224 N.W. 14 (1929) (subrogation granted); *Hadley v. Schow*, 146 Neb. 163, 18 N.W.2d 923 (1945); *American Nat'l Bank v. Clark*, 11 Neb.App. 722, 660 N.W.2d 530 (2003), opinion modified 12 Neb.App. 222, 670 N.W.2d 484 (Neb.App. 2003) (equitable subrogation permitted because new lender intended to have first lien).

Nevada

Laffranchini v. Clark, 39 Nev. 48, 153 P. 250 (1915); *Mort v. United States*, 86 F.3d 890 (9th Cir. (Nev.) 1996) (doctrine used to grant subrogation to lien ahead of federal tax lien); *Houston v. Bank of America Fed. Savings Bank*, 119 Nev. 485, 78 P.3d 71 (Nev. 2003) (adopting Restatement position that actual knowledge of intervening lien does not bar use of remedy); *American Sterling Bank v. Johnny Management LV, Inc.*, 245 P.3d 535, 126 Nev. Adv. Op. 41 (Nev. 2010) (intervening lien holder prejudiced by accelerated maturity date on note and increased amount of new loan;

equitable subrogation deemed not appropriate); *Freedom Mortgage Corp. v. Trovare Homeowners Ass'n*, 2012 WL 5986441 (D.Nev.) (unpublished) (doctrine of replacement mortgage from Restatement of Property (Mortgages) Second § 7.3 used to give lender priority over intervening lien when lender paid off its own prior loan secured by the same property); *Fontainebleau Las Vegas Holdings, LLC v. A1 Concrete Cutting & Demolition, LLC*, 289 P.3d 1199, 128 Nev. Adv. Op. 53 (2012) (mechanic's lien claimant has special status that bars use of equitable subrogation to subordinate its lien to that of a deed of trust that refinances the debt of a lender whose deed of trust had priority over the mechanic's lien; Arizona declined to adopt the *Fontainebleau* reasoning, in *Weitz Company L.L.C. v. Heth*, 235 Ariz. 405, 333 P.3d 232014 (Ariz. 2014), reported in this section); *Bank of America, N.A. v. Bailey*, 2017 WL 2695293 (D.Nev.) (unpublished) (lender had not yet proven it reasonably expected to have first lien on property, because it received title report showing junior deed of trust not paid off or subordinated at closing); *Zhang v. Recontrust Company, N.A.*, 2017 WL 5499229 (Nev.) (unpublished) (refinance lender has priority over contract purchaser by equitable subrogation by standing in shoes of deed of trust that predated purchase contract; no "double recovery" in allowing lender to be equitably subrogated and giving title insurer money judgment against borrower for attorneys' fees in getting lien).

New Hampshire

Caron v. Manchester Fed. Sav. & Loan Ass'n, 90 N.H. 560, 90 N.H. 560 (N.H. 1940) (equitable subrogation employed to give priority to lender that intended to obtain a first lien); *Chase v. Ameriquest Mortgage Co*., 155 N.H. 19 (2007) (equitable subrogation "is a broad doctrine, which is given liberal application," and it "applies where one who has discharged the debt of another may, under certain circumstances, succeed to the rights and position of the satisfied creditor."); *In re Chase*, 388 B.R. 462 (Bkcy.D.N.H. 2008) (lien by equitable subrogation is created by court order, and bankruptcy trustee avoided the lien granted based on equitable subrogation because court decision was not recorded in the real estate records); *Bilden Properties, LLC v. Birin*, 165 N.H. 253, 75 A.3d 1143 (N.H. 2013), (purchasers and their lender had inquiry notice of mortgage granted by seller although it recited wrong name for borrower, and took subject to lien; however, they were granted equitable lien in amount of senior mortgages paid off at closing, thus permitting missed lien holder to foreclose, but only after paying buyers amount of paid-off senior lien); *Bank of America, N.A. v. Citizens Bank*, 2015 DNH 233, 2015 WL 9305653 (D.N.H. 2015) (unpublished) (lender that paid off all of first mortgage loan and part of junior revolving credit loan entitled to subrogation over HELOC mortgage that was not released, predicting that New Hampshire will adopt Restatement position that actual knowledge does not bar use of remedy); *Deutsche Bank Nat'l Trust Co. v. Pike*, 916 F.3d 60 (1st Cir. (N.H.) 2019) (lender that failed to get wife to sign mortgage on homestead not entitled to equitable subrogation because it did not prove that wife got benefit from loan or participated in fraud on refinancing lender, because New Hampshire Supreme Court has held that equitable principles may limit homestead rights "only when there has been fraud, deception, or other misconduct in the procurement of funds spent on a homestead."); *Santander Bank, N.A. v. Day*, 2019 WL 4861366 (N.H.) (unpublished) (refinance lender entitled to equitable subrogation to cure defect in its mortgage, which was not signed by borrowers as trustees of their revocable trust, the capacity in which they held title).

New Jersey

Equity Sav. & Loan Ass'n v. Chicago Title Ins. Co., 190 N.J.Super. 340, 463 A.2d 398 (App.Div. 1983) (subrogation by equitable assignment to put new lender in same priority position as paid-off mortgagee); *Union Nat'l Bank v. Nelkin*, 354 N.J.Super. 557, 808 A.2d 856 (N.J.Super.A.D. 2002) (doctrine not applied to subordinate revolving credit loan, full balance of which was not paid off); *In re Day*, 443 B.R. 338 (Bkcy.D.N.J. 2011) (bankruptcy trustee exercising strong-arm powers as putative bona fide purchaser for value beat unrecorded mortgage given by person who never took title, and equitable subrogation rejected). New Jersey took a step toward the Restatement position in *Investors Savings Bank v. Keybank Nat'l Ass'n*, 424 N.J.Super. 439, 38 A.3d 638 (App.Div. 2012). A later decision adopted at least part of the Restatement position. In *Sovereign Bank v. Gillis*, 432 N.J.Super. 36, 74 A.3d 1 (N.J.Super.A.D. 2013), the court granted equitable subrogation to a lender that paid off a first lien, as to an intervening equity loan lien, despite the lender's claimed actual knowledge of the intervening lien, in reliance on the Restatement and decisions from Washington and other states. However, it said that it was not required to resolve the "significant doctrinal and policy issues" raised by the Restatement position, because the case could be decided under § 7.3 of the Restatement, concerning replacement loans, rather than § 7.6, which addresses equitable subrogation for parties paying off loans made by others. Also see *Reibman v. Myers*, 451 N.J.Super. 32, 164 A.3d 1080 (N.J.Super. 2017) (lender that paid off loan that paid off loan secured by valid lien entitled to two-step equitable subrogation; court imposed equitable lien against rights of borrower's spouse and co-owner of property who received benefit from loan); *Amboy Bank f/k/a Amboy National Bank v. David N. Findel*, Monmouth County, New Jersey Superior Court Docket No. F-02500-10, decision issued February 17, 2017 (equitable subrogation used despite lender's actual knowledge of intervening lien based on *Sovereign Bank v. Gillis*, 432 N.J. Super. 36, 46 (N.J.A.D. 2013) that favored position of Restatement (Third) of Property-Mortgages §7.6(b)(4) that knowledge is irrelevant); *Wilmington Savings Fund Society, FSB v. 61 Holdings, LLC*, 2019 WL 3063740 (N.J.A.D.) (unpublished) (equitable subrogation used to give lender intended first position; lender had no actual knowledge of intervening lien, but actual knowledge is no longer a bar to doctrine in New Jersey).

New Mexico

Houston Lumber Co. v. Skaggs, 94 N.M. 546, 613 P.2d 416 (1980); *Resolution Trust Corp. v. Barnhart*, 116 N.M. 384, 862 P. 2d 1243 (N.M.App. 1993) (new lender subordinated to position of paid-off lender as to intervening lien unless intent or equity demands otherwise); *Bank of New Mexico v. Romero*, 121 N.M. 837, 918 P.2d 1337, 1996 -NMCA- 065 (N.M.App. 1996) (granting equitable subrogation to surety); *Beltramo v. Litton Loan Servicing, LP (In re Beltramo)*, 367 B.R. 825 (Bkcy.D.N.M. 2007) (equitable subrogation not applied to reverse priorities of intervening and refinancing lender in bankruptcy context).

New York

United States v. Baran, 996 F.2d 25 (2nd Cir. (N.Y.) 1993) (listing prior New York decisions); *Roth v. Porush*, 281 A.D.2d 612, 722 N.Y.S.2d 566, 2001 N.Y. Slip Op. 02712 (N.Y.A.D. 2 Dept. 2001) (purchaser cannot jump ahead of lien by equitable subrogation; knowledge of title insurer bars use of doctrine also); *Crispino v. Greenpoint Mortgage Corp.*, 304 A.D.2d 608, 758 N.Y.S.2d 367 (N.Y.A.D. 2 Dept. 2003) (lender not entitled to equitable subrogation because of unclean hands; loan was to bank officer, who forged wife's signature, causing mortgage to be invalid; assignee of mortgage took subject to equitable defenses); *Green Tree Credit LLC v. Hopkins*, 9 Misc.3d 1122(A), 2005 WL 2782579 (N.Y.Sup.), 2005 N.Y. Slip Op. 51729(U) (unpublished) (equitable subrogation denied because intervening lien was recorded and thus imparted constructive notice); *Arbor Commercial Mortgage, LLC v. Associates at the Palm, LLC*, 95 A.D.3d 1137, 945 N.Y.S.2d 694 (N.Y.A.D. 2 Dept. 2012), 2012 N.Y. Slip Op. 03968 (reversing prior decisions holding that lender was barred from asserting equitable subrogation based on constructive notice of intervening lien); *Accredited Home Lenders, Inc. v. Walker*, 37 Misc.3d 1228(A), 964 N.Y.S.2d 57 (Table), 2012 WL 6051928 (N.Y.Sup.), 2012 N.Y. Slip Op. 52216(U) (unpublished) (lender equitably subrogated to liens it paid off to achieve priority over judgment docketed in recording gap despite creditor's argument that lender could have gotten down-date search); *Carney v. Gil*, 125 A.D.3d 559, 6 N.Y.S.3d 3, 2015 N.Y. Slip Op. 01590 (N.Y.A.D. 1 Dept. 2015) (equitable subrogation not used to grant equitable lien to lender that made loan to limited liability company to replace mortgage court had voided because not all of the LLC members had approved the loan, and not used to impose a lien on the interests of the LLC members who sought the loan and signed the mortgage, because court had mistaken impression that doctrine may be used only to reorder priorities rather than to impose an equitable lien when justice so requires; see Section 7.6 of the Restatement (Third) of Property: Mortgages, which explains that equitable subrogation may be used to impose a lien against the interest of the person who borrowed the money to replace an invalid lien); *CitiMortgage, Inc. v Chouen*, 63 N.Y.S.3d 443, 154 A.D.3d 914, 2017 N.Y. Slip Op. 07427 (N.Y.A.D. 2 Dept. 2017) (borrower's bankruptcy discharge did not bar lender from standing in shoes of paid-off lender because remedy of equitable subrogation is in rem, not in personam); *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 64 N.Y.S.3d 228 (N.Y.A.D. 2 Dept. 2017) (after court declared mortgage void because lender waited too long to foreclose, lender not entitled to lien by equitable subrogation because of delay and six year statute of limitations); *Weiss v. Phillips*, 65 N.Y.S.3d 147, 157 A.D.3d 1 (N.Y.A.D. 1 Dept. 2017) (lender entitled to equitable subrogation to replace mortgage given by people who got title by fraud because money lent by new lender was used to pay off valid debt of rightful owner); *Filan v. Dellaria*, 43 N.Y.S.3d 353, 144 A.D.3d 967, 2016 N.Y. Slip Op. 07922 (N.Y.A.D. 2 Dept. 2016) (refinance lender who paid off first lien entitled to equitable subrogation versus other liens not paid off because they were fraudulently satisfied; junior lenders not harmed by new lender's priority); *First Franklin Financial Corp. v. Beniaminov*, 42 N.Y.S.3d 46, 144 A.D.3d 975, 2016 N.Y. Slip Op. 07923 (N.Y.A.D. 2 Dept. 2016) (equitable subrogation could be used to impose lien to replace forged mortgage because loan money paid off prior valid mortgage debt; however, owner raised triable issue of fact in asserting that lender knew of forgery); *Lombard v. Yacoob*, 168 A.D.3d 919, 92 N.Y.S.3d 398, 2019 N.Y. Slip Op. 00427 (N.Y.A.D. 2 Dept. 2019) (when lender paid off a prior loan made by Berkshire, and Berkshire paid off earlier loan held by Ocwen, new lender entitled to stand in shoes of Ocwen in order to establish a valid lien despite the fact that new lender's borrower took title by a fraudulent deed); *Nationstar Mortgage LLC v. Adee*, 172 A.D.3d 1693, 100 N.Y.S.3d 427, 2019 N.Y. Slip Op. 03873 (N.Y.A.D. 3 Dept. 2019) (equitable subrogation not used to salvage invalid reverse mortgage); *Wells Fargo Bank, N.A. v. Dalfin*, 169 A.D.3d 910, 95 N.Y.S.3d 108, 2019 N.Y. Slip Op. 01255 (N.Y.A.D. 2 Dept. 2019) (even if borrower's signature was forged on refinance mortgage as claimed, lender would be

entitled to valid lien by equitable subrogation).

North Carolina

Wallace v. Benner, 156 S.E 795 (N.C. 1931) (new party may use equitable subrogation to succeed to rights of party whose debt was paid with new party's money); *Peek v. Wachovia Bank & Trust Co*., 242 N.C. 1, 86 S.E.2d 745 (1955) (lender may employ equitable subrogation only if it was "excusably ignorant" of intervening lien). *Trustees of the Garden of Prayer Church v. Geraldco Builders, Inc.*, 336 S.E.2d 694 (N.C.App. 1985); *First Union Nat. Bank v. Lindley Laboratories, Inc.*, 510 S.E.2d 187 (N.C.App. 1999) (subrogation "is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case"); *In re Project Homestead, Inc.*, 374 B.R. 193 (Bkcy.M.D.N.C. 2007) (doctrine used to protect lenders whose deeds of trust were not recorded by closer versus borrower's bankruptcy trustee); *Falk v. Federal Nat'l Mortgage Ass'n*, 738 S.E.2d 404 (N.C.App. 2013) (new lender that paid off lender having priority over another deed of trust based on subordination agreement not entitled to subrogation because it failed to get its own subordination, and was thus a mere volunteer); *Bayview Loan Servicing, LLC v. Locklear*, 2017 WL 3080750 (E.D.N.C.) (unpublished), appeal dismissed 736 Fed.Appx. 405 (Mem) (lender claiming priority over federal tax lien based on equitable subrogation was subject to three-year statute of limitations but statute began running when lender discovered error).

North Dakota

Heegaard v. Kopka, 55 N.D. 77, 212 N.W. 440 (N.D. 1927) (intervening lienholder may be prejudiced if it purchases property at foreclosure sale in reliance on record state of title free of lien); *State Farm Mutual Auto. Ins. Co. v. Wee*, 196 N.W.2d 54 (N.D. 1971) (doctrine applicable when "the one invoking it has rightfully discharged debt at the instance and for the benefit of the debtor and that he may be substituted as creditor").

Ohio

Leppo, Inc. v. Kiefer, 2001 WL 81262 (Ohio App. 9 Dist.) (unpublished) (insurer negligence, plus mortgage warranty subject to liens of record, precludes use of remedy); *Associates Financial Services Corp. v. Miller*, 2002 WL 519667 (Ohio App. 11 Dist.) (unpublished) (denying equitable subrogation because title insurer was negligent); *Calhoun v. Heidari*, 2003 WL 21804830 (Ohio App. 4 Dist.), 2003 Ohio 4156 (unpublished) (equitable subrogation permitted, overcoming lack of signature on later mortgage); *Chase Manhattan Bank v. Westin*, 2003-Ohio-5112, 2003 WL 22227394 (Ohio App. 12 Dist.) (unpublished) (subrogated lender not entitled to assert subordination agreement in favor of paid-off lender); *Keybank Nat'l Ass'n v. Adams*, 2003-Ohio-6651, 2003 WL 22927344 (Ohio App. 10 Dist.) (unpublished) (lender's actual knowledge of intervening mortgage and intent to obtain subordination precluded use of doctrine, because lender did not establish reasonable actions to obtain first lien); *Federal Nat'l Mortgage Ass'n v. Webb*, 2006 WL 1901016, 2006-Ohio-3574 (Ohio App. 5 Dist.) (unpublished) (equitable subrogation permitted to lender not clearly negligent in searching title); *Alegis Group L.P. v. Lerner*, 2004 WL 2647607, 2004-Ohio-6205 (Ohio App. 5 Dist.) (unpublished) (equitable subrogation denied because lender was negligent in not discovering recorded intervening lien); *IndyMac Bank, FSB v. Bridges*, 2006 WL 3703364 (Ohio App. 10 Dist.) (unpublished) (title search error bars use of doctrine); *Washington Mutual Bank* *v. Hopkins*, 2007 WL 4532679, 2007-Ohio-7008 (Ohio App. 10 Dist.) (unpublished) (Restatement position used to apply doctrine despite claim of title searcher negligence, court emphasizing windfall to intervenor); *Old Republic Nat'l Title Ins. Co. v. Fifth Third Bank*, 2008-Ohio-2059, 2008 WL 1914297 (Ohio App. 1 Dist.) (unpublished) (lender's tardiness in recording mortgage not only caused it to take second lien but precluded it from asserting equitable subrogation to reorder priorities with intended second mortgage); *Fulton v. Fulton*, 2008 WL 2168997 (N.D. Ohio) (unpublished), modifying 2008 WL 2682564 (N.D.Ohio) (lender not entitled to equitable subrogation over second filed federal tax lien based on payoff of first tax lien, when second lien recorded just before mortgage); *Washington Mutual Bank v. Chiappetta*, 584 F.Supp.2d 961 (N.D. Ohio 2008) (lender entitled to equitable subrogation despite search error because title searcher was not agent of lender and to do otherwise would give windfall to intervening lien holders); *ABN AMRO Mortgage Group, Inc. v. Kangah*, 180 Ohio App.3d 689, 906 N.E.2d 1195, 2009-Ohio-359 (Ohio App. 8 Dist. 2009), app.den. 121 Ohio St.3d 1471, 905 N.E.2d 652, 2009-Ohio-2045 (Ohio May 6, 2009) (municipality not exempt from rules of equity, including doctrine of equitable subrogation as to its junior mortgage); *Deutsche Bank Nat'l Trust Co. v. Boswell*, 2011-Ohio-673, 949 N.E.2d 96 (Ohio App. 1 Dist. 2011) (lender not subrogated as to judgment docketed six weeks before mortgage was recorded because the judgment "was a public record"); *Countrywide Home Loans, Inc. v. Korb*, 2011 WL 1662248 (Ohio App. 11 Dist.), 2011-Ohio-2094 (unpublished) (equitable subrogation granted to subordinate intervening lien, despite the claimed search negligence of the lender's title company, to prevent unjust enrichment, distinguishing *Kangah* decision); *Fifth Third Mortgage Co. v. Fillmore*, 2013 WL 425116, 2013 -Ohio- 312 (Ohio App. 5 Dist.) (unpublished) (lender entitled to equitable lien with priority over mortgage that borrower had assigned from his father-lender's estate, and because borrower wife gave false lien affidavit, because "the fraudulent actions of [the borrower] should not be rewarded over the negligent actions of Fifth Third"); *BankUnited v. Klug*, 2013 -Ohio-1599, 2013 WL 1707709 (Ohio App. 9 Dist.) (unpublished) (when borrower falsely stated on mortgage that he was unmarried and wife attacked mortgage based on dower interest after foreclosure was completed, lender might be entitled to equitable subrogation if it proves that it was not "guilty of culpable negligence" in accepting the mortgage despite fact that loan application listed borrower as married).

Oklahoma

Equitable Life Assur. Soc. of U.S. v. McFadden, 181 Okla. 162, 72 P.2d 795, 1937 OK 519 (Okla. 1937) (employing doctrine to replace forged mortgage); *Southwest Title & Trust Co. v. Norman Lumber Co.*, 1968 OK 71, 441 P.2d 430 (Okla. 1968); *Citizens State Bank of Tulsa v. Pittsburg County Broad. Co.*, 1954 OK 51, 271 P.2d 725 (Okla. 1954); *American General Finance, Inc. v. Kent*, 2008 WL 4447065 (W.D.Okla.) (unpublished) (payoff of prior valid lien not proven); *Mortgage Electronic Registration Systems, Inc. v. United States*, 134 P.3d 913, 2006 OK CIV APP 45 (Okla.Civ.App. 2006) (lender otherwise qualified for remedy but question of fact as to whether or not it was guilty of inexcusable neglect which would bar its use because title report missed tax lien); *Deutsche Bank Nat'l Trust Co. v. Roberts*, 233 P.3d 805, 2010 OK CIV APP 47 (Okla.Civ.App. 2010) (assignee of forged mortgage entitled to be subrogated to mortgage paid off); *Countrywide Home Loans, Inc. v. BancFirst*, 264 P.3d 1262, 2011 OK CIV APP 111 (Okla.Civ.App. 1 Div. 2011) (lender not entitled to subrogation over line of credit mortgage because it did not have borrowers close the account on payoff); *In re Estate of Carlson*, 367 P.3d 486, 2016 OK 6 (Okla. 2016) (Oklahoma Supreme Court ruled that people who accepted transfer-on-death deeds for parcels already encumbered by mortgages had right to equitable liens against grantor's other estate land, after estate announced it did not intend to use estate money to pay off those loans); *Sansu Capital, LLC v. Shayona Investment, LLC*, ___ F.Supp.3d ___, 2018 WL 6059394 (W.D.Okla. 2018) (not yet released for publication) (property insurer that paid claim benefits to lender entitled to stand in shoes of its mortgage).

Oregon

Holzmeyer v. Van Doren, 172 Or. 176, 139 P.2d 778 (1943) (party seeking equitable subrogation must have been "ignorant of the existence" of the intervening lien); *Metropolitan Life Ins. Co. v. Craven*, 164 Or. 274, 101 P.2d 237 (1940) (equitable subrogation available only if "the party advancing the money to defray the prior lien is not guilty of negligence"); *Dimeo v. Gesik*, 164 Or.App. 567, 993 P.2d 183 (Or.App. 1999), later decision 195 Or.App. 362, 98 P.3d 397 (Or.App. 2004) (lender entitled to remedy only if it reasonably believed that intervening lien would be removed through closing); *Rusher v. Bunker*, 99 Or.App. 303, 782 P.2d 170 (Or.App. 1989) (lender entitled to equitable subrogation; constructive notice not a bar); *Boresek v. United States Dep't of Agriculture*, 2014 WL 4792587 (D.Or.) (unpublished) (addressing "a matter of first impression in any court, state or federal," court held that United States waived sovereign immunity to permit private party to assert priority by equitable subrogation over mortgage held by federal government).

Pennsylvania

Home Owners' Loan Corp. v. Crouse, 151 Pa.Super. 259, 30 A.2d 330 (1943) (lender who made new loan was volunteer because it was not obligated to pay off prior debt to preserve an interest in the property); *First Commonwealth Bank v. Heller*, 2004 PA Super 431, 863 A.2d 1153 (Pa.Super. 2004) (although logic of Restatement is "compelling and very persuasive," no subrogation because new lender knew of intervening lien and did not get subordination); *Indymac Bank v. Arczip, Inc.*, 2006 WL 3460033 (Pa.Com.Pl.) (unpublished) (equitable subrogation may apply if lender had no actual knowledge of intervening lien); *1313466 Ontario, Inc. v. Carr*, 954 A.2d 1, 2008 PA Super 135 (Pa.Super. 2008) (same outcome as in *Heller* based on similar facts); *Fowler v. Rauso*, 425 B.R. 157 (Bkcy.E.D.Pa. 2010) (imposition of equitable lien to prevent unjust enrichment); *In re D'Angelo*, 505 B.R. 650, 59 Bankr.Ct.Dec. 37 (E.D.Pa. 2014) (state court order granting lender equitable subrogation lien not voidable in bankruptcy filed within claimed preference period because order granting lien was not transfer of property of estate); *Citizens Bank of Pennsylvania v. Reimbursement Technologies, Inc.*, 609 Fed.Appx. 88, 2015 WL 1936463 (3rd Cir. (Pa.) 2015) (unpublished) (doctrine not used to give bank remedy for return of stolen money because bank did not pay debt of another); *Infante v. Bank of America, N.A.*, 130 A.3d 773, 2015 PA Super 265 (Pa.Super. 2015) (equitable subrogation used to impose lien on residence in amount of prior valid mortgage granted by both spouses, to replace mortgage signed by husband only, finding that wife would obtain windfall if she obtained title free of lien; court distinguished cases denying equitable subrogation to banks whose liens were defective due to negligence of lender); *McConaghy v. Bank of New York, Trustee*, 192 A.3d 194, 2018 PA Super 194 (Penn.Super. 2018) (fact that borrower forged signatures on loan documents did not make lender guilty of unclean hands or justify trial court's refusal to use equitable subrogation to place lender in the shoes of valid liens it had paid off, reversing trial court ruling).

Rhode Island

Cullen, Inc. v. Capital Crossing Preferred Corp., 2004 WL 877634 (R.I.Super.) (unpublished) (lender entitled to subrogated lien on property for taxes paid).

South Carolina

Dodge City of Spartanburg, Inc. v. Jones, 317 S.C. 491, 454 S.E.2d 918 (1995) (doctrine available when lender does not have actual knowledge of intervening lien); *Matrix Financial Services Corp. v. Frazer*, 2010 WL 3219472 (S.C.) (unpublished) (lender had unclean hands and was not entitled to remedy of equitable subrogation because it did not hire lawyer to search title and draft loan documents, thus practicing law without a license); *Independence Nat'l Bank v. Buncombe Professional Park, LLC*, 411 S.C. 605, 769 S.E.2d 663 (S.C. 2015) (attorney closing agent's actual knowledge of existing lien was not imputed to refinancing lender and did not bar its right to equitable subrogation).

South Dakota

Bennett v. Campbell, 48 S.D. 285, 204 N.W. 177 (S.D. 1925) (first lien holder regained priority over second lien holder by subrogation when mortgage was reinstated); *Buhl v. McDowell*, 60 S.D. 22, 242 N.W. 638 (S.D. 1932) (co-owner who redeemed taxes entitled to be subrogated against ownership rights of co-owner and spouse); *Metropolitan Life Ins. Co. v. Frick*, 61 S.D. 9, 245 N.W. 921 (S.D. 1932) (lender entitled to cure invalidity of mortgage given by minor by subrogation); *Wells v. Walworth County*, 61 S.D. 413, 249 N.W. 730 (S.D. 1933) (new lender subrogated and entitled to priority over intervening lien).

Tennessee

ATS, Inc. v. Kent, 27 S.W.3d 923 (Tenn.App. 1998) (equitable relief denied lender that paid off prior mortgage because court said Tennessee had no equitable remedy in that situation); *Citicorp Mortgage, Inc. v. BancorpSouth Bank*, 2004 WL 2715278 (Tenn.App. 2004) (unpublished) (actual knowledge of lien bars equitable subrogation); *Indymac Mortg. Holdings, Inc. v. Kauffman*, 2001 WL 1683779 (Tenn.App.) (unpublished) (negligent title search bars equitable subrogation); *Associates Home Equity Services, Inc. v. Franklin Nat'l Bank*, 2002 WL 459007 (Tenn.App.) (unpublished) (equitable subrogation granted prematurely because valid defenses might exist of actual knowledge or negligent title search); *Bankers Trust Co. v. Collins*, 2003 WL 21516214 (Tenn.App.) (unpublished) (equitable subrogation denied because lender was negligent in failing to record mortgage, and in rejecting payoff check); *Trustmark Nat'l Bank v. Deutsche Bank Nat'l Trust Co.*, 2010 WL 3269978 (Tenn.App.) (unpublished) (containing thorough discussion of doctrine and rejection of actual knowledge as a bar to the remedy); *Bank of New York Mellon v. Goodman*, 2014 WL 1516329 (Tenn.App. 2014) (unpublished) (equitable subrogation denied lender that recorded deed of trust in wrong county, as to two judgment liens that attached before mortgage recorded, despite fact that judgment creditors are not bona fide encumbrancers; court accepted judgment creditor's argument that falling land value would work prejudice if subrogation were permitted, an argument rejected in *Bank of America, N.A. v. Miranda*, 2014 WL 3529768 (Mass. Land Court 2014) (unpublished); *Bank of America, N.A. v. Southeastern Bldg. Corp.*, 2015 WL 153701 (M.D.Tenn.) (unpublished) (property owner who agreed to pay for work on property as part of forbearance agreement with lender had no lien by equitable subrogation for value of payments because doctrine is not used to give a lien to one who pays a debt for which he is primarily responsible).

Texas

Hubert Lumber Co. v. King, 468 S.W.2d 503 (1971); *Home Savings Ass'n v. Southern Union Gas Co.*, 486 S.W.2d 386 (1972); *Yeager Electric & Plbg Co., Inc. v. Gaines Building, Inc.*, 492 S.W.2d 921 (Tex.Civ.App. 1973); *Houston Inv. Bankers v. First City Bank*, 640 S.W.2d 660 (Tex.Civ.App.1982); *First Federal Sav. & Loan Ass'n of Beaumont v. Stewart Title Co.*, 732 S.W.2d 98 (Tex.App. 1987); *Vogel v. Veneman*, 276 F.3d 729 (5th Cir. (Tex.) 2002) (equitable subrogation protects purchase money mortgage even though conveyance void as circumventing homestead law); *LaSalle Bank N.A. v. White*, 2006 WL 1152337 (Tex.App.-San Antonio) (unpublished) (equitable subrogation salvages home equity mortgage void Texas Constitutional prohibition); *Hulen v. Hamilton*, 2008 WL 553812 (Tex.App.-Fort Worth) (unpublished) (good Samaritan lender was not mere volunteer, and thus entitled to use doctrine to reorder priorities); *AMC Mortgage Services, Inc. v. Watts*, 260 S.W.3d 582 (Tex.App.-Dallas 2008) (equitable subrogation may not be used to put refinancing lender in first position after intervening lien foreclosed and property sold to third parties); *Reyes v. The Bank of New York*, 2009 WL 1942182 (Tex.App.-Dallas) (unpublished) (purchase money lender entitled to use of doctrine); *Chase Home Finance, L.L.C. v. Cal Western Reconveyance Corp.*, 309 S.W.3d 619 (Tex.App.-Houston (14 Dist.) 2010) (intervening lien holder not harmed by subordination of its lien to that of new purchase money lender although new owner may be less creditworthy than former owner, and thus more likely to default and cause junior lien to be extinguished); *In re Kelly*, 2013 WL 6798894 (Bkcy.S.D.Tex.) (unpublished) (when second lien holder foreclosed and then borrowed money to pay off first deed of trust loan, after which borrower won suit to rescind foreclosure, lender that paid off first lien was granted equitable lien in amount of payoff); *Dees v. Dees*, 2014 WL 2538750 (Tex.App.-Ft. Worth 2014) (unpublished) (man who gave money to his brother to be used to pay off house loan not entitled to equitable subrogation because he did not directly pay off debt, which is required element of equitable subrogation in Texas; also, brother was truly a volunteer because he did not advance money under legal compulsion or to preserve his own right in property); *In re Morales*, 520 B.R. 544 (Bkcy.W.D.Tex. 2014) (lender that paid delinquent real estate taxes on borrower's property was equitably subrogated to tax lien); *Defense Resource Services, LLC v. First Nat'l Bank of Central Texas*, 2015 WL 4064781 (Tex.App.-Waco) (unpublished) (court refused equitable subrogation to lender that paid off first lien because lender did not establish all required elements and junior lender would have been "prejudiced" by decrease in land value from payoff date to date of trial); *Wilmington Trust, N.A. v. Rob*, 2015 WL 7076637 (W.D.Tex.) (unpublished) (equitable subrogation, although a remedy, is also a claim or cause of action and may be pled as such; lender may claim subrogation for real estate taxes it paid from loan proceeds); *Holley v. Holley and Taylor, Inc.*, 2017 WL 549010 (Tex.App.-Eastland 2017) (unpublished) (entity related to borrower that gave mortgage on its property as additional collateral for loan was not volunteer in paying off loan and could claim equitable subrogation and foreclose on property that was primary loan collateral); *Benamou v. Wells Fargo Bank N.A.*, 2017 WL 743714 (N.D.Tex.) (unpublished) (equitable subrogation used to replace home equity deed of trust that borrowers attacked as unconstitutional); *Zepeda v. Federal Home Loan Mortgage Ass'n*, 2018 WL 781666 (S.D.Tex. 2018) (unpublished), reconsid.den. 2018 WL 1947848 (no equitable subrogation to save deed of trust invalid under state constitution despite borrower's admission that she signed deed of trust and that lender's money was used to pay off prior loan secured by valid lien; lien void under constitution "because the lender’s signature did not appear on the Acknowledgement of Fair Market Value"); (on appeal in *Zepeda*, 935 F.3d 296 (2019), the Fifth Circuit Court of Appeals said it could not determine if the lender was entitled to equitable subrogation, and certified this question to the Texas Supreme Court: "Is a lender entitled to equitable subrogation, where it failed to correct a curable constitutional defect in the loan documents under § 50 of the Texas Constitution?"); *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 566 S.W.3d 836 (Tex.App.-Houston (14th Dist.) 2018) (bank entitled through equitable subrogation to lien ahead of mechanic's liens for amount paid from loan to satisfy tax liens ahead of mechanic's liens); *PNC Mortgage v. Howard*, 2019 WL 2575052 (Tex.App.-Dallas) (unpublished) (equitable subrogation not used to salvage lender's right to foreclose that was lost by failure to correctly foreclose on deed of trust within five years after default was declared, citing *Zepeda* and other authorities); *Worley v. Avinger*, 2019 WL 3729508 (Tex.App.-Dallas) (unpublished) (purchaser at homeowner association lien foreclosure who then paid off home equity loan to protect her title is entitled by equitable subrogation to receive surplus from her own bid amount, because home equity lender would have been entitled to surplus).

Utah

Richards v. Security Pacific Nat'l Bank, 849 P.2d 606 (Utah App. 1993) (lender not entitled to subrogation as to mechanic's liens because it had constructive notice of same, and lender would receive windfall from improvements not paid for if doctrine employed); *Homeside Lending, Inc. v. Miller*, 2001 UT App 247, 31 P.3d 607, 428 Utah Adv.Rep. 6 (Utah App. 2001) (lender not entitled to priority when title insurer excepted judgment, then mistakenly removed it); *Olsen v. Chase*, 270 P.3d 538, 2011 UT App 181 (Utah App. 2011) (doctrine not used to enforce subordinations of lien claims to mortgage); *Federal Deposit Ins. Corp. v. Taylor*, 2011 UT App 416, 267 P.3d 949, 697 Utah Adv. Rep. 8 (Utah App. 2011), reh.den. Jan. 6, 2012 (equitable liens imposed based on after-acquired-title doctrine, but equitable subrogation not applicable); *First Nat'l Bank of Layton v. Palmer*, 362 P.3d 904, 729 Utah Adv. Rep. 7, 2013 UT App 50 (Utah App. 2013) (lender that recorded a new deed of trust two months after closing because USDA required loan to be split was not entitled to priority over second lien because it should have known to get a subordination agreement).

Vermont

Guernsey v. Kendall, 55 Vt. 201, 1881 WL 7868 (Vt. 1882) (doctrine recognized, but not used to aid the purchaser of a mortgage debt to avoid redemption of a senior lien holder's debt); *Island Pond Nat'l Bank v. Lacroix*, 104 Vt. 282, 158 A. 684 (1932); *Brattleboro Savings and Loan Ass'n v. Hardie*, 2014 VT 26, 94 A.3d 1132 (Vt. 2014) (homestead law did not defeat mortgage granted by husband in title because wife was not owner, did not live in house, and couple was divorcing; however, if mortgage had been void, concurring justice would have granted equitable subrogation under 27 V.S.A. § 107, which says that protected homesteads are still subject to "attachment and levy of execution"); *GMAC Mortgage, LLC v. Orcutt*, 506 B.R. 52 (D.Vt. 2014) (adopting four-element test for determining if lender is entitled to remedy of equitable subrogation, borrowed from Massachusetts decision); *In re Jones*, 534 B.R. 588 (D.Vt. 2015) (lender entitled to secured position up to amount of liens it paid off, although its own mortgage void because it was on homestead property and was signed by only one spouse); *In re Rubino*, 2016 WL 859344 (D.Vt. 2016) (unpublished) (court used doctrine to impose lien on four parcels not included in mortgage, but which secured loan paid off, relying on *Jones* decision).

Virginia

Centreville Car Care, Inc. v. North American Mortgage Co., 263 Va. 339, 559 S.E.2d 870 (Va. 2002) (equitable subrogation denied because title searcher for new lender missed intervening lien); *Deutsche Nat'l Bank Trust Co. v. Batmanghelidj*, 2007 WL 4125403 (E.D.Va.) (unpublished), modifying 2007 WL 2713109 (E.D.Va. 2007) (federal court relied on *Centreville* in denying equitable subrogation on grounds that it would "reward" the lender's "failure…to discover the recorded liens" and because intervening lien holders would be hurt because new loan was more than old loan); *In re Botero-Paramo*, 445 B.R. 530 (Bkcy.E.D.Va. 2011) (court denied equitable subrogation to lender that bought loan after lawsuit started challenging priority of deed of trust because loan buyer who bought at a discount was "seeking not to be protected against a loss but instead to garner a profit"); *Botero-Paramo v. Tysons Financial, LLC*, 483 Fed.Appx. 779, 2012 WL 2055005 (4th Cir. (Va.)) (unpublished) (lender not entitled to equitable subrogation; because "the title report on which BONY relied failed to reflect [the lien], BONY must seek relief elsewhere.").

Washington

The Washington Supreme Court has adopted the rule of the *Restatement (Third) of Property: Mortgages* § 7.6 in full, in accordance with "the modern trend," in *Columbia Community Bank v. Newman Park, LLC*, 177 Wash.2d 566, 304 P.3d 472 (Wash. 2013). It overturned prior cases that used the volunteer rule as a bar to equitable subrogation, especially *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wash.App. 238, 46 P.3d 812 (Wash.App. 2002). That case held that a lender was not entitled to subrogation because it was a "volunteer" in making its loan because it "did not act under any ... duty or compulsion, but instead chose freely and voluntarily to avail itself of a business opportunity." The new decision expanded on the acceptance of the Restatement in *Bank of America, NA v. Prestance Corp.*, 160 Wash.2d 560, 576, 160 P.3d 17 (2007), which adopted the Restatement in part. *Prestance* was followed in *In re Greer*, 2008 WL 2655805 (Wash.App. Div. 2) (unpublished). In *Columbia Community Bank v. Newman Park, LLC*, 177 Wash.2d 566, 304 P.3d 472 (Wash. 2013), the lender was tricked into making a loan based on fake authority documents for the borrower entity. The court relied on that portion of the Restatement rule that says subrogation is available when a lender is induced to pay off a debt by "misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition." See also *Worden v. Smith*, 314 P.3d 1125 (Wash.App. Div. 3 2013) (equitable lien imposed in favor of junior lien holder who bid at sale and whose money was improperly applied to avoid unjust enrichment to party redeeming the foreclosed loan); *Sygitowicz v. United States*, 2007 WL 2496095 (W.D.Wash.) (unpublished) (relative who lent money secured by deed of trust who did not know funds were used to pay off prior liens not entitled to equitable subrogation to those liens to beat federal tax lien); and *LaSalle Bank NA v. Vogtman*, 2010 WL 1981831 (Wash.App. Div. 1) (unpublished) (equitable subrogation not employed to place lien on half interest of tenant in common who did not sign present deed of trust because higher loan amount would make use of doctrine unfair). In addition to the *Tax Pros* decision, *Columbia Community Bank* overturned other decisions that had barred equitable subrogation due to actual knowledge of intervening lien, including *Kim v. Lee*, 9 P.3d 245 (Wash.App.Div. 1 2000); *Bank of America v. Wells Fargo Bank, N.A.*, 126 Wash.App. 710, 109 P.3d 863 (Wash.App.Div. 1 2005); *Kim v. Yakima County Title Co.*, 31 P.3d 665 (Wash. 2001) (denying remedy because of insurer's negligence and holding that "loss should fall on the title company rather than the innocent judgment creditor"); *Flagstar Bank, FSB v. Eerkes*, 2014 WL 4384063, 114 A.F.T.R.2d 2014-5893 (W.D.Wash.) (unpublished) (lender not entitled to equitable subrogation against federal tax lien because the paid off lender's lien had been released before tax lien was recorded; court said government had *special status* that needs protection because, "as an involuntary creditor, [it] had no choice as to whether Mr. and Mrs. Eerkes would become indebted to it or the mechanisms by which it could seek recovery: it took the steps necessary to seek full recovery for the public treasury."); *America's Credit Union v. Countrywide Home Loans, Inc.*, 188 Wash.App. 1063, 2015 WL 4456181 (Wash.App. 2 Div. 2015) (unpublished) (equitable subrogation used to reverse lien priorities; court rejected argument that there was no need to reorder the liens because the property had sufficient value to secure both loans); *Bel Air & Briney v. City of Kent*, 358 P.3d 1249 (Wash.App. 1 Div. 2015) (land buyer who paid off first lien but did not learn of recorded junior lien until after close of escrow granted lien by equitable subrogation to have priority over junior lien, but buyer not permitted to foreclose and extinguish junior lien; court relied primarily on Section 7.6 of the Restatement (Third) of Property Mortgages in concluding that equitable subrogation aids a good faith buyer).

West Virginia

Herold v. Barlow, 47 W.Va. 750, 36 S.E. 8 (W.Va. 1900) (purchaser who pays off liens of seller is subrogated); *Huggins v. Fitzpatrick*, 102 W.Va. 224, 135 S.E. 19 (W.Va. 1926) (new lender entitled to subrogation and priority over intervening lien when lender promised a first lien and had no actual knowledge of intervening lien); *Buskirk v. State-Planters' Bank & Trust Co.*, 113 W.Va. 764, 169 S.E. 738 (W.Va. 1933) (junior lien holder's payment of taxes did not give it priority over senior lien); *Fire Ass'n of Philadelphia v. Ward*, 130 W.Va. 200, 42 S.E.2d 713 (W.Va. 1947) (equitable subrogation doctrine generally); *In re 201 North George St., LLC*, 2015 WL 5707119 (Bkcy.N.D.W.Va. 2015) (unpublished) (bankruptcy court held that lender that released its first lien and replaced it with new mortgage was entitled to reinstate earlier lien or to claim equitable subrogation if it made substitution in ignorance of intervening lien).

Wisconsin

Rock River Lumber Corp. v. Universal Mortgage Corp. of Wis., 82 Wis.2d 235, 82 Wis.2d 235 (1978); *Pierner v. Computer Resources and Technology, Inc.*, 1998 WL 51496, 217 Wis.2d 292, 577 N.W.2d 388 (Table) (Wis.App. 1998) (unpublished); *Ocwen Loan Servicing, LLC v. Williams*, 305 Wis.2d 772, 741 N.W.2d 474 (Wis.App. 2007) (doctrine limited to refinance lenders, but applied to avoid unjust enrichment); *Bank of New York v. Johnson*, 2009 WI App 110, 771 N.W.2d

929 (Table), 2009 WL 1606756 (Wis.App.) (unpublished) (TILA violation did not give lender unclean hands or deprive it of right to equitable remedy); *Citizens State Bank v. Pirius*, 342 Wis.2d 250, 816 N.W.2d 351 (Table), 2012 WL 1587586 (Wis.App.), 2012 WI App 73 (unpublished) (intervening lienholder not "prejudiced" based on allegation it did not pursue borrower harder because it believed it had first lien); *In re Fischer*, 483 B.R. 877 (Bkcy.E.D.Wis. 2012) (when state court default foreclosure judgment established priority between mortgages, *Rooker-Feldman* abstention doctrine prevented bankruptcy court from reordering priority by use of equitable subrogation); *In re Trampush*, 552 B.R. 817 (Bkcy.W.D.Wis. 2016) (lender granted equitable subrogation for balance of its own prior loan that it paid off with new loan secured by new mortgage; however, court refused to give lender priority for new advances over intervening lien based on future advance clause in satisfied mortgage, which lender had voluntarily satisfied, extinguishing constructive notice of that term).

Wyoming

Wyoming Bldg. & Loan Ass'n v. Mills Const. Co., 38 Wyo. 515, 269 P. 45 (1928) (equitable or legal subrogation doctrine adopted); *Gaub v. Simpson,* 866 P.2d 765 (Wyo. 1993) (person who paid taxes to protect his property interest entitled to subrogation); *Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs, N.A.*, 144 P.3d 1224, 2006 WY 132 (Wyo. 2006) (court declined to adopt Restatement position; lender with knowledge of intervening lien not entitled to subrogation).

3.4.7.4 Defenses Based On Race-Notice Recording Laws

State recording statutes protect a purchaser or encumbrancer that records its conveyance against the rights of other persons whose conveyances are not recorded. Some recording laws are "pure" race statutes, giving priority to the person who first records, with few or no exceptions. Other laws are race-notice statutes, which protect the first person to record only if that party does not have knowledge of the other conveyance.[445]

When instruments of conveyance, such as two mortgages, get recorded out of the intended order, a race-notice law typically will permit the intended first lien holder to reorder the recording priority if the intended second lien holder had knowledge of the intended first lien at the time the mortgage was delivered or recorded.[446] Under a race-notice system, a lender with actual knowledge

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[445] The subject of recording laws generally is beyond the scope of this text. See Joyce Palomar, *Patton and Palomar on Land Titles* (3rd Ed.), Chapter 3, for a complete discussion of the subject. One interesting example is *Borries v. Goshen Mortgage, LLC*, 219 So.3d 593 (Miss.App. 2017), in which the court held that a recorded instrument failed to impart constructive notice because one of its essential terms was missing, but found that the buyer would still be bound by her actual knowledge of the instrument if it appeared in a search of the real estate records. However, the buyer was found not to have actual knowledge of the instrument because the title company did not locate it in the title search.

[446] *Baer v. Douglas*, 2012 WL 917190 (Cal.App. 4 Dist.) (unpublished); *First Bank v. East West Bank*, 199 Cal.App.4th 1309, 132 Cal.Rptr.3d 267 (Cal.App. 2 Dist. 2011). In *Wells Fargo Bank, N.A. v. Gakin*, 2013 WL 869942 (Minn.App.) (unpublished), the court refused to reorder recording priority based on funding date, so that a mortgage recorded first but disbursed after the junior mortgage would have been second. The junior mortgagee creatively but incorrectly sought to splice together the race-notice recording law with the doctrine that a lender may not enforce a lien securing a debt until the loan is made. In *Bank of East Asia (U.S.A.) N.A. v. Javaherian*, 2013 WL 206127 (Cal.App. 2

of a prior interest in property does not receive priority over the competing lien or title interest by recording its mortgage before the other interest is recorded.[447] A decision that focused on the knowledge and status of the lender with recording priority blunts the argument that the intended first lien holder was negligent in recording late, which can also thwart its right to equitable subrogation.[448]

All or most of the states take the view that a judgment creditor is not a bona fide purchaser entitled to the protections afforded by the race-notice recording laws.[449]

3.4.7.5 Conveyances Outside of Chain of Title

Most state laws provide that constructive notice of real estate interests is imparted by a grantor-grantee index. A grantor-grantee index is a name index. The "chain of title" consists of a set of links, as the name suggests, each of which is a deed.[450] A conveyance (deed, mortgage, easement or otherwise) that is recorded outside of the chain of grantors is deemed not to impart notice of the

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Dist.) (unpublished), a deed of trust to private parties was marked as recorded one day before a deed of trust to Bank of East Asia was recorded. However, the private deed of trust was not indexed on the day the bank's lien was recorded. The bank had no knowledge of the private deed of trust. The court ruled that the bank's lien had priority over the private deed of trust, because there was no notice of the lien through the index on the day the bank's lien was recorded.

[447] *Aurora Loan Services, LLC v. Molter*, 2010 WL 3159571, 2010-Ohio-3704 (Ohio App. 5 Dist.) (unpublished) (junior mortgagee whose lien was recorded first found not entitled to priority because it had actual knowledge of intended first mortgage, and thus was not entitled to race-notice law protection, and because it would receive a windfall); *CitiMortgage, Inc., v. FMM Bushnell, LLC*, 2014 WL 7338876 (Mich.App. 2014) (unpublished) (lender not a bona fide encumbrancer entitled to benefit of race-notice recording law when it made loan with full knowledge of competing lien; because both loans were made on the same day, priority question could only be settled by determining which loan closed first).

[448] In *Aurora Loan Services*, 2010 WL 3159571, 2010-Ohio-3704 (Ohio App. 5 Dist.) (unpublished), the court acknowledged that a lender is ordinarily denied equitable subrogation in Ohio if it is "negligent," and thus turned to the race-notice law to rebut the intended junior mortgagee's expert testimony that the senior lender was negligent in taking 34 days to record its mortgage.

[449] Based on this principle, a Maryland court held that a deed of trust became a lien on the date of delivery and had priority over a judgment lien docketed two years later. *Chicago Title Ins. Co. v. Mary B.*, 190 Md.App. 305, 988 A.2d 1044 (Md.App. 2010).

[450] The process of building a chain of title is described in a book written by a law professor and counsel for a title insurer: "Suppose, for example, that the United States Government records show that the United States sold a particular tract of land to John Jones on March 15, 1840. The title searcher will turn to the Grantor Index, which is arranged alphabetically, and, beginning with the date March 15, 1840, he will look under the letter "J" for any deeds or mortgages made since March 15, 1840, by John Jones. Naturally he would not expect to find any deeds or mortgages of that land made by Jones prior to March 15, 1840, because Jones did not become the owner under that date. Therefore the law does not require him to look for any such deeds or mortgages prior to that date. Suppose he finds that John Jones conveyed the land to Joseph Smith by deed dated September 10, 1860, and recorded November 1, 1860. He will now look under the letter "S" for any deeds or mortgage by Smith on or after September 10, 1860 … This process is repeated until he has brought the title down to the present. This process is called running the chain of title." Robert J. Kratovil, *Real Estate Law*, 5th Ed., §123, p. 64.

instrument.[451] For example, if Smith deeds Blackacre to Jones by a deed recorded on June 1, a mortgage granted by Jones and recorded on May 25 of the same year is a "wild" instrument that will not be discovered in a search of the grantor-grantee index. The search under "S" for Smith will end on June 1, and the search under "J" for Jones will begin that day also. The mortgage, appearing in the list of recorded instrument six days earlier, is not in the "chain" of title.

The "wild instrument" argument depends on the state or county's index system. If state law provides that only the grantor-grantee index imparts constructive notice, the argument is sound. If the state provides that a tract index also imparts notice, at least in those places in which one is maintained, the argument may fail.[452] A tract index is a parcel index. The chain of title under a tract index is comprised of all instruments pigeonholed into the index slot reserved for that parcel.[453] An instrument recorded before the grantee takes title will still be posted against the parcel, thus imparting notice.

3.4.7.6 Liens That Fail to Impart Constructive Notice

A lien that contains an inaccurate grantor or legal description, or which is accurate but incorrectly indexed by the recorder, typically does not impart constructive notice. If the lien is inaccurate or incorrectly indexed, the insured may assert that it is not binding on the insured as a *bona fide* purchaser or lender for value. Liens are indexed in two ways—by name or by parcel. The following is a summary of the law concerning the general rules by which courts determine if a lien imparts constructive notice, broken down by those two categories of liens.

3.4.7.6.1 Name Indices And Constructive Notice

Liens that are indexed by name rather than parcel present their own set of issues about the sufficiency of the lien or index entry to impart notice.

Federal tax liens fall in this category, and many of the cases on this subject concern federal tax liens. The sufficiency of a filing of a federal tax lien is determined by federal law.[454] 26 U.S.C. § 6323 states that a federal tax lien is not binding "as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed ... ." Subsection (f), in turn, requires that a lien be filed

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[451] See Joyce Palomar, *Patton and Palomar on Land Titles*, (3rd Ed.), §§69-70 for a systematic treatment of the issue.

[452] For example, in *Wells Fargo Bank, N.A. v. Simpson*, 36 N.E.3d 266, 394 Ill.Dec. 333, 2015 IL App (1st) 142925 (Ill.App. 1 Dist. 2015), reh.den. June 30, 2015, mod. on den.reh. August 3, 2015, a mortgage was found to be enforceable even though it was not recorded in the chain of title. See Joyce Palomar, *Patton and Palomar on Land Titles*, (3rd Ed.), §§5-13 for a discussion and comparison of the recording laws and the pure race and race-notice systems adopted by the various states.

[453] "[The tract] index allocates a separate page in the index to each piece of property in the county, and if you are interested in a particular piece of property, you simply locate the proper page in the index, where you will find all recorded deeds and other documents relating to this piece of property." Robert J. Kratovil, *Real Estate Law*, 5th Ed., § 124, p. 65.

[454] *United States v. Polk*, 822 F.2d 871, 873 (9th Cir. 1987).

"in such a manner that a reasonable inspection of the index will reveal the existence of the lien."[455] One must fall under the classes of protected parties listed in § 6323 in order to take free of the tax lien.[456]

Notice comes from proper indexing, not simply by recording. The entire doctrine of constructive notice is built on the premise that a document, once recorded, will be indexed in such a way as to permit a title searcher to locate it when searching the chain of title. [457] The person seeking

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[455] 26 U.S.C. § 6323(f)(4).

[456] In *Brady v. Internal Revenue Service*, 83 A.F.T.R.2d 99-1487, 1999 WL 221821 (E.D.Cal.) (unpublished), a person who sold a half interest in property to the taxpayer was found not to be a purchaser, and thus not entitled to be protected against a federal tax lien against the grantee, even though the taxpayer's name was misspelled on the lien.

[457] In *Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 390 Md. 211, 888 A.2d 297 (Md. 2005), the court gave an impressively lucid explanation of the little-appreciated process of title examination, refuting the common notion that notice is imparted by a document simply by recording: "We continue by offering a brief description of the process of examination of titles, … which is a relatively laborious process that changed little during the first centuries following this nation's founding. The importance of correct indexing being a necessary part of filing and recording of instruments affecting property--if the purpose of the document is to afford constructive notice--can only be understood, if one fully understands the nature of the title examination process. …A title examiner goes to the place where the land records and other applicable records repose. He or she develops a chain of title, i.e., a list of the people who have owned the property for the last specified period of years. The property, or various fractional interests in it, may have been owned by one person or a hundred persons over that particular period of time. Then, during the periods in which each owner owned the property, or any portion of it or interest in it, the examiner must check to see whether during the period that particular owner owned the property, he or she had sold or mortgaged his or her interest in it to someone other than the person above him in the chain of title (in essence selling or mortgaging the same property more than once) or whether during the period of time each particular owner owned the property any judgments were rendered against such respective owner or whether, during that period any suits were filed anywhere that might constitute lis pendens against the respective owner and to the property while that owner owned it. As a practical matter it is impossible in a lifetime to examine every original document of every kind ever filed in the land and other records, which would be necessary if the buyer or lender is to be assured that the property is lien free and is owned by the person who is selling it, if the buyer or mortgage lender is required to be responsible for non-indexing or mis-indexing. Presume that an owner in 2000 had owned a subject property in Baltimore City for four years. In the year 1999-2000 there were 31,000 civil cases alone filed in that jurisdiction; in the year 1998-1999 there were 32,742 civil cases filed; in 1997-1998 there were 28,119 civil cases filed; and in 1996-1997 there were 26,877 civil cases filed in the Circuit Court of that jurisdiction. Altogether, during the period our seller owned the property there were 118,737 civil cases filed. Additionally, the title examiner under such circumstances would have to examine all cases pending at the beginning of the respective period of time--in the example given there were an additional 107,920 civil cases pending in that jurisdiction at the beginning of 1996-1997. If mis-indexing were to be at the risk of the buyer or, as in the present case, at the risk of the banks who are the third-party mortgagees, the person examining the title would have to personally read all the papers filed in those 226,658 cases in addition to federal lien dockets, tax records and the millions of other documents in the land records in order to insure that none of them constituted lis pendens against the property and to verify that nothing adversely affecting title occurred while the last owner (seller) held complete and clear title to the property. Then, once that is accomplished (which is impossible in the first instance) the title examiner would have to do the same thing in respect to the period of time that each prior owner owned the property, millions of additional documents (usually for a period of at least 60 years at the time the writer was examining titles). Relying on indexing is the only thing that makes it possible for title attorneys to limit the examination of documents to those that are relevant, generally those cases and documents indexed in the grantor's or debtor's name. If indexing were to be eliminated, the marketability of titles would be seriously compromised and the entire system of property in this country might collapse. The contrary position, i.e., indexing is not required, would result in millions of documents having to be reviewed to certify a clear title. It would be an impossible task." 390

to impart notice of his or her rights is obligated not only to record the instrument, but to verify that it has been indexed so that it will impart notice.[458] The failure of the party adverse to the insured to impart constructive notice of its rights is a powerful defense for the insured.[459] However, there are circumstances under which notice is imparted through the index despite the misposting of the instrument by the recorder.[460]

A lien indexed by name may or may not be enforceable against a parcel of land purchased by the debtor under another name. Thus, a lien that recites the debtor's correct legal name at the time of the filing of the lien may or may not be enforceable against property when the debtor purchased the land under a new legal name.[461] A lien that is filed using a name that is not the debtor's true legal name does not impart notice.[462] However, when there is adequate information of the use of an alias

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Md. at 235-7, 888 A.2d at 311-3.

[458] "It is the duty of a person offering an instrument for record to see that it is both properly recorded and properly indexed." *Commonwealth v. Roberts*, 392 Pa. 572, 586, 141 A.2d 393, 400 (1958); see *In re 250 Bell Road*, 479 Pa. 222, 228 n.3, 388 A.2d 297, 300, n.3 (1978); cited with approval in *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000); *Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 390 Md. 211, 888 A.2d 297 (Md.App. 2005) (party recording lis pendens has duty to verify that it is indexed so as to impart constructive notice, and loses to bona fide encumbrancer for value when instrument not properly indexed).

[459] In *Keybank National Association v. NBD Bank*, 699 N.E.2d 322 (Ind.App. 1998), a mortgage on which the legal description stated the wrong range did not provide notice because it "described an existing parcel of real estate ... [and] was indexed in the Recorder's office consistent with the legal description contained in the mortgage and, thus, out of the chain of title ... ." The lender argued that mere recording gave inquiry if not constructive notice, and that a careful search should have revealed the NBD mortgage. The court disagreed, holding that the onus is on the party recording an instrument to make sure that its lien gives notice, rather than on the bona fide purchaser or encumbrancer to find the document. An instrument recorded outside of the chain of title does not give any notice. The court concluded: "To hold otherwise would cause the recording statute to prove a snare, instead of a protection."

[460] In *In re Arvizu Construction, Inc.*, 430 B.R. 544 (Bkcy.D.Ariz. 2010), the borrower's name was misspelled in the posting of a deed of trust in the index, but the instrument was still found to impart notice because its legal description was accurate; therefore, the bankruptcy trustee, as a putative bona fide purchaser, could not avoid it. In *First Citizens Nat'l Bank v. Sherwood*, 879 A.2d 178 (Pa. 2005), a mortgage was misposted by the recorder. The court ruled, very simply, that recording alone imparted notice: "Per [the recording law], the legal effect of the recording of a written agreement such as a mortgage is to give subsequent purchasers constructive notice of the mortgage." The court tacitly admitted that its decision does not make practical sense, but blamed the result on the legislature. It refused the "invitation" from the injured lender to adopt the rulings of *Coco v. Ranalletta*, 189 Misc.2d 535, 733 N.Y.S.2d 849 (N.Y.Sup.Ct. 2001) and *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (2000), discussed in this section. The *Sherwood* court may have been influenced by, but did not mention, the case of *Antonis v. Liberati*, 821 A.2d 666 (Pa. 2003), which held that a mortgage did not impart notice, and found the lawyer responsible to his client for failing to verify that the mortgage was properly posted. *Antonis* relied on *Prouty v. Marshall*, 225 Pa. 570, 74 A. 550 (1909).

[461] See *United States v. Polk*, 822 F.2d 871 (9th Cir. 1987), which found that the IRS does not have the duty to find the property owned by the taxpayer and file liens under each name by which the taxpayer has later taken title. However, another court found that a lien filed against a woman taxpayer under her former married name was not notice when the taxpayer had since remarried and taken title to the property under her married name. *Davis v. United States*, 728 F.Supp. 513 (D.C.Ill. 1989). In *Lawyers Title Ins. Corp. v. Phillips*, 108 F.Supp.2d 1382 (D.C.M.D.Ga. 2000), a title agent was found not to have standing to contest a lien filed against an alias, so the court did not address the issue on its merits.

[462] *United States v. Clark*, 81-1 U.S.T.C. p. 9406 (S.D.Fla. 1981); *United States v. Buenting (In re Crystal Cascades*

in the public records that impart notice to a purchaser of real estate, a lien that names the debtor by that alias may be enforceable.[463]

The appropriate rule is that a purchaser has no constructive notice of a lien that is indexed by name only, if the debtor's name is misspelled on the lien. One commentator has suggested a rather amorphous standard: "whether or not the [name] designation affords under the circumstances an opportunity to a person dealing with the delinquent taxpayer to ascertain the existence of a federal tax lien."[464] This rule would create a standard which is too imprecise to be followed in practice. In modern reality, with the strains on name indices caused by increased population, the lien creditor has a duty to correctly spell the debtor's full name in order to give constructive notice to otherwise bona fide purchasers and encumbrancers for value.

Modern courts recognize that, as population increases, fewer people have names that adequately distinguish them from others. Thus, in one case, a judgment docketed against a Walter M. Smith was found not to be impart constructive notice to create a lien on property owned by Walter William Smith, Sr., particularly given the fact that the judgment contained a different address and marital status also. The court found that "[t]he differences in the middle name/initial, suffix, marital status and address, as well as the commonality [commonness?] of the name, do not provide sufficient notice to enable the judgment to constitute a lien as a matter of law."[465] A number of states hold that it is the lien holder's duty to recite the debtor's name correctly, in order to impart constructive notice with only a reasonable burden on the searcher to locate the lien in the index.[466]

Civil, LLC), 415 B.R. 403 (B.A.P. 9th Cir. 2009) (federal tax liens that left out a word in the taxpayer entity's name did not impart notice; court rejected IRS's argument that it imparted constructive notice because a wild card search using the first two words of the name would have turned up the liens).

[463] In *Kivel v. United States*, 878 F.2d 301 (9th Cir. 1989), the court accepted expert testimony that an examination of all of the documents in the chain of title, including released tax liens, would have revealed the alias under which the tax lien was filed. Therefore, the lien was found to give notice sufficient to be discovered on a reasonable inspection of the index. *Kivel* is discussed in *California Title Insurance Practice*, § 4.24, published by Continuing Education of the Bar.

[464] Annotation, *Sufficiency of Designation of Taxpayer in Recorded Notice of Federal Tax Lien*, 3 A.L.R.3d 633, §1[c].

[465] *In re Walter William Smith, Sr.*, Order d. 7/12/99, Bkcy. Case No. 98-26931-DHA, E.D.Va.

[466] "It is the duty of a person offering an instrument for record to see that it is both properly recorded and properly indexed," per *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000). The court found that proper spelling is essential to the name index. "The indexing requirement of alphabetizing of names in judgment indexes is the foundation by which judgment liens are researched. The reason is simple. If a judgment is not indexed in the proper fashion, i.e., in alphabetical order, a searcher may never find it." See also *Coco v. Ranalletta*, 305 A.D.2d 1082, 759 N.Y.S.2d 274 (N.Y.A.D. 4 Dept. 2003) (duty to see that lien is properly indexed is that of lienholder; no constructive notice imparted by mortgage lien improperly indexed, even though broad search of electronic index could have revealed lien). In *First Merit Bank, NA v. Guarantee Title & Trust Co.*, 2006 WL 1791148, 2006-Ohio-3333 (Ohio App. 9 Dist. 2006) (unpublished), the court cited several cases for the rule that "[i]t is the duty of a person offering an instrument for record to see that it is both properly recorded and properly indexed." *Baker v. Coffman*, 24 Ohio N.P. (N.S.) 259 (1922); *Brown v. Ault*, 56 Ohio Law Abs. 536 (N.D. Ohio 1949); *Waicker v. Banegura*, 357 Md. 450 (2000); and *Commonwealth v. Roberts*, 392 Pa. 572 (1958). In *First Merit*, the court also found that the lender had a duty to draft the instrument to impart notice. The title insurer had given the lender the borrower's name by which he took title. The lender mistakenly moved his first initial to become a middle initial on the mortgage. The lender was not paid off when the borrower sold

A purchaser is obligated to search a name variant only if he or she is actually aware of the alternate name.[467] Colorado holds that, when a person holds title using a first initial, a judgment search must be made against the middle name as well; however, the court refused to broaden the search duty to include *idem sonans* names, a subject further discussed further below.[468] A California decision involving a judgment lien expanded this definition of knowledge by imputing the escrow officer's knowledge of a name variation to the purchaser.[469] A mortgage recorded under a woman's

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the property, because a later title searcher did not discover the mortgage. The borrower later filed bankruptcy, preventing the lender from recovering the debt from the borrower personally. The lender's failure to impart constructive notice was also found to be excluded from policy coverage under Exclusion 3(a), as a matter "created" by the lender.

[467] *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000), noted that a name variance can be binding on a purchaser who actually knows the variant name under which the lien is docketed. "In Messinger v. Eckenrode, 162 Md. 63, 158 A. 357 (1932), Susanna Messinger conceded that she never conducted a search of the judgment index, that the judgment was indexed under the correct surname and correct middle names of the judgment debtors (although not under the correct first name), and that she knew that the parties commonly went by their middle names under which the judgment was indexed. In other words, Messinger would have had actual knowledge that the indexing was wrong had she conducted a title examination. Under the facts of that case, we held that there was sufficient evidence presented that Messinger, because of her actual knowledge, would have found the judgment if a proper search of the judgment index had been conducted. Crucial to our interpretation was not only that no search was conducted, but that Messinger actually knew the property owners by the names under which the judgment was indexed: "If anyone had inspected the index in the clerk's office, he would have found the name 'Heagy' and the Christian names by which they were known to the appellant . ... " Id. at 69, 158 A. at 359 (emphasis added). In other words, a court may employ a subjective test to consider the independent knowledge of an involved party. Whether a party has actual knowledge that a judgment is indexed under an alternative spelling or incorrect name is the primary factor a court should consider in determining whether, had a title examination been conducted, the party would have found the specific judgment. If the party has actual knowledge that the judgment was indexed, or likely to be indexed, under an incorrect name, the party has a duty to search under that incorrect name because, due to the party's actual knowledge, the party presumably would have discovered the misindexed judgment."

[468] *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308 (Colo. 2003) mod. on den.reh. (Aug 04, 2003).

[469] *In re Marriage of Cloney*, 91 Cal.App.4th 429, 110 Cal.Rptr.2d 615 (Cal.App. 1 Dist. 2001). In that case, a judgment against James Michael Cloney was found enforceable against the purchaser of property titled in Mike Cloney because the escrow officer saw Cloney's full name on his driver's license, which she reviewed as notary. In imputing the escrow officer's knowledge to the purchaser, the court said: "It is well-settled law in California that the holder of an escrow is agent for all parties up to the time that the escrow is closed… Because an escrow agent in a real property conveyance is a dual agent for both the purchaser and the seller, any escrow agency is of a limited and special nature, and the obligations imposed on an escrow agent to disclose matters to his or her principals are more limited than those imposed on an agent pursuant to a general agency. For this reason, in order for any knowledge acquired by an escrow agent to be imputed to either principal, such knowledge must have been acquired by the escrow agent within the course and scope of his or her limited agency. Nevertheless, insofar as the escrow agent-acting within the course and scope of his or her agency duties-acquires specific material information pertinent to matters within the same escrow that could have a substantial adverse effect on the principal, such knowledge will be imputed to the principal. … The question, then, is whether Holcomb's actual knowledge of Cloney's full name was acquired within the course and scope of her escrow agency. We conclude that it was. Holcomb asked for Cloney's identification, not simply as a notary public, but as the escrow officer acting on behalf of both parties. Before Cloney signed the grant deed conveying the Property to respondent, it was necessary to ascertain that he was, in fact, the person he represented himself to be. This information was necessary to Holcomb for her to carry out her duties as escrow agent to respondent. Although she testified she believed Cloney's identification was "confidential" and she could not reveal it to anyone, her belief was clearly incorrect.

married name did not impart constructive notice when there was no other record evidence of her name change.[470]

The rule of *idem sonans* has been suggested by lien creditors as a defense when the name on the lien docket does not match the name under which the debtor took title. *Idem sonans* is a rule for establishing that a person who uses two names is in fact the same person. The courts commonly say that, in verifying identity, the law addresses the ear. The rule has been states as follows: "if two names sound alike, or substantially alike, although spelled differently, they are presumed to be names of the same person."[471]

The *idem sonans* doctrine is a savings clause that smooths over name variations that would otherwise be considered breaks in a chain of title, such as when a person takes title by one name and deeds out by a variant spelling.[472] This legal fiction was not invented to broaden the constructive

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Under the law, Holcomb was required to supply this information to any member of the general public upon simple written request and payment of "not more than thirty cents" per photocopied page. (Gov.Code, § 8206, subd. (c).) Moreover, Holcomb acquired knowledge of Cloney's true full name in the process of fulfilling her escrow duties of supervising the execution of the conveyance documents and disbursement of purchase moneys. Because this information was obtained in the course of her escrow agency and was highly material to the subject matter of that agency, Holcomb was obliged by her agency to disclose this information to respondent as one of her principals. As a matter of law, therefore, she is presumed to have fulfilled this duty of her agency. The highly material knowledge of Cloney's identity must therefore be imputed to respondentY"

[470] *In re Corbett*, 284 B.R. 779 (Bkcy.W.D.Pa. 2002).

[471] Basye, *Clearing Land Titles*, West Publishing Co., § 19, pp. 92-3. See also *Thompson on Real Property*, Thomas Ed., Vol. 11, § 92.12(i) and Patton, *Land Titles*, 2nd Ed., § 78. Black's Law Dictionary 744 (6th Ed. 1990) describes the rule this way: "Under the rule of 'idem sonans,' variance between allegation and proof of a given name is not material if the names sound the same or the attentive ear finds difficulty in distinguishing them when pronounced." *National Packaging Corp. v. Belmont*, 47 Ohio App.3d 86, 88 n.1, 547 N.E.2d 373, 374 n.1 (1988) said this: " The doctrine of idem sonans has been defined as: 'The arbitrary orthography and pronunciation given to proper names, and the variant spelling resulting from ignorance have led the courts to formulate the doctrine ... , which means 'sounding the same.' Under this doctrine a mistake in spelling the name of a party is immaterial if both modes of spelling have the same sound. The grounds for applying the doctrine to slight variations in spelling is that of de minimis non curat lex--the principle that the law is not concerned with trifles ... . Thus, it is not every mistake in names which will invalidate an instrument or proceeding ... . Since words are intended to be spoken, bad spelling will not vitiate their intended effect where the sound is substantially preserved.'"

[472] In *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000), for example, the court noted the proper and limited uses of the doctrine: "This Court has hesitated to embrace this doctrine and applied it only in two older cases. See State v. Warfield, 139 Md. 74, 76, 114 A. 835, 836 (1921) (holding that an indictment using the word "tract" instead of "track" would be saved by the doctrine of idem sonans); Elliott v. Knott, 14 Md. 121, 135 (1859) ("The names 'Penryn' and 'Pennyrine' should be regarded, in the absence of all proof to show they belong to different tracts of land, as applicable to the same, and as idem sonans."). Both Warfield and Elliot are distinguishable from the case sub judice. Neither of them involved the priority of liens arising out of misindexing. Additionally, neither involve the misspelling of a party's name, much less the misspelling of a party's name in a judgment index in which the only way to find the judgment is alphabetically by the judgment debtor's name." In *National Packaging Corp. v. Belmont*, 47 Ohio App.3d 86, 88 n.1, 547 N.E.2d 373, 374 n.1 (1988), the court noted prior decisions applying idem sonans in question-of-identity situations. As interpreted by the *Waicker* court, however, *National Packaging* distinguished these cases as follows: "The Ohio court then discussed several old Ohio cases of various types in which the doctrine of idem sonans had been applied, noting that in each case there was other evidence from which a proper identification of the relevant party would have

notice imparted by a document that creates a lien indexed by name. If it were so used, it would make the searching of a name index very time-consuming and uncertain in the extreme, since there can be so many variants on any name.[473]

Therefore, courts agree that the doctrine of *idem sonans* may not be used to make a purchaser bound by notice of a tax or judgment lien in which the debtor's name is spelled differently than on the conveyance vesting title to the property,[474] except when the sole variant is a middle initial or

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been actually known: Lessee of Pillsbury v. Dugan's Administrator, 9 Ohio 117 (1839) (involving a petition for partition sale in which the notice contained a description of the property); Buchanan v. Roy's Lessee, 2 Ohio St. 251 (1853) (dicta regarding the misspelling of a party's name in a publication notice in a quiet-title action); and Turpin v. State, 19 Ohio St. 540 (1869) (involving a variance in the spelling of a forged signature in an exhibit and the indictment, when there was other evidence of the identity of the person whose name was forged)."

[473] *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308 (Colo. 2003) mod. on den.reh. (Aug 04, 2003) (*idem sonans* rejected). In *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000), the court said: "Allowing for misnomers even in the form of minor misspellings would undermine the entire indexing system of judgment liens. A minor misspelling may render a judgment "undiscoverable" by even the most prudent of searchers. As in Belmont, in the case at bar the name at issue, Banegura, could be misspelled in an almost inexhaustible number of ways: Baneguna, Baneguma, Banegupa, Baneguha, Banegure, Baneguri, Baneguro, Banguro, Beneguro, Binegua, Benigura, Benegara, ad infinitum. As we stated, supra, one of the purposes of the alphabetized index and records system of judgment liens is to provide an organized and efficient method by which the general public can easily and effectively research money judgments acting as liens on a particular parcel of land. It serves, if done properly, to give constructive notice to subsequent purchasers, encumbrancers, or others who may deal with the title to the real estate, of any and all judgments that constitute liens on real property. It does so by providing a method whereby title examiners can examine the judgment index under the name of the title owner, as that name is recorded among the land records of a particular jurisdiction. The only way constructive notice is sufficient is if the correct name of the title owner of the land against which the lien is sought to be enforced is indexed and recorded in the judgment lien indexes. '[To constitute notice to ... encumbrancers, a judgment must be properly docketed by the correct [first] name and surname of the judgment debtor.' Venetsky, 28 N.J.Super. at 187, 100 A.2d at 295. In the case of judgment liens there is no designation of, or reference to, the property in question to aid in the conveying of notice to the searcher. The only way to conduct research in the judgment lien index is by the name of the title holder of the land as that name is reflected in the land records--this is why the information included, especially the surname, needs to be accurate. Considering that a misspelling might render a judgment impossible to find, in the absence of evidence of actual knowledge of the misspelling or misnomer, there is a presumption that a judgment indexed under an incorrect or misspelled name will not be found by a party examining title to property under the correct name as reflected in the land records."

[474] See *Orr v. Byers*, 198 Cal.App.3d 666, 244 Cal.Rptr. 13 (1988); *Frederick Ward Associates, Inc. v. Venture Inc*., 99 Md.App. 251, 636 A.2d 496 (1994) (judgment indexed against the name "Chris Walker" did not constitute a lien against "John C. Walker"); *Jones v. Parker*, 107 N.J.Super. 235, 258 A.2d 26 (1969) (judgment against Asa C. Parker, indexed under Ace Parker not notice); *Venetsky v. West Essex Building Supply Co.*, 28 N.J.Super. 178, 100 A.2d 291 (1953) (real owner Clarence F. Gottsleben; judgment against Fred Gottsleben not notice); *National Packaging Corp. v. Belmont*, 47 Ohio App.3d 86, 547 N.E.2d 373, (1988); *Commonwealth v. Roberts*, 392 Pa. 572, 141 A.2d 393 (1958); and *Russeck v. Shapiro*, 170 Pa.Super. 89, 84 A.2d 514 (1951) (judgment against Abraham and Edith Wagner indexed incorrectly under Albert and Edith Wagner not notice: "Albert is an Anglo-Saxon name of Teutonic origin, and by no process can it be demonstrated that it is a variant of the ancient Semitic name of Abraham. There is no similarity in either the spelling or in the sound which in the use of one might suggest the other."). Cases involving federal tax liens are collected in Annotation, *Sufficiency of Designation of Taxpayer in Recorded Notice of Federal Tax Lien*, 3 A.L.R.3d 633; 35 Am.Jur.2d, Federal Tax Enforcement, § 9; Am.Jur., *Internal Revenue*, § 217. Many of the above cases are discussed in *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000), in which the court rejected the use of the doctrine as to judgments because of "its inapplicability in modern society in respect to misspelled names in judgment

name that is lacking or wrong.[475] In *Orr v. Byers*,[476] when urged to find that a judgment gave

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indexes." The *Waicker* court held that "the doctrine of idem sonans generally does not apply to the indexing and recording of judgment liens. To hold otherwise, in the absence of additional evidence of the facts and circumstances relating to a party's actual knowledge, would lessen the functional necessity of the alphabetized recording system to the free marketability of property titles in Maryland." *Waicker* relied in part on *Jaczyszyn v. Paslawski*, 147 Pa.Super. 97, 24 A.2d 116 (1942), the facts of which it recited as follows: "John Paslawski had a judgment against Nikolai Borys that was entered incorrectly in the judgment index under the name Mikola Borys. Mrs. Jaczyszyn's attorney searched the judgment index but found no record in favor of Mr. Paslawski against Nikolai Borys. The Pennsylvania Superior Court ruled in Mrs. Jaczyszyn's favor, holding that the judgment indexed under Mikola Borys did not constitute constructive notice of a judgment against Nikolai Borys. The court reasoned: "It was the duty of the plaintiff in the judgment, Mr. Paslawski, to see that [the name recorded in the judgment index] was correctly entered. There was no duty resting on Mrs. Jaczyszyn, or her attorney, to search the records for any other name than the one Borys was always called and known by, Nikolai Borys." Id. at 101, 24 A.2d at 118 (citations omitted).

In *National Packaging*, a judgment against Michael Bol<u>a</u>n was indexed and recorded under the incorrect name Michael Bol<u>e</u>n. The judgment lien claimant argued "that the certified judgment filed under a similar sounding but incorrect spelling of the debtor Bolan's name, retaining the same initial letters as the correctly spelled name, should have been held to give rise to a valid lien for the benefit of NPC and to provide the appropriate constructive notice to title searchers." The court rejected the doctrine: "We hold that the doctrine of idem sonans is inapplicable to names that are misspelled in judgment-lien name indexes. We are not a frontier society of pioneers with little education or an absence of precedent and system. Since the [Ohio] Supreme Court issued its opinion in Pillsbury, we have experienced a tremendous growth in the population and the economy, and those developments have spawned countless real estate sales and a volume of litigation resulting in an abundance of indexed judgment liens. In modern society we cannot overlook matters of form by continuing to indulge the outmoded premises of our societal infancy. To impose rigidly the doctrine of idem sonans to name indexes now maintained for judgment liens would tax all land abstractors beyond reasonable limits and require them to be poets, phonetic linguists, or multilingual specialists. The additional time necessary to examine name indexes under such a stringent doctrine would make the examinations financially prohibitive.

"The appellees, in their brief, demonstrate the difficulty in applying the doctrine of idem sonans to the range of spellings implicated in the instant case: Bolan, Bolen, Bolin, Bowlin, Bowlan, Bowlen, Bolun; the addition of double "l," "ein," and "ien" spellings does not even exhaust all conceivable spelling possibilities. The impossibility of the task created by the doctrine of idem sonans is further illustrated by the fact that we, as a society and state, are no longer a small homogeneous population primarily of European abstraction. Since our infancy, we have added Asian, African, South American, Oriental and Arabic surnames. The spelling, sound, and pronunciation of our population's surnames create an insurmountable burden for an abstractor to face in appreciating all the possible variations ... . [A] strict application of the doctrine [of idem sonans] today would leave a real estate purchaser with a lingering fear that misspelled lien-holders, either negligently or deliberately, might be lurking under the idem sonans doctrine in the judgment- debtor indexes." Id. at 90, 547 N.E.2d at 375-76. The Maryland *Waicker* court adopted this holding of *National Packaging*.

[475] Most cases involving initials have to do with the inclusion or lack of an initial, or the use of the wrong middle initial. Most courts have found that the initial is not fatal to notice, because the first and last names are indexed under the correct name. See *Coral Gables, Inc. v. Kerl*, 334 Pa. 441, 6 A.2d 275 (1939) (holding that a judgment indexed in the name of Caroline Kerl constituted notice of a judgment against Caroline C. Kerl) and *Department of Pub. Assistance v. Reustle*, 358 Pa. 111, 56 A.2d 221 (1948) (judgment indexed in the name of Rosie Reustle was notice of a judgment against Rosie C. Reustle). A minor variation in middle name was found not to thwart notice, when the lien was readily discernible in the index, in *Susquebanc Lease Co. v. Lucchesi*, 707 A.2d 540, 542 (Pa.Super.1998). In that case, a judgment against Camill Louis Lucchesi, indexed under Camill Lewis Lucchesi was found sufficiently similar to be a lien against real estate. The court said that "appellate courts have resolved such cases on the basis of the factual circumstances and practical considerations present in each case." The court concluded:

constructive notice even though the debtor's name was misspelled, a California court found *idem sonans* inapplicable:

> In our view, the case at bar presents a situation where the written name is material. We therefore decline to follow Green's holding[[477]] which, in essence, dispenses with the formalities of record notice. Moreover, the Green opinion entirely ignores the added burden placed on the searcher who is charged with knowledge of the alternative spellings.
>
> In refusing to apply the doctrine here, the trial judge found requiring a title searcher to comb the records for other spellings of the same name would place an undue burden on the transfer of property. The court observed "if you put the burden on those people in addition to what comes up when the name is properly spelled, to track down and satisfy themselves about whatever comes up when the name is improperly spelled in all different ways that it might be improperly spelled, it leads to, I think, an unjustifiable burden." We agree.[478]

"Camill Lewis Lucchesi" appear[s] on the very same or adjacent page as other entries against the name Lucchesi, which did not include the middle name "Lewis." Two judgment liens had been recorded ... against "Lucchesi." Another was filed against "C.L. Lucchesi, a/k/a C. Louis" ... . These several judgments filed against an individual with a name very similar to that of the seller of the property on the same or adjacent pages should have alerted a reasonably careful searcher to verify the identity of the judgment debtor rather than relying solely on the name as listed in the judgment index." Id. at 542-43. In *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000), the court summarized the cases: "These cases indicate that those courts are generally less inclined to hold a mistake in a middle name or initial to as high of a standard as a mistake in a first name. Thus, an error in a middle name, according to those courts, is less likely to hinder constructive notice and be fatal to lien priority." Courts divide on whether or not a search must be made for judgments entered only by the first initial, as opposed to the full first name. In *Garner v. Cluck*, 209 Ark. 912, 916, 193 S.W.2d 661, 663 (1946), Arkansas rejected the notion, saying: "Where an initial is employed instead of the first name of the judgment debtor, an error therein is as fatal as it would be in the name itself. In regard to the middle initial, some authorities hold that if a middle initial is used, it must be the proper one, especially when there are other persons in the district who have a similar name." However, in *Green v. Meyers*, 98 Mo.App. 438, 72 S.W. 128 (1903), the court held that a judgment docketed against "E.G. Seibert" attached to, and was record notice to a purchaser of, land owned by Eleanor G. Sibert. The *Green* court acknowledged that *idem sonans* dealt with identity and was therefore properly addressed to the ear, while record notice is a matter of sight. However, it bridged the gap with the rather metaphysical remark that notice "is, above all, a matter for the consideration of the mind."

[476] 198 Cal.App.3d 666, 244 Cal.Rptr. 13 (Cal.App. 4 Dist. 1988).

[477] *Green v. Meyers*, 98 Mo.App. 438, 72 S.W. 128 (1903).

[478] *Orr v. Byers*, 198 Cal.App.3d 666, 671, 244 Cal.Rptr. 13, 16 (Cal.App. 4 Dist. 1988). *Orr* was distinguished in *Brady v. Internal Revenue Service*, 83 A.F.T.R.2d 99-1487, 1999 WL 221821 (E.D.Cal.) (unpublished), in which a lien against Yolanda Braskat was filed naming "Y. Brasket." However, the party claiming the protection of *Orr* and §6323 was Ms. Braskat's tenant in common, who sold her a one-half interest in the property. The court found that he was not a purchaser entitled to protection under §6323, and therefore the lien attached despite the lack of notice caused by the misspelling.

In short, the lien creditor has the burden of spelling the debtor's name correctly.[479] However, at least one court has used the doctrine of *idem sonans* to broaden the search duty to the benefit of the federal government as creditor.[480]

3.4.7.6.2 Parcel Indices And Constructive Notice

Some instruments or conveyances are recorded but fail to impart constructive notice to a purchaser for value. When the policy contains the standard exception for easements not in the public records, the policy provides no coverage against easements that are not recorded, or which are recorded but do not appear in the chain of title. See §12.4 for a discussion of the unrecorded easement exception. That exception is consonant with other standard exceptions that limit the insurer's risk to matters discoverable in a title search. See §12.3.1 for a discussion of the rationale behind such standard exceptions.

Some courts have held that the title insurance policy does not protect against instruments or rights that are not in the chain of title. For example, in *Fekishazy v. Thomson*,[481] when a lease was found to be a wild instrument, the policy was found not to indemnify the insured against the lessee's rights:

> [W]e ... declare that the lease from Ruth Thomson to John Thomson does not constitute a defect or encumbrance affecting plaintiffs' title to the premises for the purposes of determining TRW's liability under its title insurance policy and that TRW should be discharged of all responsibility to plaintiffs under its title insurance policy.[482]

The same rule was enunciated, albeit as to an abstractor of title, in *1119 Delaware v. Continental Land Title Co.*[483] The court found that the abstractor's liability depended on whether or not the permit was recorded in the chain of title:

> Assuming the CUP was within the chain of title[FN5], Continental should have included the CUP in the abstract of title as an encumbrance.
> [FN5] Continental does not contend the CUP was recorded outside the chain of title. We note that a "wild" document, the existence of which could not be found by a

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[479] *Antonis v. Liberati*, 821 A.2d 666 (Pa. 2003) (attorney liable for failing to verify that mortgage was properly indexed in order to impart constructive notice).

[480] See *United States v. Z Investment Properties, LLC*, 921 F.3d 696(7th Cir. (Ill.) 2019), holding that a buyer's constructive notice of federal tax liens is more inclusive in a jurisdiction having electronic indices rather than paper records, and using *idem sonans* to find that a tax lien imparted notice despite the misspelling of the taxpayer's name.

[481] 612 N.Y.S.2d 276 (A.D. 3 Dept. 1994).

[482] 612 N.Y.S.2d at 279.

[483] 16 Cal.App. 4th 992, 20 Cal.Rptr.2d 438, 445 (Cal.App. 2 Dist. 1993).

search of grantor/grantee indices, does not impart constructive notice.[484]

In most instances, however, the fact that an instrument does not impart notice is not a bar to policy liability, unless excepted in Schedule B. The instrument's failure to impart notice serves as a basis for the insurer to defend or protect the insured from the adverse interest. See the discussion of this issue at §3.4.7.6.

Some states have held that instruments entitled to recordation and duly recorded, but which are misindexed or mislabeled by the recorder or register of deeds, impart no constructive notice.[485] Some states follow the rule that an instrument does impart constructive notice if it is discoverable in a title search, despite a technical deficiency in the instrument.[486] Other states follow the doctrine that an instrument that is recorded, but which fails to contain all of the elements required by law for a valid conveyance, or to entitle it to be recorded, do not impart notice despite the fact that they are

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[484] 20 Cal.Rptr.2d 438, 443. To the same effect is *Diel v. Security Title Ins. Co.*, 142 Cal.App.2d 808, 298 P.2d 873 (Cal.App. 3 Dist. 1956).

[485] See Miller & Starr, *Current Law of California Real Estate*, 2nd Ed., § 8:18; also, John C. Murray, *Defective Real Estate Documents: What Are the Consequences?*, 42 <u>Real Property, Probate and Trust Journal</u> No. 2 (Summer 2007), p. 368, an excellent treatment of statutes and cases which ascribe liability to parties for defects in execution, drafting, recording and indexing, with a strong emphasis on how bankruptcy trustees capitalize on such defects, and his companion article on how such defects boomerang on the parties' counsel: *Attorney Malpractice in Real Estate Transactions: Is Title Insurance the Answer?*, at page 221.

[486] In *In re Crane*, 742 F.3d 702, 58 Bankr.Ct.Dec. 232 (7th Cir. (Ill.) 2013), the court ruled that the suggestion in a statute that a mortgage recite the due date of the loan and the rate of interest was not a requirement in order to impart constructive notice; therefore, a bankruptcy trustee did not have the strong-arm power to avoid a mortgage that did not recite those terms. The lower court decision had held that the mortgage did not impart notice, and caused the title industry to obtain a change in the law (Illinois statute 765 ILCS 5/11) making it clear that the recitation of a due date and interest rate are not mandatory. 2012 Ill. Legis. Serv. P.A. 97–1164, § 20. In *Borries v. Goshen Mortgage, LLC*, 219 So.3d 593 (Miss.App. 2017), the court held that a recorded instrument failed to impart constructive notice because one of its essential terms was missing, but found that the buyer would still be bound by her actual knowledge of the instrument if it appeared in a search of the real estate records. However, the buyer was found not to have actual knowledge of the instrument because the title company did not locate it in the title search. Ohio has produced a series of decisions that have saved the notice effect of a recorded mortgage. The Ohio recording statute requires that a mortgage contain a "description of land," and say that a mortgage is valid when it is in the form required by law "in substance." In *Fifth Third Mortgage Co. v. Brown*, 2012-Ohio-2205, 970 N.E.2d 1183 (Ohio App. 8 Dist. 2012), the court said that the law does not require a formal metes and bounds description and that a description of the property "is sufficient if it is such as to indicate the land intended to be conveyed, so as to enable a person to locate it." In *ABN AMRO Mortgage Group, Inc. v. Jackson*, 159 Ohio App.3d 551, 558-559, 2005-Ohio-297, 824 N.E.2d 600 (Ohio App. 2 Dist. 2005), the court held that a mortgage imparted notice despite a deficient description because it recited the correct tax parcel number and street address. In *Acacia on the Green Condominium Ass'n v. Jefferson*, 2016-Ohio-386, 47 N.E.3d 207 (Ohio App. 8 Dist. 2016), the court said that a mortgage that contained no description at all still imparted notice because a title examiner was able to locate the mortgage in the records "with ease." In *Williams v. Schneider*, 109 N.E.3d 124, 2018 -Ohio- 968, 2018 WL 1353291 (Ohio App. 8 Dist. 2018), the court held that a metes and bounds description, though incomplete, was nonetheless adequate to impart notice, so that the mortgage had priority over later-filed mechanic's liens. In *Sides v. Saliga*, 2019 WL 2529551 (Tex.App.-Austin) (unpublished), the court held that a declaration of restrictions was in the chain of title despite the fact that the full legal name of the declarant was not recited in the instrument.

readily found by a title search.[487] Bankruptcy trustees use these principles and their strong-arm avoidance powers to avoid an otherwise valid mortgage or other interest in property, in order to capture it for the benefit of unsecured creditors.[488] However, bankruptcy courts apply normal recording law notice principles when they consider notice given to the bankruptcy debtor, or priority disputes between creditors.[489]

Some states have held that an instrument that is recorded, but which is not in a class of documents entitled by statute to be recorded, does not impart notice and may be expunged from the record.[490] In some states, the recorder, as custodian of the public records, may be personally liable

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[487] For example, in *Life Insurance Co. of Virginia v. Page*, 178 Miss. 287, 301, 172 So. 873, 876 (1937), the court held that the failure to name a beneficiary caused a recorded deed of trust not to impart constructive notice.

[488] See, for example, the following representative decisions. In *Heritage Real Estate Investment, Inc. v. Dynasty Group, Inc*., 783 Fed.Appx. 403, 67 Bankr.Ct.Dec. 226 (5th Cir. (Miss.) 2019) (unpublished), the court held that, while a deed is an effective conveyance between seller and buyer whether or not it is recorded, a bankruptcy trustee is treated as a hypothetical bona fide purchaser under Section 544, giving him or her the ability to avoid the deed if it is not recorded. The court went on to hold that the deed, though later recorded, was ineffective because it was not signed by the grantor. In *In re Jones*, 580 B.R. 916 (Bkcy.M.D.Ga. 2017), a Georgia court held that a recorded mortgage did not impart constructive notice because the signature page was inadvertently not included in the instrument (or perhaps was included but got caught in the recorder's scanner and not imaged). The lender argued that the mortgage did contain a signature page because the borrowers signed an attached rider. Ironically, the lender relied on bankruptcy court decisions that had saved mortgages under similar circumstances. This court distinguished those decisions, and let the trustee avoid the mortgage. In *In re Forrester*, 2017 WL 5468172 (Bkcy.D.N.H.) (unpublished), the trustee tried to avoid a mortgage because it described the property as Unit 3 in a condominium, while the declaration created Units 3 A and 3 B, but no Unit 3. However, the mortgage also described the parcel by its correct street address and tax parcel number. The trustee argued that the description was ambiguous and inaccurate, and thus it could not possibly impart constructive notice despite the fact that it was recorded. He relied on *U.S. Bank, N.A. v. Bickford*, 2015 WL 1470879 (D.N.H. 2015), another federal decision, in which a mortgage described the right parcel but also said the land was the same as that conveyed in a certain deed, and the deed described a different parcel. In *Bickford*, the court said that the mortgage did not impart notice, but solely to reach the conclusion that a federal tax lien had priority over the mortgage. In *Forrester*, the court did not avoid the mortgage. The court noted that this mortgage did not describe two different parcels that exist, but one parcel that did exist (by the tax parcel number and street address) and one that did not (by the reference to Unit 3).

[489] A New Mexico bankruptcy court found that the debtor took title subject to an existing, recorded deed of trust because he purchased with constructive notice of the instrument and also had actual knowledge of it, in *In re Lamey*, 2017 WL 1839154 (Bkcy.D.N.M. 2017) (unpublished). Also, in *In re Hard Rock Exploration, Inc*., 580 B.R. 202 (Bkcy.S.D.W.Va. 2017), a junior creditor asserted that its lien was not subject to a deed of trust because it contained too skimpy a legal description to impart notice. The court disagreed, after applying conventional law about the adequacy of a legal description in a conveyance instrument. West Virginia court decisions have upheld conveyances that described the land by number of acres, "all my land" in a certain town or county, land lying on a certain side of a river, and similar methods short of a conventional metes and bounds description. The court found the deed of trust was adequate because it encumbered "all of the Company's interests" in land located within that county. Also, in *Park Bank v. U.S. Bank Trust, N.A*., 2018 WL 3954162 (W.D.Wis. 2018) (unpublished), a Wisconsin court accurately applied that state's race-notice recording law to find that a lender whose mortgage was recorded first was still subject to another mortgage because it was granted first, though recorded afterward. The second lender had actual knowledge of the loan that predated its own, because it was disclosed by the borrowers on their financial statement.

[490] *Ward v. Superior Court*, 55 Cal.App.4th 60, 63 Cal.Rptr.2d 731 (2 Dist., Div. 2 1997). In recent years, certain states have seen an increase in sham recordings by anti-government groups. When recorders refuse to record these instruments, they are sometimes severely harassed. In some states, slander of title statutes have been amended to impose

for negligent supervision of his `or her employees if the office improperly accepts documents for recording, or fails to record or index them in a timely fashion, or misindexes or mislabels them in the indices.[491]

A third party sometimes seeks to impute notice of its recorded instrument to an insured based on the insurer's knowledge or notice of the instrument. A title insurer is not the agent of the insured, and the insurer's knowledge of an instrument is not imputed to the insured.[492] Constructive notice is imparted only according to the rules established in each state as to which indices and records serve as the "official" set of records.[493] *Dunlap Investors Ltd. v. Hogan*[494] is also illustrative. In that case, a recorded easement lacked a legal description and was granted by a party which was not the record owner. It therefore was not in the chain of title, and further could not be discovered by reviewing its legal description. However, a copy of the easement was located in the title insurer's "base" file. The easement holder sought to impute notice on the servient parcel owner on the theory that the insurer was the owner's agent. The court found that the insurer was not the insured's agent, and the information contained in its prior title file was not imputed to the insured owner.

Further, an insured does not have imputed notice of all of the records maintained in its title insurer's office, which often includes an extensive title plant. As a Connecticut court noted, it is imperative that there be an objective standard as to which records impart notice to purchasers, and that a purchaser not be bound by notice from records in private title plants:

"It has always been the policy of our law that the land records should be the authentic

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more serious civil and even criminal penalties for the recording of such instruments, or for the harassment of recorders. See *'Paper Terrorism,'* Condell Private Letter, No. 62, July 10, 1997, p. 1.

[491] See cases and articles regarding the liability of recorders of deeds and other government records custodians, found at §5.7.

[492] *Rice v. Taylor*, 220 Cal. 629, 32 P.2d 381 (1934); *Huntington v. MILA, Inc.*, 119 Nev. 355, 75 P.3d 354 (Nev. 2003); *Colegrove v. Behrle*, 63 N.J.Super. 356, 164 A.2d 620 (1960); *Soper v. Knaflich*, 26 Wash.App. 678, 613 P.2d 1209 (1980); *Tamburine v. Center Savings Assn*., 583 S.W.2d 942 (Tex.Civ.App. 1978) (writ refused, October 24, 1979); *Newberry v. Scruggs*, 336 Ark. 570, 986 S.W.2d 853 (1999); *Wallace v. Frontier Bank, N.A.*, 903 So.2d 792 (Ala. 2004) (notice to title company not imputed to insured, citing *Rice, Soper* and other authorities); *First Properties, L.L.C. v. JPMorgan Chase Bank, N.A.*, 993 So.2d 438 (Ala. 2008) (grantee on deed outside of chain of title cannot overcome failure to impart notice to lender on claim that title searcher was lender's agent and could have discovered deed); *Ennis Homes, Inc. v. Rancho Lucerne Valley Public Finance Authority*, 2005 WL 3081236 (Cal.App. 5 Dist.) (unpublished) (lender did not have notice of deed of trust from preliminary title report which initially made exception for instrument but was later deleted); *J.S. Evangelista Development, L.L.C. v. Foundation Capital Resources, Inc*., 2014 WL 1679067 (Mich.App. 2014) (unpublished) (insurer's knowledge of off-record contract not imputed to lender insured to defeat its bona fide encumbrancer status).

[493] See, for example, *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998), reh.den.: "The general rule ... is that in the absence of an express declaration in the statute, records and documents filed pursuant to statute do not impart constructive notice. ... Furthermore, the matter of constructive notice from recorded documents is entirely a creature of statute and not of common law. ... Such notice must therefore be created by the statute itself or not at all."

[494] 133 Ariz. 130, 650 P.2d 432 (Ariz. 1982).

> oracle of title on which a bona fide purchaser ... might safely rely." … The plaintiff's argument would require the defendants to look beyond the Greenwich land records…. That proposition runs contrary to over a century of jurisprudence holding that one searching title to land is not bound to search the records at large, but is bound with only such facts as appear in the chain of title to the particular lot in question.[495]

There may be very limited circumstances under which the knowledge of a title insurer may be imputed to the insured.[496] Also, an insured may receive actual knowledge of an interest in land or a recorded instrument by reading a title insurance commitment or policy.[497]

3.4.7.7 Estate Tax Liens

On occasion, a title insurer makes the decision to insure the sale of property by an estate, accepting evidence from the estate that the estate tax has been paid in full, or that none will attach. If the IRS later asserts that a federal tax lien attaches, federal law provides that the lien is nonetheless divested to the extent that the estate proceeds are "used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof."[498] To prove divestment, a title insurer must show that the sale proceeds satisfied "charges against the estate or expenses of its administration," and that a court with proper jurisdiction allowed the satisfaction.

One court chastised several title insurers who had insured the title to property sold by an estate for not proving up the "careful tracing" required to show that the sale proceeds were used to satisfy estate expenses or charges.[499] The court was looking for hard evidence that estate debts had

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[495] *Lee v. Duncan*, 88 Conn.App. 319, 870 A.2d 1 (Conn.App. 2005), cert.den., 274 Conn. 902, 876 A.2d 12 (Conn. June 2, 2005).

[496] In *Hall v. World Savings and Loan Ass'n*, 189 Ariz. 495, 943 P.2d 855 (1997), the deed by which the owner/borrower took title recited that nominal consideration had been paid for the property. A judgment creditor sought to have the insured mortgage found junior to the judgment under a fraudulent conveyance statute, based on this notice. The court agreed "that the title company was [the lender] World's agent for purposes of the title report, and thus World is bound by whatever notice the title company had while acting within the scope of its authority." However, because only nominal consideration is often recited on deeds in Arizona, "nothing on the face of the recorded documents alerted either the title company or World to the possibility of fraud or the need for further investigation."

[497] *Sides v. Saliga*, 2019 WL 2529551 (Tex.App.-Austin) (unpublished) (buyer received notice of recorded restrictions excepted in commitment, and was not excused from that notice by her claim not to have reviewed commitment); *Cosentino v. Kunkle*, 2019 IL App (2d) 181001-U, 2019 WL 4318750 (Ill.App. 2 Dist.) (unpublished) (buyers of real estate had no claim against seller or broker for fraudulent concealment of pending road improvement because buyers received title commitment that excepted recorded notice disclosing pending project). A Washington court held that a reference to an easement in a title insurance commitment provided "legal notice" of the encumbrance to the purchaser. *Nicklaus v. Serosky*, 1998 WL 138688 (Wash.App.Div. 2) (unpublished).

[498] 26 U.S.C. §6324(a)(1).

[499] *First American Title Ins. Co. v. U.S.*, 2005 WL 1126929, 95 A.F.T.R.2d 2005-2460, 2005-1 USTC 60,501 (W.D.Wash. 2005).

been paid, and it appears that the title companies did not have such evidence. Further, the court found that the payments were not made by court order, because the estate had operated under Washington's informal probate statute, citing a Fifth Circuit decision to that effect, which construed Texas law.[500]

Because a title insurer is not the taxpayer, the only authority under which it may challenge the imposition of an estate tax lien is by bringing a wrongful levy action against the United States. Such an action must be brought within "the expiration of 9 months from the date of the levy."[501] Another code section says that, in such an action, the third party may only challenge the levy, and not the amount of the assessment.[502]

In the 2007 decision of *EC Term of Years Trust*, the Supreme Court ruled that the code section that provides the right to challenge the amount of a levy is available only to the taxpayer.[503] Following that decision, the Ninth Circuit held that three title insurers did not have the right to challenge the estate valuation by the IRS which triggered the tax levy.[504] The title insurers relied on an earlier decision, *United States v. Williams*,[505] which had suggested that a third party could challenge the assessment. However, in *EC Term of Years Trust*, the Supreme Court said this interpretation of *Williams* was too broad. The Ninth Circuit thus held that justice did not require that the insurer be allowed to challenge the IRS's valuation of the assets in the estate:

> Justice does not require that § 1346 be embraced to avoid the § 7426 limitation on challenges to assessments. Had Jensen paid the estate taxes when due, or paid the installments and not gone bankrupt, she could not have challenged the assessment, because she had agreed to it. There is no good reason why her failure to pay the estate's taxes should reopen the valuation of Frisko Freeze, Inc. True, the homeowners and the title insurers that stepped into their shoes did not have a chance to challenge the assessment. But the assessment was not really their problem. Their problem was that the real estate chain of title included an estate that had not paid its taxes. A third party that pays a tax to eliminate a tax lien on the third party's property is, under § 7426(c), bound by the assessment on the property.

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[500] *Kleine v. United States,* 539 F.2d 417 (5th Cir. 1976).

[501] 26 U.S.C. §6532(c)(1).

[502] 26 U.S.C. § 7426 says that, as to third parties, "the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid."

[503] 28 U.S.C. § 1346, construed in *EC Term of Years Trust v. United States,* 550 U.S. 429, 127 S.Ct. 1763, 167 L.Ed.2d 729 (2007).

[504] *First American Title Ins. Co. v. United States,* 520 F.3d 1051 (9th Cir. (Wash.) 2008).

[505] 514 U.S. 527, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995).

3.4.8 Right To Appeal Adverse Ruling

The policy gives the insurer the right to pursue an appeal in order to clear title or defend the insured.[506] When the insurer initially rejected a tender of defense, it may not assume control of the appeal, including choice of counsel, without the insured's consent.[507]

Most ALTA policies explicitly state that the insurer reserves the right to pursue an appeal "in its sole discretion," which clearly indicates the intent to leave that decision to the insurer. Some and perhaps most states will permit the insurer to make that election based on the policy's language.[508] However, some states have developed doctrines, applied to all lines of insurance, that require an insurer to appeal decisions adverse to the insured, under certain circumstances and without regard for the policy language.[509] In some states, the rule is stated that an insurer has a duty to appeal an adverse judgment when there are reasonable grounds therefor.[510]

When the insurer elects not to appeal, the judgment becomes the final determination in the action and, if it is adverse to the insured, loss is payable.[511] If the insured's title is threatened by other adverse claims or actions while an appeal is pending, the insurer may wish to consider the interim measures discussed at §3.4.4.[512]

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[506] Condition 5(c) of the 2006 ALTA policies says: "Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order." Conditions and Stipulations 4(c) of the 1992 ALTA policies contains a nearly identical provision.

[507] *Rajchandra Corp. v. Title Guar. Co.*, 558 N.Y.S.2d 1001 (Sup. Ct. A.D. 1990).

[508] See, for example, *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 235 P.3d 387 (Idaho 2010) (holding that "[u]nder the plain language in the insurance policy, Stewart Title had the contractual ability to abandon Mortensen's appeal and to instead tender full payment of the policy to Mortensen."); also, see *Guarantee Abstract & Title Co., Inc. v. Interstate Fire & Cas. Co., Inc.*, 228 Kan. 532, 618 P.2d 1195 (1980). In *Wei v. Stewart Title Guar. Co*., 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court found that the insurer was not required to appeal a trial court judgment because the insureds prevailed at trial on the only issue for which there was policy coverage; the issue the insureds wanted to appeal was beyond the scope of policy coverage.

[509] *Stalberg v. Western Title Ins. Co.*, 282 Cal.Rptr.43, 49 (1991) stated that an insurer "has a duty to defend its insureds until the final determination of the underlying action," citing *CNA Casualty of California v. Seaboard Surety Co.*, 176 Cal.App.3d 598, 618, fn. 11, 222 Cal.Rptr. 276 (1986). In *Stalberg*, the insurer was found to have breached the duty to defend by refusing the appeal. In fact, the appeal was not refused. The insurer had insisted on trial counsel doing the appeal. The court held that the insurer had no right to insist on the choice of counsel, since it had "wrongfully denied a defense." Id. *Schneider v. Commonwealth Land Title Ins. Co*., 17 Misc.3d 552, 844 N.Y.S.2d 657, 2007 N.Y. Slip Op. 27364 (N.Y.Sup. 2007).

[510] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, § 4:17, Thomson Reuters. A New York court held that the insurer was obligated to appeal a decision awarding some of the insured land to a neighbor, as long as there were reasonable grounds for such an appeal, and the insurer was precluded from paying the insured diminution in lieu of an appeal, in *Schneider v. Commonwealth Land Title Ins. Co*., 17 Misc.3d 552, 844 N.Y.S.2d 657, 2007 N.Y. Slip Op. 27364 (N.Y.Sup. 2007).

[511] *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962).

[512] In *Trigiani v. American Title Ins. Co.*, 392 Pa.Super 427, 573 A.2d 230 (Pa. Super. 1990), a foreclosure sale was held while the appeal was pending. The insured would have been required to bid in at the foreclosure sale to preserve its

3.4.9 Expenses Incurred While Insurer Is Clearing Title

The final determination provision establishes that the policy permits the insurer to clear title, and that no loss is payable unless and until the attempt to clear title fails. Except for very limited exceptions, then, the insurer is not required to pay the insured for expenses or claimed damages incurred while the insurer is clearing title.[513] As one court stated it:

> A title policy indemnifies rather than guarantees the state of the insured title. The policy does not guarantee that litigation will not occur, but, in fact, assumes the opposite, that many types of title defect litigation can occur. The insured's claim must await an adverse title determination by a court. "The claim only lies once a court speaks, and not before, and not if the court's judgment is favorable."[514]

The ALTA Homeowner's Policy reserves the right to pursue title clearance through a final determination, including all appeals, but also enumerates certain elements of loss the insurer will pay in the event that the insured is not permitted to occupy the property while title is being cleared. Paragraph 6.b(2) states that, if the insured is not permitted to occupy the land while title is being cured, the insurer shall pay rent for "a reasonably equivalent substitute residence," plus "reasonable costs ... to relocate any personal property ... for up to twenty-five (25) miles from the Land ... ." By implication, the policy does *not* provide coverage for any other expenses incurred by the insured while the insurer is clearing title.

Despite the policy terms, some courts have awarded damages to insureds when the insurer fails to take prompt action to clear title, or when it seeks to cure the title defect but is unsuccessful.[515]

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position in the property, which it refused to do. The court said that the insured was not required "to throw good money after bad" by bidding in while its case was on appeal. The insured was awarded policy limits.

[513] 2006 ALTA policies Conditions 9(a) and (b); 1992 ALTA Owner's Policy Conditions & Stipulations 9(a) and (b); 1992 ALTA Loan Policy Conditions & Stipulations 8(a) and (b); ALTA Residential Policy Conditions 6(b); and ALTA Homeowner's Policy Conditions 6(c)(1). See *Holmes Development, LLC v. Cook*, 2002 UT 38, 48 P.3d 895 (Utah 2002), which denied claims for lost lot sales, lost profit on those sales, and carrying costs for the property, because the insurer successfully defended the insured's title: "First American cured any claims of unmarketability of title by succeeding in establishing title in Holmes by litigation. Section 9(a) expressly provides that litigation is a 'reasonably diligent manner' of establishing title and curing any alleged title defects. Therefore, according to the plain language of section 9(a), First American has 'fully performed its obligations with respect to that matter' and cannot 'be liable for any loss or damage caused thereby.'... In the policy, First American contracted to have 'no liability' to Holmes under the policy unless a court rendered a final judgment adverse to Holmes's title. …The result of the Keystone litigation was favorable to Holmes ... Accordingly, section 9(b) precludes Holmes from recovering further against First American beyond the costs First American incurred defending Holmes's title when the Keystone litigation quieted title in Holmes as against Keystone and no adverse final determination resulted."

[514] *Lawyers Title Ins. Corp. v. Synergism One Corp.*, 572 So.2d 517, 518 (Fla.App. 1990) (quoting Barlow Burke, *Law of Title Insurance* (1986 & 1988 Supp.), § 9.4.3, *Staying the Claim for Pending Litigation*.

[515] *Cocoa Properties Inc. v. Commonwealth Land Title Ins. Co*., 590 So.2d 989 (Fla.App. 1991); *Nebo, Inc. v. Transamerica Title Ins. Co*., 21 Cal.App.3d 222, 98 Cal.Rptr. 237 (Cal.App. 4 Dist. 1971). However, in *Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. & Trust Co*., 141 Ariz. 363, 687 P.2d 371 (Ariz.App. 1984), the court

Nebo, Inc. v. Transamerica Title Ins. Co.[516] is often cited by the insured as support for a claim for lost income from the property or other expenses incurred while the insurer is seeking to clear title. The *Nebo* court held:

> The provisions in the policy permitting the company, at its own cost and without undue delay, to litigate defects in title to final determination in a court of last resort, do not specify the company is not liable for actual damages resulting from the defect while the litigation goes on.[517]

Nebo interpreted an older form of policy that did not contain a final determination provision. Also, the insurer in *Nebo* did not take affirmative action to clear title, and did not disclose the then-pending lawsuit about ownership of the property in the policy. The insured was denied the right to collect rent from the income-producing property during the two years in which the lawsuit was pending. See §3.4.4 regarding measures which the insurer may take to assist the insured while title is being cleared and §3.4.5 regarding the final determination provision.

3.4.9.1 Lost Rent

The policy does not indemnify the insured for lost earnings from the property during the time in which the insurer is clearing title.[518] There are two reasons for this: such potential income is typically speculative and thus not "actual monetary loss or damage" incurred by the insured, and the policy states that no loss is payable until there has been a final determination in the litigation, and that result is adverse to the insured. Thus, when the title issue delays the construction of a building, which in turn delays the renting of that building to a tenant, the insurer is not required to pay the insured the projected rental income from the originally anticipated date of occupancy to the date on which the tenant is actually able to take possession. The policy also does not indemnify the insured owner against rent paid by the insured to lease alternate space, as discussed in §3.4.9.2.

However, when the insured purchases an existing building with existing tenants, and the insured's title is so questionable on the policy date that a court rules that a party other than the insured is entitled to the rent earned during the time title is in dispute, that lost rent is compensable under the policy because it represents "actual monetary loss or damage" that the insured will never

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found that the insurer was not guilty of bad faith for following a "do nothing" strategy in litigation which was approved by the insured and was part of a greater plan to acquire a larger parcel. In *Hodas v. First American Title Ins. Co*., 696 A.2d 1095 (Maine 1997), the court found an insured entitled to indemnity for a reduction in sale price which occurred when the property was sold during the course of the action to clear title, even though the insurer successfully removed the defect not long after the sale.

[516] 21 Cal.App.3d 222, 98 Cal.Rptr. 237 (Cal.App. 4 Dist. 1971).

[517] 21 Cal.App.3d at 228, 98 Cal.Rptr. at 241.

[518] In *Neikes v. Ticor Title Company of Oregon*, 291 Or.App. 720, 423 P.3d 102 (Or.App. 2018), the title insurer obtained the release of a deed of trust, after which the insured suffered no loss, including a claimed lost sale, lost rent or an alleged decline in the property's value while its title was in jeopardy.

recover except from the insurer. Thus, in *Nebo, Inc. v. Transamerica Title Ins. Co.*,[519] the insured was found entitled to be paid as a policy loss the rent that the court ordered be paid to the competing owner during the pendency of the suit in which title was contested. In *American Legion Ed Brauner Post v. Southwest Title & Ins. Co.*,[520] the insured was found to be entitled to an indemnification payment equaling the rent the insured could have received from a tenant during the time in which the insurer was clearing title to extinguish a recorded lease.

When a competing owner claims the right to collect rent from the property, the insurer may wish to protect the insured by obtaining an agreement or order escrowing the rents, paying them into court, appointing a receiver or property manager who will use the rents to cover building expenses, or some similar arrangement. An arrangement that allows the insured to receive the rent if it succeeds in the litigation avoids the loss that the *Nebo* court found to be payable by the insurer. See §3.4.4 regarding stopgap measures that the insurer may take while a title clearance action is pending.

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[519] *Nebo, Inc. v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 222, 98 Cal.Rptr. 237 (1971).

[520] 253 La. 608, 218 So.2d 612 (1969).

3.4.9.2 Carrying Expenses

FORM 64, Appendix A
Measure of loss payable if title clearance unsuccessful

The title insurer is not liable for payment of the insured's ownership costs for the real estate, such as taxes and debt service, during the time in which the insurer is paying to clear title.[521] As one court explained, such expenses are not losses incurred due to a title defect, but rather are ordinary costs of ownership; such expenses are most clearly not losses when the insured has the use of the property:

> ... Plaintiffs are fully compensated by the award of damages ... based on the difference in the fair market value of the properties with and without the defects established by the evidence. The damage awards on the negligence and breach of contract claims cannot be reconciled because they are based on two contrary assumptions. The contract award assumes that Plaintiffs retain the value of the property with the defects while the negligence award assumes Plaintiffs would never have purchased it if they had known of the defects. Because Plaintiffs retain their respective interests in the land, an award of their out-of-pocket costs associated with

[521] *Michigan Properties, L.L.C. v. Chirco Title Co.*, 2012 WL 11000 (Mich.App.) (unpublished) (insurer not responsible for paying ownership expenses and other claimed damages for the two-year period in which insurer was clearing title, which it succeeded in doing, although insured had bought property intending to quickly flip it). In *Hilfer v. United States Mortgage & Title Guaranty Co.*, 14 N.J.Super. 456, 82 A.2d 463 (1951), the court held that the insurer was not required to pay the insured interest on borrowed money and real estate taxes it paid while the insurer was clearing title, although that effort was unsuccessful, because the insurer took immediate action to remove the title defect and paid the insured within 30 days after the loss was fixed. In *Eureka Investors Corp. N.V. v. Chicago Title Ins. Co*., 743 F.2d 932 (D.C. Cir. 1984), the court held that the insurer was not required to reimburse the insured for loan expenses and real estate taxes paid while title was being cleared, because the insured incurred those expenses as the owner of the property. In *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997), the insurer was found not to be liable to the insured for the real estate taxes, mortgage payments and property insurance it paid while the insurer (successfully) cleared title. A Michigan court refused to dismiss a claim for carrying costs incurred while title was being cleared. In *Soto v. First American Title Ins. Co.*, 2008 WL 3049982 (E.D.Mich.) (unpublished), title was subject to a mortgage when the insured owner purchased it. The insurer later purchased the property at the sheriff's sale conducted by the adverse lender and tendered title to the insured, who insisted that he was also owed money damages. The appeals court considered the tender of title to resolve the defect, but reversed summary judgment in favor of the insurer because the insured might be able to prove consequential damages: "Inherent in fee simple ownership is the right to quiet enjoyment and possession. … Defendant did not provide Plaintiff with possession for several months, the result of which ended in the property falling into foreclosure. It was foreseeable that the Property would go into foreclosure, and Plaintiff alleges that Defendant delayed curing the defect in title to secure a more desirable purchase price. … Plaintiff has presented a question of fact as to whether the house falling to foreclosure arose naturally from Defendant's delay in curing the breach, and damages relating to the foreclosure are recoverable… . Because Defendant's actions to cure the title defect may have been too little too late, and did not make Plaintiff whole, Defendant is not entitled to Summary Judgment … ." In *RA Southeast Land Company LLC v. First American Title Ins. Co.*, 2016 WL 4591740 (D.Nev.) (unpublished), the court found that the insurer was not liable for various kinds of carrying costs that the insured allegedly incurred while the insurer was protecting its title.

> ownership of the units such as maintenance, mortgage interest, insurance and taxes would result in a windfall.[522]

Another court held that the insurer was not responsible for the mortgage interest and property taxes paid by the insured while the title clearance litigation was pending, when any delay in the property's development was not directly caused by the title issue.[523]

The title insurer also is not responsible for expenses incurred by the insured in moving from the insured building, renting an alternative dwelling or similar expenses.[524] The policy also does not permit the insured to receive money for the claimed value of the enjoyment of the disputed portion of the property while its ownership is being litigated.[525] Under a loan policy, the title insurer is not obligated to pay the lender advances it makes while title is being cleared.[526] The title insurer also is not liable to an insured for the loss of the use of the money invested in the property while title is being cleared.[527]

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[522] *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997).

[523] *Native Sun Investment Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (Cal.App. 4 Dist. 1987).

[524] In *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), the court rejected the purchaser's claims against both seller and title insurer for "house hunting expenses, the cost of moving from their house, the cost of renting an apartment after they moved, the loss of favorable financing and depreciation on the house, closing costs, and house payments made to" their lender. The claim concerned an encroachment onto an easement, which the insurer resolved by buying a partial release of the easement for $100. The purchaser had insisted on rescinding the sale despite the easement holder's willingness to release. Because the insurer had obtained the release at its own cost, the purchaser obtained no judgment award against the insurer. In *Perry*, the insurer was sued in its role as escrowee, not on the policy, but the result is entirely consistent with principles governing policy claims. In *Marchetti v. Chicago Title Ins. Co*., 829 F.3d 498 (7th Cir. (Ill.) 2016), the insureds originally asserted that the insurer was required to reimburse them for rent they paid for another dwelling during the time in which their ownership and right to possess the insured property was being litigated, but they withdrew that claim, and the court found that such rent was not compensable under the policy.

[525] In *Miller v. Ticor Title Ins. Co*., 194 Or.App. 17, 93 P.3d 88 (Or.App. 2004), a portion of the yard adjacent to the insureds' house was claimed by the neighbor. The neighbor had the better record ownership claim, but the insurer paid for an adverse possession lawsuit that was successful. The insureds demanded money for the loss of use of the disputed land during the lawsuit, which the court denied, based on the final determination clause.

[526] See *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014), which held that carrying costs incurred by the lender were not caused by the covered lien claims, and that the insurer had not agreed to pay such expenses while it exercised its valid right to clear title. However, in *Guernsey Bank v. Milano Sports Enterprises, L.L.C.*, 2011 WL 1780911 (Ohio App. 10 Dist.), 2011-Ohio-2162 (unpublished), the court held that such expenses were within the scope of losses payable because protective advances are included in the definition of "indebtedness." The court ignored the fact that the word "indebtedness" is not used in the measure of loss provision, and that the full amount of the debt is calculated only if the insurer elects to purchase the loan from the insured. In *Bank of Sacramento v. Stewart Title Guar. Co.*, 2011 WL 6396533 (9th Cir. (Cal.)) (unpublished), the court found that a complaint survived a motion to dismiss when it alleged that the insurer was required to pay carrying costs incurred by the lender while the insurer was clearing title by litigation, and the lender claimed that the insurer did not clear title with reasonable diligence.

[527] In *Halfmoon Professional Offices v. American Title Ins. Co*., 652 N.Y.S.2d 390 (A.D. 3 Dept. 1997), the insured

3.4.9.3 Construction Expenses

FORM 45, Appendix A
Denial of delay damage claim

An insured's claim for money spent to build improvements on the property after the date of policy is inconsistent with the policy's measure of loss as the diminution in value to the property due to the covered title defect.[528] When a title defect is discovered while the insured is constructing improvements on the property, the defect may halt the project. If the insurer elects to cure title, it will ordinarily wish to attempt to avoid a construction stoppage. Frequently, however, the decision to halt funding or construction is made by the construction lender or the borrower and not the insurer, even despite the insurer's good faith attention to solving the title problem. When work has stopped, an insured owner may seek payment for its expenses incurred because of the delay. Except in the most unusual situation, such expenses are not payable.

As stated above, the current forms of policy state that damages do not accrue while the insurer clears title. Thus, in *Lawyers Title Ins. Co. v. Synergism One Corp.*,[529] the court held that construction delay expenses were not payable because the title matter was resolved in a reasonable time (33 months):

> We agree with appellant and hold that only paragraph 7(b) [equivalent of 9] applies to the facts of this case. A title policy indemnifies rather than guarantees the state of the insured title. The policy does not guarantee that litigation will not occur, but, in fact, assumes the opposite, that many types of title defect litigation can occur. The insured's claim must await an adverse title determination by a court. "The claim only lies once a court speaks, and not before, and not if the court's judgment is favorable." D. Burke, Law on Title Insurance (1986 & 1988 Supp.), section 9.4.3, titled Staying

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partnership's sale proceeds were held in escrow pending the removal of the title defect. The court ruled that "only the direct losses [the insured] sustained are recoverable." The insurer was not required to pay partners in the insured partnership the lost earnings from their shares of the proceeds while the money was tied up in the real estate. The court said that "The individual claims for lost profits arise from losses relating to personal investments and/or personal loans, not debts or investments of the partnership. The individuals claim that they intended to either make certain investments or pay off certain loans with the money each would have received from the sale proceeds. These damages are remote and consequential in nature and not covered under the title insurance contract which is in the nature of an indemnity contract requiring actual loss [citations omitted]." In *Buffington v. Atlanta Title & Trust Co*., 43 Ga.App. 444, 159 S.E. 297 (1931), the court dismissed a similar claim, because the damages were caused not by a defect in title but the foreclosure of a lien reported in the policy.

[528] In *Gray v. Commonwealth Land Title Ins. Co*., 27 A.3d 852 (N.H. 2011), the court rejected the insured owner's claim for building costs she had incurred on the property before she discovered that her title was bad, because the policy limits compensable loss to the diminution in value to the property or the land's value.

[529] 572 So.2d 517 (Fla.App. 1990).

the Claim for Pending Litigation.[530]

Several early cases awarded as loss the cost to rebuild a structure on the property, to remove a structure from a neighbor's land, or an increase in construction cost due to the title defect. The cases involved earlier policy forms that did not contain final determination provisions. The seminal case on construction damages is *Pennsylvania Laundry Co. v. Land Title & Trust Co.*[531] That policy did not contain an exception for the rights of the public in an alley on the property, which rights forced the owner to reconfigure the building then under construction. The court permitted recovery for the added construction cost, stating that ""[a]nything which renders it necessary to spend more money in using a lot impairs the value of the land."[532] In *Burks v. Louisville Title Ins. Co.*,[533] a neighbor announced his claim of title to a portion of the property while construction was proceeding. The insurer had been aware of the insured's intent to build but did nothing to resolve the claim when made. The court said the title defect "not only deprived plaintiff of part of the land he had bought, but required him to change the location of his driveway, to do additional grading, and to delay his construction, which, with other consequential damages suffered by plaintiff, exceeded the amount of defendant's guaranty."[534] Similarly, in *Buquo v. Title Guaranty & Trust Co.*,[535] the policy was issued "guaranteeing the lines of" the lot based on a survey, with the insurer aware that the insured intended to build immediately. The insured built a wall on the lot line shown on the survey. The lot line was incorrect. The court held that loss equaled the cost to remove the wall plus the value of the land. However, it denied recovery for consequential damages resulting from the insured's lack of ability to complete the project. The insured had argued that the insurer was responsible for such damages because the cost of rebuilding the encroaching wall impoverished the insured.

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[530] Id. at 518.

[531] 74 Pa.Super. 329 (1920).

[532] Id. at 338.

[533] 95 Ohio App. 509, 121 N.E.2d 94 (1953).

[534] 121 N.E.2d at 97.

[535] 20 Tenn.App. 479, 100 S.W.2d 997 (1936).

3.4.9.4 Lost Profit Or Sale

The policy does not make the insurer responsible for paying a loss to the insured measured as the loss of profit the insured might have earned on a sale of the property that might have occurred while the insurer was clearing title.[536] Also, the loss payable to the insured for the loss of a portion of the insured parcel is not measured as the resale value of the lots that might have been platted in the disputed part of the land, which was unplatted when the policy was issued.[537] An insured that could have converted and sold condominium units while title was being cleared was found entitled to payment from the insurer of the value of those lost sales.[538] An insurer that cleared title was not liable to the insured for its claimed lost profit from a shopping center it was allegedly delayed in building while title was being protected.[539]

3.4.9.5 Decline In Land Value And Other Claimed Expenses

Insureds sometimes seek payment for other types of expenses or losses they claim to have incurred during the time in which title was being cleared.[540] A California case based on negligent

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[536] In *K Corp. Enterprises, Inc. v. Fidelity Nat'l Financial, Inc*., 2015 WL 3755339 (Cal.App. 5 Dist.) (unpublished), the court held that a title insurer did not owe the insured owner for the profit it would have earned on a contract it lost during the time title was being cleared by the title insurer. The court said no loss was payable to the insured because the insurer cured the title issue. However, in *Eureka Investors Corp. N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984), the court found that the insurer was responsible for lost profit on resale when the policy contained an endorsement protecting against the effect of the tenants' rights to object to the conversion of the apartments to condominium units. The tenants did object, and thus delayed the sale of units. The *Eureka* court, however, rejected a claim by the insured for loss of earnings, based on the notion that the insured was too "distracted" by the title problem to concentrate on other profitable business. *Red Lobster Inns of America Inc. v. Lawyers Title Ins. Corp.*, 656 F.2d 381 (8th Cir. 1981) has been cited as supporting a claim for lost profit from the operation of a business. In that case, the property was encumbered by a restriction not shown on the policy. The restriction prohibited the restaurant use for which the land was purchased. The insured settled the restriction claim, then sued for the profit it would have made during the delay period. The court approved the claim. *Red Lobster* was not a policy claim, however. It was premised on a separate contract by which the insurer specifically agreed to advise the insured of any restrictions of record that would be violated by restaurant use and to provide the insured with a copy of such restrictions. In *Neikes v. Ticor Title Company of Oregon*, 291 Or.App. 720, 423 P.3d 102 (Or.App. 2018), the title insurer obtained the release of a deed of trust, after which the insured suffered no loss, including a claimed lost sale, lost rent or an alleged decline in the property's value while its title was in jeopardy. In *Marceaux v. Baker*, 2019 WL 5701736 (Ariz.App. 1 Div.) (unpublished), a title insurer that paid for a confirming deed to the insured was not also liable to the insured for the value of a claimed lost sale of the property.

[537] In *Pulte Home Corp. v. Industrial Valley Title Ins. Co.*, 25 Cumberland L.J. 157, 73 Pa. D. & C.2d 320, 1975 WL 16878 (Pa.Com.Pl. 1975), for example, a home builder-developer was denied its claimed loss of profit on the resale of lots when the existence of the title defect was claimed to have reduced the number of lots in the proposed subdivision by three, which the court considered too speculative a measure of loss.

[538] *Eureka Investors Corp. N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984).

[539] *RA Southeast Land Company LLC v. First American Title Ins. Co.*, 2016 WL 4591740 (D.Nev.) (unpublished). The insured claimed that, in the interim, a competitor built another shopping center nearby and stole all of the best tenant prospects.

[540] In *Yesilevich v. Republic Title Co.*, 2011 WL 10068810 (Ill.App. 1 Dist.) (unpublished), when the title insurer diligently defended the insureds' title in litigation and settled the case, it was not liable for water damage and other deterioration of the building that occurred during the two years or so that the litigation was pending, during which time

misrepresentation rather than policy loss found that a dentist-owner was entitled to reimbursement for his time spent trying to straighten out the title problem, but not at his professional rate.[541]

Courts disagree as to whether or not the insurer can be liable to the insured for any decline in the value of the property between the date of policy and the date of loss. Several decisions involving property that had declined in value set the date of loss as the policy date, which is a means of causing the insurer to pay not only the diminution in value caused by the covered matter but also the decline in the property's value from the policy date to the date on which the claim is paid.[542] However, other courts have rejected such claims, holding that the policy does not assure that the property has any particular value, and that diminution in value caused by the covered matter is the sole loss payable under the policy.[543] A complete collection of those decisions is found at §3.2.3.4, concerning the

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the insureds did not have possession of the building. In *Stewart Title Guar. Co. v. Tilden*, 110 P.3d 865, 2005 WY 53 (Wyo. 2005), an insurer was found liable to the insured for his attorneys' fees in an arbitration, despite the fact that the insurer cleared title and the arbitrator found no compensable loss, because the arbitrator also determined that it took an unreasonably long time to clear title. The court based the award of attorneys' fees on a state law that says "[i]n any actions or proceedings commenced against any insurance company," the insured may recover attorney's fees when an insurer "refuses to pay the full amount of a loss covered by the policy and that the refusal is unreasonable or without cause." In such cases, "any court in which judgment is rendered for a claimant may also award a reasonable sum as an attorney's fee and interest at ten percent (10%) per year." § 26-15-124(c), Wyoming Statutes.

[541] *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994).

[542] In *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505 (D.Ariz.) (unpublished), the court held that loss was to be measured on the date the loan was made, because according to the court that is when the lender suffered its loss. The *Equity Income* court relied on *G&B Investments*, 460 B.R. 848 (Bkcy.S.D.Miss. 2011), which flatly held that "[a]llowing the insurer to wait to value the [insured interest] in a falling real estate market works to the insurer's benefit, a result that does not construe an ambiguity in the policy in favor of the insured." In *First American Title Ins. Co. v. Johnson Bank*, 353 P.3d 370, 237 Ariz. 490 (Ariz.App. 1 Div. 2015), the insured deed of trust was not defective. The claim concerned a use restriction. The facts were thus similar to those in *Equity Income*. The Arizona appeals court adopted the reasoning of *Equity Income*, and set the policy date as the loss date. The Arizona Supreme Court accepted review, however. The high court significantly modified the appeals court rulings and rejected the reasoning of *Equity Income*. 239 Ariz. 348, 372 P.3d 292 (Ariz. 2016). In *Johnson Bank*, the Supreme Court adopted the date of policy as the loss date, but only as to the facts of that claim. The court said that, "[w]hen the title defect is an undisclosed lien, the foreclosure date might well be the appropriate valuation date because the lender's damage results from not having priority in the foreclosure proceeds." One of the authorities that supported that limited rule, the court said, was the criticism of *Equity Income* found in Christopher B. Frantze, *Equity Income Partners LP v. Chicago Title Insurance Co. and Recovery Under A Lender's Title Insurance Policy in A Falling Real Estate Market*, 48 Real Prop. Tr. & Est. L.J. 391 (2013). Also, the Supreme Court rejected the ruling of the appeals court, which had assumed that the title defect caused the borrowers to default in order to grant summary judgment to the lender. The high court said that, "[o]n remand, Johnson Bank will have to prove that the title defect caused the borrowers' default and subsequent foreclosure to justify using the date of the policies as the valuation date. If Johnson Bank fails to satisfy this burden, then the proper valuation date is the foreclosure date." The *Johnson Bank* court also said: "[u]nder the policies, First American did not expressly agree to indemnify or otherwise insure against the risk of a drop in the real estate market." Decisions on owner's policies that have addressed the question of whether or not depreciation in the value of the land can be claimed as loss under the policy are discussed at §3.2.3.4 and §3.4.9.5. In *Whitlock v. Stewart Title Guar. Co*., 399 S.C. 610, 732 S.E.2d 626 (S.C. 2012), the South Carolina Supreme Court held that loss under an owner's policy is measured as of the date of policy, which ruling may also apply to loan policies. See §3.2.3.4 for a complete discussion of the date of loss under an owner's policy, and §3.2.4.2 concerning the date of loss under a loan policy.

[543] *Premier Community Bank v. First American Title Ins. Co.*, 2015 WL 3949327 (W.D.Wash. 2015) (unpublished);

owner's policy date of loss, and §3.2.4.2, which discusses the loan policy date of loss. Several courts have awarded the insured the decline in property value for some period of time when the insurer responded to the claim by seeking to clear title but, in the court's opinion, the insurer did not clear title with reasonable diligence. Those decisions are found at §3.4.1, which discusses the so-called covenant to clear title diligently.

Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC, 2015 WL 807055 (unpublished). In *Premier Community Bank*, the insurer obtained an equitable lien on the property and converted it to title, which it tendered to the lender insured. The lender demanded to be paid the amount by which the property had declined in value from the policy date to the day on which title was tendered to it. The court rejected that claim, and found that the insurer owed no money to the lender for the decline in value. It rejected the Citicorp analysis, because Citicorp had ignored the insurer's right to tender title to the insured in full satisfaction of its policy duties. See §3.4.6.1 for a complete discussion of that principle. A South Carolina court rejected the insured's claim for a decline in property value during the time in which the successful title clearance action was pending, in *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994). In *Bank of Sacramento v. Stewart Title Guar. Co*., 2011 WL 6396533 (9th Cir. (Cal.)) (unpublished), vacating 2010 WL 3784096 (E.D.Cal.), the Ninth Circuit vacated a district court ruling that definitively stated that a bank may not collect as loss the depreciation in the property's value during the time in which the insurer is clearing title. However, the appeals court held only that the bank "has alleged legally cognizable damages caused by the claimed breach in the form of increased carrying costs for any additional time title was unmarketable due to the alleged lack of reasonable diligence." It said it did "not reach the validity of any of the other damages theories asserted by the Bank." The decision is unpublished. In *In re Evans*, 2011 WL 6258881 (Bkcy.S.D.Miss.) (unpublished), the court said that the title insurers "did not assume … the risk … that the real property that secured OmniBank's loans maintained its value in the marketplace." In accord is *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427 (5th Cir. (La.) 2014). In *Wade v. Stewart Title Guar. Co.*, 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), the court refused to award the insured the decline in value of the property or the insured's carrying costs while the insurer was clearing title without litigation. It relied on prior Illinois decisions in saying that "... title insurance does not provide coverage of the loss of value to the land itself. *Rackouski v. Dobson*, 261 Ill.App.3d 315, 318, 199 Ill.Dec. 875, 634 N.E.2d 1229 (1994). 'If the value of the property appreciates or depreciates, the title policy is not affected.' *McLaughlin v. Attorneys' Title Guaranty Fund, Inc*., 61 Ill.App.3d 911, 916, 18 Ill.Dec. 891, 378 N.E.2d 355 (1978)." The *Wade* court said that the policy itself "evinces an intent by the parties to preclude defendant from liability from the loss in value to plaintiff's property," citing the final determination provision, which says the insurer owes no loss payment if it clears title. See also the cases discussed at §§3.4.1, 3.4.5 and 3.4.6. In *Neikes v. Ticor Title Company of Oregon*, 291 Or.App. 720, 423 P.3d 102 (Or.App. 2018), the title insurer obtained the release of a deed of trust, after which the insured suffered no loss, including a claimed lost sale, lost rent or an alleged decline in the property's value while its title was in jeopardy.

3.5 Payment Of Policy Limits

FORM 65, Appendix A
Tender of policy limits

An insured's recovery under the title insurance policy may not be in an amount greater than the policy limit.[544] All title insurance policies state that the insurer may satisfy all policy obligations, including the duty to defend, by tendering policy limits.[545] This provision has been consistently upheld.[546] However, state law generally controls as to whether or not an insurer may terminate the duty to defend by payment of policy limits. See §4.11 for a complete discussion of the pay-and-walk principle and policy terms.

The option to pay policy limits rests with the insurer. The insurer is never obligated to pay policy limits, since the insurer always has at least one other option provided by the policy, which is payment to the insured of the value of the property. Thus, when a title clearance action is taken but the title defect is limited rather than eliminated, loss is payable for the diminution in value of the land as encumbered by the defect as limited.[547] The insurer does not owe policy limits as a form of punishment for not having entirely eliminated the encumbrance.[548]

If an inflation protection endorsement has been attached to the policy, the insurer must

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[544] *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012) (reversing appeals court decision permitting recovery for more than policy limits and limiting liability to policy amount); *Gomez v. Fidelity Nat'l Title Ins. Co. of New York*, 34 Misc.3d 1233(A), 950 N.Y.S.2d 608 (Table), 2012 N.Y. Slip Op. 50360(U), 2012 WL 671935 (N.Y.Sup.) (unpublished) (rejecting claim for damages of more than policy limits).

[545] Condition 7(a) of the 2006 ALTA Owner's policies states: "In case of a claim under this policy, the Company shall have the following additional options: (a) To Pay or Tender Payment of the Amount of Insurance. (i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay." The comparable provisions of the 1992 ALTA policies are Conditions and Stipulations 6(a)(i) of the Owner's policy and § 7(a)(i) of the Loan policy.

[546] *First American Title Ins. Co. v. Grafton Partners, LLC*, 2009 WL 792263 (D.Mass.) (unpublished) (all policy duties cease on payment of policy limits, including duty to defend); *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp*., 282 F.R.D. 423 (N.D.Ill. 2012) (all duties cease on payment of policy limits). The Idaho Supreme Court held that an insurer that paid policy limits had satisfied all of its policy duties, in *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982). In *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), the Minnesota Supreme Court reversed an appeals court ruling that the insurer was liable for more than policy limits for its failure to fix an allegedly ambiguous legal description. In *Friedeberg v. Bullard*, 2019 WL 1416473 (unpublished), recommendations adopted in 2019 WL 1412106 (E.D.Ark. 2019) (unpublished), aff'd 783 Fed.Appx. 648 (8th Cir. 2019), all claims by the insured based on the policy were terminated when the insurer paid the policy limits to the insured, including the insured's claim against the insurer that the policy had been issued without a "proper" title examination and his bad faith claim.

[547] See *Ruger v. Commonwealth Land Title Ins. Co.*, 1996 WL 769793 (Del.Super.) (unpublished), in which the insurer tendered policy limits but declined to clear title as demanded by the insured.

[548] *Linder v. Ticor Title Ins. Co. of Calif.*, 647 N.E.2d 37 (Ind.App. 4 Dist. 1995).

calculate the current amount of the policy in order to pay policy limits.[549] In those states that consider the insurer to have a fiduciary obligation to the insured while a claim is pending, that duty ceases when the insurer pays policy limits.[550] See §9.1.3.1 for a more complete discussion of the assertion that a title insurer owes a fiduciary duty to an insured.

3.6 Paying Party Adverse To Insured

The insurer may also resolve a claim by getting a deed, release or satisfaction of an adverse party's interest in or lien on the insured parcel.[551] For example, the insurer may pay off a lien,[552] or obtain a deed for the insured. The insurer may settle a lawsuit in which a third party asserts a right in the property by an agreement that resolves the title issue.[553] See also §3.7, discussing the closely-related subject of the insurer obtaining the conveyance of a right to the insured in order to establish title as insured.

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[549] *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994). In *Appleby v. Chicago Title Ins. Co.*, 80 A.D.3d 546, 914 N.Y.S.2d 257, 2011 N.Y. Slip Op. 00170 (N.Y.A.D. 2 Dept.), involving a policy containing a New York TIRSA market value rider, the court held that the insurer was not entitled to summary judgment declaring that payment of the face amount of the policy was its maximum liability for a lack of access, because the rider states that the amount of insurance is the property's market value on the date of loss, as established by three appraisers.

[550] Thus, when the insured and insurer jointly sought to recoup their losses after the insurer paid the claim, the insurer was found not to have a fiduciary duty to disregard its own interest and agree to a settlement that only benefited the insured, in *Security Title Guar. Corp. of Baltimore v. McDill Columbus Corp.*, 543 So.2d 852 (Fla.App. 1989).

[551] Condition 7(b)(i) of the 2006 ALTA policies states that the insurer has the right "to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay… ." Conditions & Stipulations 6(b) of the 1992 ALTA policies contains a nearly-identical provision.

[552] *Hilfer v. U.S. Mortgage & Title Guar. Co.*, 14 N.J.Super 456, 82 A.2d 463 (1951). In *Lewis and Clark Bank v. Stewart Title Guar. Co*., 2012 WL 2946717 (D.Or.) (unpublished), the insurer purchased a loan secured by a deed of trust with priority over the insured deed of trust, after litigating priority for the insured. It did not immediately remove the lien. The court dismissed a lender's claim for alleged lost profit on the sale of its loan that it claimed was foiled due to the existence of the prior lien, finding that it posed no threat to the insured once owned by the insurer.

[553] *Sala v. Security Title Ins. & Guar. Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (Cal.App. 2 Dist. 1938).

3.7 Obtaining Title For Insured

Another option for the insurer is to obtain a conveyance to the insured of land or a property right such as an easement in order to establish title as insured in the policy. If the insurer succeeds in establishing title as insured, no loss is payable to the insured.[554] This option is sometimes used when the claim involves a lack of a right of access to the property. See §3.2.3.1.5 for a complete discussion of resolving a claim concerning lack of access, including the purchase of an access right. Also, if the insured's title to a portion of the property is defective, the insurer is sometimes able to resolve the claim by obtaining a conveyance of the property from its rightful owner to the insured.[555]

If the insurer elects to consider this alternative, it is not required to pay a price for the lost property that far exceeds the land's true value. It is not uncommon for the true owner to demand payment of a ransom price when he or she learns that an insurance company is trying to obtain the land for an insured. Similarly, the insured is not entitled to purchase the land at whatever price the seller demands, and then be fully reimbursed by the insurer.[556] Rather, loss is still measured as the true value of the lost parcel, if a separate parcel, or the difference in value between the entire parcel as insured and the land actually owned by the insured. The insurer will typically either pay the true diminution value to the insured as loss, or to the property owner to acquire the land, after which no loss is payable to the insured.

Also, when the insured purchases the lost land before tendering a claim to the insurer, or without the insurer's written consent given in advance, the voluntary settlement provision will ordinarily apply, meaning that the insurer is not required to reimburse the insured. The voluntary settlement provision is discussed at §2.14. Even if a claim is payable despite the insurer's prior written consent for the purchase, the loss payable may be less than the purchase price paid by the insured, which may not have reflected the property's true value.

Similarly, the insurer is not required to purchase for the insured's benefit more land than was insured. On occasion, the true owner of the lost parcel is willing to sell the land, but only as part of a larger parcel. In such a case, the insured is entitled to be indemnified only for the value of the land insured in the policy.[557] Although the insured incurs additional cost to purchase the uninsured land, that property also has value that accrues to the insured's benefit.

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[554] See *Neikes v. Ticor Title Company of Oregon*, 291 Or.App. 720, 423 P.3d 102 (Or.App. 2018), in which the title insurer delivered title to the insured free of the covered matter, a deed of trust, after which the insured suffered no loss, including a claimed lost sale, lost rent or an alleged decline in the property's value while its title was in jeopardy.

[555] See *Lawyers Title Ins. Corp. v. Synergism One Corp.*, 572 So.2d 517 (Fla.App. 4 Dist. 1990), for example, in which the insurer obtained a quit claim deed from a neighbor to quiet his claim of title to the land.

[556] For example, in *Hillsboro Cove, Inc. v. Archibald*, 322 So.2d 585 (Fla.App. 1975), the insured paid about $50,000 to obtain title to a 30-foot strip of land. The affected parcel's proportionate value of the land when the insured purchased it three years earlier was found to be just $6,000, however. The court awarded the insured the proportionate value of the property rather than the amount it spent obtaining title. *Hillsboro* thus acknowledges that loss must be measured by an objective standard.

[557] In *Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 687 P.2d 371 (App. 1984), the insured purchased a larger parcel than the land insured because the neighbor insisted on selling the larger parcel. The court held that the insurer was obligated to pay only for the land insured. The insured had paid an additional amount, but had received land that had additional value.

Occasionally, the insurer attempts to arrange this type of cure, but abandons the effort in order to resolve the claim a different way. While an insurer may become bound by contract to purchase a property right, the insurer cannot be required by the third party to purchase a right for the insured's benefit, in an action for specific performance, when the parties have only a tentative agreement about the conveyance of that property right.[558]

3.8 Purchasing The Insured Indebtedness

The loan policy states that the insurer may buy the indebtedness from the insured lender, on which all liability under the policy ceases.[559] Conditions 8 of the 2006 ALTA Loan policy states that loss is the least of the policy limit, the diminution in value to the property or the Indebtedness. Thus, the insurer has the option to purchase the debt, but is not obligated to do so when demand is made by the insured.[560] If the land is worth less than the debt, the insurer is not entitled to demand that the insured sell the debt on payment of the value of the land, but the insured may agree to do so.

The 2006 ALTA Loan policy adds a definition of "Indebtedness" at Conditions 1(d).[561] This provides a very inclusive list: principal, principal advanced after date of policy, interest, prepayment penalties, cost of foreclosure, and advances to protect the mortgage lien or to prevent waste. The 1992 ALTA policy, by contrast, used the phrase "unpaid principal indebtedness," as reduced under the *pro tanto* provision.[562] The effect of the definitional change in the 2006 policy is compounded by

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[558] *Haessly v. Safeco Title Ins. Co.*, 825 P.2d 1119 (Idaho 1992).

[559] Condition 7(a)(ii) of the 2006 ALTA Loan policy states that, "[i]n case of a claim under this policy, the Company shall have the following additional options," one of which is: "To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay. When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security." Further, Conditions 7(a) states that "Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation."

[560] *Miller v. Commercial Standard Ins. Co*., 248 So.2d 675 (Fla.App. 2 Dist. 1971).

[561] "… the Indebtedness is the sum of (i) the amount of the principal disbursed as of Date of Policy; (ii) the amount of the principal disbursed subsequent to Date of Policy; (iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance; (iv) interest on the loan; (v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law; (vi) the expenses of foreclosure and any other costs of enforcement; (vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title; (viii) the amounts to pay taxes and insurance; and (ix) the reasonable amounts expended to prevent deterioration of improvements; but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured."

[562] Conditions & Stipulations 7(a)(ii) of the 1992 ALTA loan policy states that loss is limited to: "the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon ... ."

the elimination of the *pro tanto* provision. The 1992 and prior policies said that payment of the debt reduced the policy amount dollar for dollar. With that language erased, it will be far less common for the Indebtedness to be less than policy limits, particularly if the borrower is in default, because default interest, penalties and attorneys' fees are all added to the Indebtedness.

In those cases in which the Indebtedness is less than policy limits or diminution, the insurer will almost invariably wish to exercise the option to purchase the loan. The insurer is entitled to a full assignment of the loan and delivery of the loan documents when it purchases the debt from the insured.

4 Duty to Defend

One of the insurer's options in resolving a claim is to defend an insured who has been sued. The other options in resolving a covered claim are discussed in Chapter 3. The defense of an insured is not, strictly, an alternative to the other options which the insurer normally possesses. Rather, the duty to defend is separate from and in addition to the duty to indemnify. However, the two duties are complementary, in that a successful defense of the insured's title satisfies the duty of indemnity also.[1]

The law concerning an insurer's duty to defend an insured is local in nature. The reader must consult state law on all issues concerning the duty to defend, in addition to the cases cited herein. There are several related subjects discussed in other portions of this treatise. The insurer's right to bring an action to cure title is discussed at §3.4. The insurer's right to resolve the claim by settling with the adverse claimant is discussed at §3.6. Insurer bad faith is covered in Chapter 16.

4.1 Policy Provisions Regarding The Duty To Defend

The policy creates a duty to defend the insured in litigation for which the policy provides coverage. This duty is addressed in almost every provision of the policy. The defense duty is referenced in the Covered Risks. The 1992 policy states the following on the policy cover, below the list of insuring provisions:

> The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

The 2006 policies contain a nearly-identical recital below the statement of Covered Risks.

The title insurance policy is not a "consuming" policy—that is, the amount of insurance coverage is not reduced by the attorneys' fees and expenses incurred in defending the insured, as is

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[1] See §3.4.5, discussing the final determination of loss provision, found at Condition 9(b) of the 2006 ALTA policies and Conditions & Stipulations 8 and 9, respectively, of the 1992 ALTA Owner's and Loan policies.

the case with many other types of insurance policies. This principle is restated in Condition 8 of the 2006 policies (Conditions & Stipulations 7 of the of the 1992 ALTA policies), regarding the extent of liability for a claim of loss, which says:

> The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy ... .

The same rule is stated in Condition 10 of the 2006 ALTA policies (Conditions & Stipulations 10 of the 1992 policies), having to do with the reduction of the Amount of Policy after payment of a loss:

> All payments under this policy, **except payments made for costs, attorneys' fees and expenses,** shall reduce the amount of the insurance pro tanto.

There is no duty to defend matters excluded, as is discussed further at §4.4. The preamble to the Exclusions states:

> The following matters are expressly excluded from the coverage of this policy **and the Company will not pay loss or damage, costs, attorneys' fees or expenses** which arise by reason of:

Condition 5(a) of the 2006 ALTA policies (Conditions & Stipulations 4(a) of the 1992 ALTA policies) contains three related limits on the duty to defend: (a) the duty to defend is limited to causes of action covered by the policy; (b) the insurer may retain its choice of counsel to represent the insured as to the covered counts of the complaint; and (c) the insurer will not pay attorney fees for non-covered counts:

> [T]he Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

See §4.7 below for further discussion of the insurer's provision of a partial defense. These limitations on the scope of the duty to defend are reiterated in Conditions 7(b) and 8(d) of the 2006 ALTA policies.

The insured has several duties regarding defense of an action. The first is to tender a request for defense:

Duty to Defend

> **Upon written request by the Insured,** and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured.[2]

The subject of the duty to tender defense is discussed at §4.3. The insured also is obligated to cooperate in his or her defense:

> In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.[3]

The insured's incipient claim of loss is not payable until the defense of the action is concluded: "[w]henever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order."[4]

The duty to defend is satisfied on payment of policy limits to the insured. If that option is exercised by the insurer:

> ... all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.[5]

However, payment of policy limits must be accompanied by payment of:

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[2] Condition 5(a), 2006 ALTA policies (emphasis added); see also Conditions & Stipulations 4(a), 1992 ALTA Owner's policy.

[3] Condition 6(a), 2006 ALTA policies; see also Conditions & Stipulations 4(d), 1992 ALTA Owner's policy.

[4] Condition 5(c), ALTA 2006 policies; see also Conditions & Stipulations 4(c), 1992 ALTA Owner's policy.

[5] Condition 7(a), ALTA 2006 policies; see also Conditions & Stipulations 6(a), 1992 ALTA Owner's policy.

any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.[6]

The defense duty also terminates on settlement with either the adverse claimant or the insured. The balance of this chapter will address these policy provisions, and the common issues encountered as to the duty to defend.

4.2 Defense Obligation Runs To Insureds Only

The insurer's obligation to defend extends only to those parties who are insureds under the policy. The subject of the definition of "insured" is fully discussed in Chapter 7. The insurer does not owe duties to the parties in the title litigation who are adverse to the insured.[7]

4.3 Tender Of Defense

All modern ALTA policies require a written tender of defense by the insured to the insurer in order to invoke the duty to defend the insured in litigation.[8] Several decisions interpreting earlier policy forms found that a formal written tender was not required by those policies' terms, however.[9] Notice provided by the insured to a title agent, or other notice short of a tender of defense, has been found not to qualify as a tender.[10] A notice of claim made prior to the time the insured is sued is also not a tender of defense.[11]

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[6] Condition 7(a), ALTA 2006 policies; see also Conditions & Stipulations 6(a), 1992 ALTA Owner's policy.

[7] In *Denton v. First American Title Ins. Co*., 379 Mont. 536, 353 P.3d 507 (Table), 2015 MT 155N, 2015 WL 3537267 (Mont. 2015) (unpublished), the court found that a title insurer that had issued an endorsement assuring a right of access over certain roads did not commit abuse of process by authorizing and paying for a lawsuit in which the insured asserted those access rights, even though the insured lost the case. Therefore, the insurer did not owe money to the defendants in the access case for their legal fees in prevailing against the insured.

[8] See *TES Properties, LLC v. Ticor Title Ins. Co.*, slip copy, 2008 WL 1767713 (S.D.Tex.) and *Armitage v. First American Title Ins. Co.*, 2007 WL 2137954 (Cal.App. 1 Dist.) (unpublished), both of which state that written tender of defense is required by the policy. See Condition 5(a) of the 2006 ALTA policies, which states that the insurer shall defend the insured "[u]pon written request by the Insured… ."

[9] In *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990), which concerned the 1970 ALTA owner's policy, the court found that notice of the suit and an indication by the insured of a willingness to allow the insurer to defend was sufficient to invoke a duty to defend. The *Allison* court acknowledged that later ALTA policies, by contrast, contain a tender requirement. Similarly, in *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953), notice short of a formal tender was found to create a duty to defend under an older California Land Title Association policy form.

[10] *Fells v. Stewart Title Guar. Co.*, 2010 WL 2197693 (E.D.Ark.) (unpublished), aff'd 400 Fed.Appx. 121, 2010 WL 4398071 (8th Cir. (Ark.) Nov 08, 2010) (unpublished) (insured's lawyer's conversation with president of title agency not a tender; insurer prejudiced by insured's failure to tender defense because it lost right to select counsel).

[11] *Armitage v. First American Title Ins. Co.*, 2007 WL 2137954 (Cal.App. 1 Dist.) (unpublished); *SAA Group, LLC v. Old Republic Nat'l Title Ins. Co.*, 2011 WL 1815725 (Mass.Super.) (unpublished) (claim notice sent a year after a lawsuit

Duty to Defend

The current ALTA policies do not obligate the insurer to pay legal fees and expenses incurred before the insured tenders its defense to the insurer, although the insurer has been found to have a duty to pay defense fees incurred by the insured after tender and before the insurer's acceptance of the defense.[12] The effect of prejudice caused by a tardy tender of defense is discussed at §2.3.3. The effect of the insured's failure to cooperate generally is discussed at §4.10.

When a lawsuit involves more than one insured, each is required to tender his or her defense separately.[13] The general rule is as stated by one commentator:

> [T]hird party notice should not satisfy the insured's notice obligation unless the information provided by the third party is such as to put the company on notice that

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was filed that did not refer to lawsuit or request a defense was not a tender of defense; tender made eight months later, after judgment was entered, was tardy).

[12] *TES Properties, LLC v. Ticor Title Ins. Co.*, 2008 WL 1767713 (S.D.Tex.) (unpublished) held that "in Texas, title insurers are not liable for pre-notice costs," citing *Houston Title Guaranty Co. v. Fontenot*, 339 S.W.2d 347, 353 (Tex.Civ.App.-Houston 1960) (writ ref'd n.r.e.). The court explained that tender is related to the insurer's right to select and manage counsel, and tardy tender frustrates that right: "Ticor contracted for the right to select counsel, and not to pay the fees of other counsel." In *Ogden Plaza Garage Company, LLC v. First American Title Ins. Co*., 2014 WL 6704366 (N.D.Ill.) (unpublished), the court held that a title insurer that accepted the insured's tender of defense and hired a firm other than the insured's choice of counsel was not required to pay the fees of the insured's law firm, not even the time spent by that firm in getting the insurer-retained firm up to speed. See also *Nilesh Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 2009 WL 2998204 (W.D.Tex.) (unpublished) (no duty to pay for cost of litigation incurred before tender); *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014 (insurer had no duty to defend lawsuit concluded before tender was made by insured as to several related lawsuits because there is no duty to pay for fees incurred before tender and there was nothing left to defend when tender was made). However, in *Ventana Partners, LLC v. Lanoue Development, LLC*, 267 Or.App. 15, 340 P.3d 107 (Or.App. 2014), the court held that the insurer had a duty to defend a lawsuit settled in principle six days before the insured tendered its defense to the insurer, on the slim argument that the case was not really settled before the tender. The court did not hold that the insurer had a duty to pay pre-tender fees, however. In *Mulhearn v. Lawyers Title Ins. Corp*., 2014 WL 213554 (Cal.App. 2 Dist.) (unpublished), rev.den. Apr. 9, 2014, the court found that the insurer was obligated to pay the nominal attorneys' fees incurred by the insured in the six weeks between tender and acceptance. In *CH Properties, Inc. v. First American Title Ins. Co*., 43 F.Supp.3d 83 (D.P.R. 2014), recons.den. 2014 WL 7140507 (D.P.R. Dec. 15, 2014), the court found that a title insurer had a duty to defend an insured from the time it became aware of a lawsuit, not from date of the tender that came much later, because it was already monitoring the suit, was defending another insured in the same suit, and used the law firm it had already hired to represent the second insured after the tender was made. The court ignored the language of the policy. It focused instead on the notion that the insurer was not "prejudiced" by the late tender, despite the fact that there is no prejudice limitation in the ALTA policy defense provision. However, in a later decision in the same case, the court said that the insurer was not required to pay the fees incurred by the insured for a second attorney retained by the insured to oversee the work of the counsel retained by the insurer. *CH Properties, Inc. v. First American Title Ins. Co.*, 204 F.Supp.3d 416 (D.P.R. 2016). In *Wei v. Stewart Title Guar. Co*., 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court held that the insurer had no duty to pay for pre-tender defense fees under Condition 5(c) of the Homeowner's policy, which says "We are required to repay You only for those settlement costs, attorneys' fees and expenses that We approve in advance." The court said that "Stewart Title was not obligated to pay any fees it did not approve in advance, whether they were incurred pre-tender or afterwards."

[13] See *Straight Creek Processing Co. v. Lawyers Title Ins. Corp.*, 1995 WL 170368 (W.D.Va. 1995) (unpublished), in which a lender's tender of defense was found not to excuse the owner from making its own tender.

> the insured might make a claim under the policy. For example, an insurance company employee might, in the course of handling a claim filed by one of the company's insureds, learn of facts that could give rise to a claim against another party. Unless the employee, however, has reason to know that the other party is insured by the same company, the insurer should not be deemed to have obtained notice of a claim by that insured.[14]

In rejecting the defense of one insured, the insurer should avoid any suggestion that it is rejecting the defense of insureds who have not tendered. If more than one insured is a defendant, the non-tendering insured's policy coverage may be different. Also, the title insurer has no database of current insureds, since no renewal premiums are paid, and does not know if other defendants are its insureds. An insurer that obtains notice of a lawsuit that might affect insureds' titles has no duty to investigate the suit to determine if it should be defending any of the parties, which the court said would impose a duty on the insurer "in terms of seeking out the identity of an unknown."[15] However, a decision construing the 1970 ALTA policy found that a tender by some was adequate notice on behalf of other insureds, all of whom were identically situated.[16]

4.4 Scope Of Duty To Defend

FORM 2, Appendix A
Retainer of counsel--no reservation of rights

The title insurance policy creates a duty to defend the insured in "litigation."[17] The term "litigation" has been held to cover a motion for an injunction that would affect the insured

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[14] Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §1.6, pp. 1-57 to 1-58, Thomson Reuters (footnotes and citations omitted). *Windt* is a very thorough and practical treatise on insurance law.

[15] *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal.App.3d 1, 58, 221 Cal.Rptr. 171, 203 (4 Dist. 1985).

[16] *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. (Wis.) 1990). The court reached that conclusion based largely on the fact that the insurer's denial letter implied that the insurer would also reject a tender of defense by any other insured. The rejection letter stated that the company did not find a duty to defend "any" of the unit owners. It implied that the insurer had investigated the titles and believed that it had current policies on all units. The insureds argued successfully that any further tenders of defense would have been "futile," given the insurer's perceived intent to deny every tender.

[17] In *Ogden Plaza Garage Company, LLC v. First American Title Ins. Co.*, 2014 WL 6704366 (N.D.Ill.) (unpublished), the court ruled that the duty to defend begins when a lawsuit is filed, not when the insured receives notice that there is a controversy that might lead to litigation. Since the ALTA policy does not define "litigation," the court looked to Black's Law Dictionary to establish the word's plain and ordinary meaning. That definition is "[t]he process of carrying on a lawsuit; a lawsuit itself." Black's defines "lawsuit" as "[a]ny proceeding by a party or parties against another in a court of law." The court agreed with First American that the term "litigation" means "the filing of a lawsuit."

improvements and an adversary proceeding in bankruptcy.[18] However, the duty to defend does not ordinarily extend to administrative proceedings.[19]

State law provides the test by which the existence of a duty to defend is determined. A common test is as follows:

> The existence of an obligation to defend is, in general, determined by the allegations of the complaint. If the allegations of the complaint state a cause of action or facts that would support a cause of action within the coverage of the policy, the insurer must defend.[20]

This is sometimes known as the "four corners" test.[21] Other courts have correctly pointed out that the test really involves eight corners, since the allegations made in the four corners of the complaint must be compared to the terms found within the four corners of the policy.[22]

There is a duty to defend only when there is a potential for coverage under the policy. One text states:

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[18] *McMinn v. Damurjian*, 105 N.J.Super. 132, 251 A.2d 310 (Ch. 1969) (injunction); *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, (7th Cir. 1990); 979 F.2d 1187 (7th Cir. 1992); *National Heat & Power Corp. v. City Title Ins. Co.*, 57 App.Div.2d 611, 394 N.Y.S.2d 29 (1977) (adversary proceeding).

[19] *Ocean View Land Co. v. West Jersey Title Guar. Co.*, 71 N.J.L. 600, 61 A. 83 (1905); *Guenther v. Old Republic Nat'l Title Ins. Co.*, 2013 WL 5424004 (D. Idaho) (unpublished) (land use contested case hearing over building permit application was not "litigation" and did not attack title, even though lack of access right was a reason for denying the permit, and therefore the insurer was not obligated to defend the insured in that proceeding). However, in *212 Marin Boulevard, LLC v. Chicago Title Ins. Co*., 2014 WL 8849641 (N.J.A.D. 2015) (unpublished), cert.den. 223 N.J. 280 (Oct. 5, 2015), the court held that the insurer was required to pay for non-litigation work that was in aid of the insured's defense in litigation, including attendance at public meetings, lobbying work, and tax advice. The court incorrectly said that "[t]here is nothing about the policy language to suggest that the promise to pay costs incurred in the defense of title would be strictly limited to the particular confines of the underlying lawsuits and would not extend to other efforts to vindicate the title conveyed." The court admitted that some courts have criticized the rule because it "allows an insurer to plead Sergeant Schultz's 'know nothing' defense, and 'thereby successfully ignor[e] true but unpleaded facts within its knowledge that require it, under the insurance policy, to conduct the putative insured's defense.'" As a result, some states have created an exception to the rule when the insurer knows that the "true facts" vary from the allegations in the complaint and suggest potential policy coverage.

[20] Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §4.1, p. 4-15, Thomson Reuters (footnote and citations omitted).

[21] See, for example, *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (1978). In *Lupu v. Loan City, LLC,* 903 F.3d 382 (3rd Cir. (Pa.) 2018), the Third Circuit Court of Appeals gave an extended explanation of the four-corners rule, observing that the rule "is about administrative ease; it ensures courts can 'efficiently determine an insurer's duty to defend, which results in less distraction from the merits of the underlying suit.'" Also, the rule does not allow courts to "rewrite the contractual duty to defend to be triggered whenever any claim is made rather than only those claims covered under the actual policy terms."

[22] *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84 (Tex.App.-Houston 1993); *CH Properties, Inc. v. First American Title Ins. Co*., 43 F.Supp.3d 83 (D.P.R. 2014), recons.den. 2014 WL 7140507 (D.P.R. Dec. 15, 2014); *Haley v. Hume*, 448 P.3d 803 (Wash.App. 1 Div. 2019).

> [T]he insurer must defend if, but only if, any of the allegations against the insured could result in a judgment that the insurer would be obligated to pay.[23]

If none of the possible outcomes of the lawsuit would result in coverage, there is no duty to defend the insured.[24]

The insurer is not relieved of a duty to defend the insured against claims because they are untenable; thus, the duty is not extinguished if there is little likelihood that the plaintiff will prevail, or if the allegations against the insured are frivolous.[25] The duty to defend also is not based on the actual outcome of the case, or the court's determination as to whether the allegations had been proven.[26] The duty is invoked if there would be a potential for coverage if the adverse claimant were to prove its allegations.[27]

However, if there is no such potential for coverage, the insurer does not owe a defense.[28]

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[23] Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §4.1, pp. 4-15 to 4-17, Thomson Reuters (footnote and citations omitted).

[24] For example, in *N E Properties, Inc. v. Chicago Title Ins. Co.*, 660 A.2d 926 (1995), the only possibilities were that the matter would be proven to be excluded or not a defect in title. The insurer had no duty to defend the insured. Similarly, in *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 911 P.2d 209 (1996), an insurer had no duty to defend or prosecute a suit on behalf of an insured after it had obtained title to the land insured. The court cited several Montana authorities for its ruling that "if the asserted claim is not covered by the policy, then the insurer has no duty to defend the insured." See also *Buss v. Transamerica Ins. Co.*, 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 939 P.2d 766 (1997) ("in an action wherein none of the claims is even potentially covered, the insurer does not have a duty to defend").

[25] *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84 (Tex.App.-Houston 1993). In *Weber v. Chicago Title Ins. Co.*, 169 Or.App. 24, 7 P.3d 714 (Or.App. 2000), the insured was sued by neighbors claiming an easement over his land to taxi their airplanes to a private airport. The insurer denied the defense, arguing that the "unrecorded easements" exception removed any potential for coverage. The easement was shown on a subdivision plat not in the insured's chain of title. The court held that there was a duty to defend because the plaintiff claimed a recorded easement, and the chain of title was a defense to be asserted in favor of the insured to defeat the plaintiff. See §9.1.3.1 for a full discussion of the rules of construction for the title insurance policy.

[26] See *Casero v. Chicago Title Ins. Co.*, 2018 WL 830225 (D.Md.) (unpublished) (duty to defend not based on outcome of suit and decision on duty to defend should not be delayed until underlying case is decided, even when allegations of the parties are fluid).

[27] *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 100 Md.App. 606, 642 A.2d 285 (Md.App. 1993); *Back Creek Partners, LLC v. First American Title Ins. Co*., 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013); *Casero v. Chicago Title Ins. Co.*, 2018 WL 830225 (D.Md.) (unpublished); *Investors Warranty of America, Inc. v. Chicago Title Ins. Co*., 2018 WL 3992147 (Cal.App. 4 Dist.) (unpublished) (insurer had duty to defend although most claims and potential outcomes fell under exclusions).

[28] For example, an insurer had no duty to defend its insured when the bankruptcy adversary complaint alleged that the insured sale-leaseback was actually intended to grant a mortgage, rather than fee simple title as insured, in *Ticor Title Ins. Co. v. FFCA/IIP 1988 Property Co*., 898 F.Supp. 633 (N.D. Ind. 1995). The court said that the allegations in the complaint, if proven, would not invoke coverage under the title insurance policy. In *Haley v. Hume,* 448 P.3d 803 (Wash.App. 1 Div. 2019), the court held that there was no possibility of coverage for a lawsuit because of a survey exception, and therefore there was no duty to defend.

There is no duty to defend based on the speculation that the plaintiff might have some other right in the insured parcel even if it did not prove its allegations, when the right alleged in the complaint does not create the potential for coverage.[29]

The 2006 and 1992 ALTA policies explicitly adopt the "eight corners" test, by limiting the duty to defend to matters for which there would be a duty to indemnify. The policies specifically state that there is no duty to defend matters excluded from coverage. The 1970 policy also was found not to create a duty to defend matters excluded from the policy.[30] The policies also do not obligate the insurer to prosecute lawsuits or claims against third parties on behalf of its insured.[31]

The duty to defend is determined from the pleading in effect when the tender is made, and the duty ceases when the claims that create the potential for coverage are withdrawn, dismissed or otherwise cease to be asserted.[32] The duty to defend may only be triggered by the allegations in the complaint, not allegations that might be made if the complaint were amended.[33] Thus, one court said:

> An insured may not trigger the duty to defend by speculating about extraneous 'facts' regarding potential liability or ways in which the third party claimant might amend its complaint at some future date... . A corollary to this rule is that the insured may not speculate about unpled third party claims to manufacture coverage.[34]

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[29] *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 642 A.2d 285, 100 Md.App. 606 (Md.App. 1993) (complaint alleged either adverse possession or implied easement, both of which were not covered because of standard exceptions).

[30] *Jesko v. American-First Title & Trust Co.*, 603 F.2d 815 (10th Cir. 1979) (Oklahoma law). Exclusions were also used to negate a duty to defend in *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84 (Tex.App.-Houston 1993) (post-policy exclusion) and *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994) (Exclusion 3(a)).

[31] *First American Title Ins. Co. v. Grafton Partners, LLC*, 2009 WL 792263 (D.Mass.) (unpublished) (insurer not required to prosecute insured's third-party claims against surveyor); *Sands Point Partners Private Client Group v. Fidelity Nat'l Title Ins. Co*., 99 A.D.3d 982, 953 N.Y.S.2d 147, 2012 N.Y. Slip Op. 07097 (N.Y.A.D. 2 Dept. 2012) (title insurer not required to prosecute eviction action for insured owner, although tenant asserted as defense to eviction that he was heir of prior owner and insured's grantor did not have good title to property; nature of action was still eviction only).

[32] *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D. Idaho) (unpublished) (duty to defend ceases when covered claims are disposed of; duty does not last as long as suit is pending if potential for coverage ceases); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012) ("[t]he duty to defend is determined at the time the insured tenders defense of the claim to the insurer"). In *Regions Bank v. Commonwealth Land Title Ins. Co.*, 977 F.Supp.2d 1237, 24 Fla. L. Weekly Fed. D 192 (S.D.Fla. 2013), the court held that the insurer's duty to defend came into being when a third party filed a pleading that attacked the insured lien. He later amended the pleading, and the insured tendered after the amendment. The insurer asserted that the amended pleading invoked an exclusion. The court found that the exclusion did not eliminate all potential for coverage, and thus the amendment did not negate the duty to defend.

[33] *Miller v. First American Title Ins. Co.*, 2006 WL 2440850 (Cal.App. 2 Dist.) (unpublished) (when complaint could not even be amended to bring the pleading within potential coverage, insurer had no duty to defend).

[34] *Gunderson v. Fire Ins. Exchange*, 44 Cal.Rptr.2d 272, 277-8 (Cal.App. 1995), quoted in *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. (Cal.)) (unpublished).

The insurer's first step in analyzing a tender of defense is to carefully read the pleading to determine if it creates the potential for a judgment against the insured for which there would be a duty to indemnify. One way to analyze the pleading is to begin with the prayer for relief, to determine if the adverse party seeks a remedy that would affect title as insured; then analyze the nature of the causes of action, to determine whether or not they assert claims that invoked covered risks as opposed to non-covered claims; then review the allegations of fact, to determine if there are recitals that appear to affect or challenge title as insured. The insurer should not base its decision on the duty to defend based only on its own interpretation of the plaintiff's intent, or on the subjective interpretation by the insured.[35]

The insured must establish that the allegations of the complaint invoke a covered risk or an affirmative coverage given by endorsement; if no coverage is invoked, there can be no duty to defend.[36] The duty to defend is determined by the nature of the rights or claims alleged. The mere

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[35] *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, (7th Cir. (Wis.) 1990) (holding that insurer's interpretation of the pleading was not the only plausible reading). In *Chicago Title Ins. Co. v. CV Reit, Inc.*, 588 So.2d 1075 (Fla.App. 1991), the insured lender was sued on "a collection of claims" by subdivision homeowners charging that the lender "was a co-developer of the project and that it received certain monies from the homeowners that it did not properly apply to the benefit of the homeowners and the homeowner's association." The insured tendered its defense to the insurer, asserting that it was "evident" that the homeowners sought an equitable lien prior to the lender's mortgage lien. The court disagreed, saying: "We do not find it 'evident' at all that such relief has been requested. Furthermore, whether or not a duty to defend exists arises from the allegations of the complaint itself, … not on some conclusions drawn by the insured based upon a theory of liability which has not been pled. … Since the allegations of the initial complaint did not allege facts which would bring the case within the coverage of the title insurance policy, it was error to enter partial summary judgment" in favor of the insured. 588 So.2d at 1075-6. Likewise, in *Blaser v. DeVries*, 2011 WL 5965762 (Mich.App.) (unpublished), the court said the question was "whether the underlying complaint arguably falls under the insurance policy, not whether a legal question regarding coverage will arguably be decided in favor of the insured. The fact that the insured credibly argued that the claims come within the policy coverage is irrelevant." In *Banner Bank v. First American Title Ins. Co*., 916 F.3d 1323 (10th Cir. (Utah) 2019), the Tenth Circuit refused to adopt the reasoning of the insured, that the allegations of the complaint should be read through the lens of the terms used in the later settlement agreement between plaintiff and defendant. The settlement agreement reframed the plaintiff receiver's allegations using terms designed to invoke policy coverage. The court said: "First, the Bank's position is inconsistent with Utah law. The duty to defend is broader than the duty to indemnify, but the duty to defend is determined from the face of the Receiver's complaint. If the Receiver's complaint was not enough to establish a duty to defend, how could the settlement agreement later create liability for indemnification? The Bank's position reverses the normal timeline, and it would effectively allow the duty to defend to attach retroactively. Second, we are hesitant to look to the settlement agreement for guidance because the parties certainly have an incentive to negotiate a settlement agreement that will create liability for the insurer, regardless of the true nature of the action."

[36] In *Feduniak v. Old Republic Nat'l Title Ins. Co*., 2014 WL 6603253 (N.D.Cal.) (unpublished), the court found that the insurer had no duty to defend the insured in an action in which the plaintiff governmental body did not assert a defect in title but, rather, sought penalties for the insured's misconduct in failing to comply with its orders. In *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999), the complaint did not invoke a Covered Risk by asserting the tortious interference with an easement by the insured owners, without seeking a judicial determination as to the rights of the easement holder in the insured parcel. In *Pete Lien & Sons, Inc. v. First American Title Ins. Co.*, 478 N.W.2d 824 (S.D. 1991), the insured asserted that there was a duty to defend based on the provisions of an ALTA 9 or comprehensive endorsement. In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co.*, 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, the court found that a title insurer had a duty to defend the insured owner in a condemnation action brought after the policy date, because a lender asserted the right to be paid the condemnation award. The condemnor did not attack title.

reference to a recorded instrument in a pleading is not an assertion of rights under that instrument, and does not invoke a duty to defend without more.[37]

If the pleadings fall within the scope of the covered risks, the insurer reviews the exclusions and exceptions to analyze whether or not they take away any potential for coverage. If an exclusion has been modified by an endorsement coverage, the exclusion is analyzed considering the effect of the endorsement.[38] The insurer has the burden of proving that an exclusion applies.[39]

Many states broaden the four corners test to say that there is a duty to defend when the facts revealed by an investigation disclose the potential for coverage, even if the complaint does not implicate coverage. In those states, the insurer's third step is to evaluate any extrinsic facts believed by the insured to establish coverage.[40] The extrinsic evidence rule is further discussed at §4.4.3.

The duty to defend may also be triggered by an answer, cross-claim or counterclaim.[41]

The court said the lender put title in dispute by asserting that it was entitled to the award. In *CH Properties, Inc. v. First American Title Ins. Co*., 43 F.Supp.3d 83 (D.P.R. 2014), recons.den. 2014 WL 7140507 (D.P.R. Dec. 15, 2014), the court found that the insurer had no duty to defend the insured owner, CH Properties, in a declaratory judgment action brought by another insurer to a party named Sunshine, in which CH Properties was named solely because its contractual rights against Sunshine might determine Sunshine's rights under its title insurance contract. The court said that there was no possible outcome in that suit that could affect the insured's title.

[37] *Armitage v. First American Title Ins. Co.*, 2007 WL 2137954 (Cal.App. 1 Dist.) (unpublished).

[38] *Pete Lien & Sons, Inc. v. First American Title Ins. Co.*, 478 N.W.2d 824 (S.D. 1991) (policy exclusion for mineral interests modified by endorsement protecting against damage from surface entry to extract minerals; endorsement coverage not creating duty to defend when no surface entry attempted).

[39] *Boxer v. Commonwealth Land Title Ins. Co.* 586 N.Y.S.2d 362 (App.Div. 1992) ("an insurer has 'the burden of proving that the incident and claim thereunder came within the exclusions of the policy'"); *Associated Bank, N.A. v. Stewart Title Guar. Co*., 881 F.Supp.2d 1058 (D.Minn. 2012) (duty to defend because exclusion was not inexorably applicable to vague allegations); *Cox v. Commonwealth Land Title Ins. Co*., 59 A.3d 1280, 2013 ME 8 (Me. 2013) (duty to defend because exception was deemed ambiguous); *Back Creek Partners, LLC v. First American Title Ins. Co*., 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013) (no duty to defend because exclusions plainly negated potential for coverage).

[40] "Before an insurer rejects a tender, it must make an adequate investigation of the facts. Failure to do so bars the insurer from denying the tendered defense, and subjects it to liability for the insureds' full attorney's fees and costs incurred thereafter with other counsel." *Stalberg v. Western Title Ins. Co.*, 282 Cal.Rptr. 43, 50 (1991).

[41] For example, the insurer had a duty to pay for a foreclosing lender-insured's fees incurred in defending counterclaims by construction lien holders to priority over the insured mortgage. *American-First Title & Trust Co. v. First Federal Sav. & Loan Ass'n*, 415 P.2d 930 (Okla. 1965); *Fox Chase Bank v. Wayne Junction Trust Co.*, 258 Pa. 272, 101 A. 979 (1917). See also *Crawford v. Safeco Title Ins. Co.*, 585 So.2d 952 (Fla.App. 1991), in which the insured filed an action and the defendant counterclaimed to quiet title, and the counterclaim was held to create a duty to defend. In *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058 (D.Minn. 2012), the court held that an answer that challenged the validity of the insured mortgage triggered the duty to defend. In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, the court found that a lender's answer asserting that it had the sole right to be paid a condemnation award was a pleading that invoked a duty to defend, since that answer implicitly attacked the owner's title. In *First Clover Leaf Bank v. National Land Title Ins. Co.*, 2015 WL 392728, 2015 IL App (5th) 120442-U (Ill.App. 5 Dist.) (unpublished), app.den. 32 N.E.3d 673 (Table) (May 27, 2015), the title insurer acknowledged that a counterclaim challenging the priority of the insured mortgage created a duty to defend; the court agreed with the insurer, however, that

However, an affirmative defense raised by a defendant in an action filed by the insured does not create a duty to "defend" the insured.[42] A general denial by a defendant to the allegations of the insured's complaint does not create a duty to prosecute the suit, although a general assertion of a right by the adverse party may.[43] The duty to defend may be invoked when the insured brings an action to quiet title to the insured property that is contested,[44] in which case the duty to defend springs from the adverse party's responsive pleading rather than the complaint.[45] However, as in a lawsuit in which the insured is the defendant, the insurer has no duty to defend against the pleading if the allegations against the insured do not invoke a covered risk.[46]

It is frequently stated that the duty to defend is broader than the duty to pay. This rubric seems inconsistent with the rule that there is a duty to defend only those matters for which there is a duty to indemnify. However, the two rules are compatible. The "broader duty" of defense means that the insurer has a defense duty for actions in which (a) the allegations of the complaint trigger an exclusion but the insured's counter-allegations would, if proven, not invoke the exclusion (see §4.4.1); (b) the complaint is so broad or ambiguous that it might support a claim for which the policy provides coverage (see §4.4.2); (c) the allegations in the complaint do not invoke a covered risk or do invoke an exclusion, but extrinsic facts suggest that a covered risk would be invoked or that the exclusion does not apply (see §4.4.3); or (d) the allegations that invoke a covered risk are frivolous (see §4.4.4). In each of these situations, there will be no duty to indemnify, but there may be a duty to defend. These four situations will be discussed in turn. Obviously, the insurer's duty to defend is broader than its duty to indemnify. But, just as obviously, it is not unlimited. It extends beyond claims that are actually covered to those that are merely potentially so--but no further. Both the duty

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the obligation to defend the counterclaim did not create a duty in the insurer to take over prosecution of the insured's foreclosure action.

[42] In *Philadelphia Indem. Ins. Co. v. Chicago Title Ins. Co*., 771 F.3d 391 (7th Cir. (Ill.) 2014), the court held that an affirmative defense, unlike a counterclaim, does not create a duty to defend. The policy limits the insurer's defense obligation to "litigation in which any third party asserts a claim adverse to the title or interest as insured." The court said that an affirmative defense is not a "claim." Likewise, in *Yarbrough v. First American Title Ins. Co*., 2015 WL 7451193 (D.Or.) (unpublished), the court held that an affirmative defense by the defendant that touched on a covered risk did not create a duty to "defend" the plaintiff-insured, because an affirmative defense is not a claim in litigation. The court relied on *Philadelphia Indemnity* for its ruling.

[43] For example, when the insured lender foreclosed and the borrower generally denied the validity of the mortgage, such a general denial did not obligate the insurer to prosecute the suit. *Pioneer Nat'l Title Ins. Co. v. Fourth Commerce Properties Corp.*, 487 So. 2d 1051 (Fla. 1986). However, in *Hart v. Ticor Title Ins. Co*., 126 Hawai'i 448, 272 P.3d 1215 (Hawai'i 2012), the insured filed a lawsuit seeking to combine two parcels. The State of Hawai'i answered the complaint by stating that it reserved any claim to the land by escheat, which claim it later withdrew by an amended answer. The state supreme court reversed two lower courts to find that this perfunctory pleading obligated the insurer to pay for the insured's lawsuit.

[44] *Leslie Apartments, Inc. v. Title Guarantee & Trust Co*., 42 N.Y.S.2d 686 (Sup.Ct. 1943); *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962).

[45] *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962).

[46] *Muench v. Oxley*, 90 Wash.2d 637, 584 P.2d 939 (Wash. 1978).

to indemnify and the duty to defend are in fact dependent on coverage--the former on actual coverage, the latter on at least potential coverage.[47]

4.4.1 Insured's Defense Bringing Suit Within Coverage

In some cases, the allegations of the complaint, if proven, would not invoke a covered risk or would trigger an exclusion, but the insured makes allegations in response that would invoke a covered risk or which would cause the exclusion not to apply.

Many states find a duty to defend in these situations. A common title insurance example is when the plaintiff asserts a lien or title interest, and alleges that the insured was not a *bona fide* purchaser or encumbrancer for value without notice, but the insured asserts that he or she had no such notice. The plaintiff's version of the facts would invoke Exclusions 3(a) or 3(b), but the exclusions do not apply if the insured proves its case.[48]

The insurer should make its own investigation of the facts. If there is support for the insured's position, some states require the insurer to assume the defense. The insurer may be entitled to require the insured to deliver a written statement or affidavit attesting that its version of the facts is true. This is part of the insured's duty to cooperate with the insurer in the provision of a defense. The duty of cooperation is further discussed at §4.10. The insurer will want to reserve the right not to pay any judgment against the insured if the plaintiff's allegations are proven, and to retender the defense if it becomes apparent through discovery that there is no reasonable basis for the insured's position. See §4.9 regarding reservations of rights. In some jurisdictions, the insurer may also require the insured to indemnify the insurer for all attorney fees expended in the event that the finder of fact does not accept the insured's version of the story.

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[47] *Buss v. Transamerica Ins. Co.*, 16 Cal.4th 35, 65 Cal.Rptr.2d 366, 939 P.2d 766 (1997) (citations omitted).

[48] "An insurer is not relieved of its duty to defend against a claim merely because the insured may be entitled to assert a valid affirmative defense such as the 1986 settlement agreement. Rather, we look to the face of the underlying complaint and try to determine therefrom whether any of the alleged claims fall within the title policy's coverage." *Ticor Title Ins. Co. v. American Resources, Ltd.*, 859 F.2d 772, 774 (9th Cir. Hawaii 1988). In *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F.Supp.2d 110 (D.Mass. 1999), the insurer accepted a defense with a reservation of rights based on an allegation that the insured was not a bona fide purchaser for value without notice. The insured's motion for summary judgment was denied, after which the insurer retendered the defense. The insured settled the case five days later, and sued for breach of the duty to defend. The court found the insurer was obligated to defend the insured. A successful defense would have proven the falsity of the allegations that raised the policy coverage issue. Therefore, the insurer retendered prematurely.

4.4.2 Ambiguous Pleadings

Most states follow the doctrine that an insurer has a duty to defend the insured if the allegations of the complaint are so ambiguous or broad that they could support a cause of action for which there is the potential for policy coverage.[49] The ambiguous pleading is a particular concern under the liberal rules of notice pleading created by the Federal Rules of Civil Procedure, and state laws which emulate the federal rules. It is not uncommon under such rules for the pleading to be so broad and conclusory that it is impossible to determine the nature of the causes of action that are pled. Also, when the complaint does not make many factual allegations, it can be difficult to establish that they invoke an exclusion.

When the allegations in the complaint could support a covered claim, there is the potential for coverage and thus a duty to defend the insured.[50] However, when the allegations cannot support a

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[49] Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §4.2, *Resolution of doubts and ambiguities*, Thomson Reuters. For example, in *Szelc v. Stanger*, 2009 WL 4573425 (D.N.J.) (unpublished), the court found that a complaint that alleged a number of causes of action was sufficiently ambiguous so that "it is at least possible that the evidence produced at trial will show that Gottesman had no knowledge of the scheme or responsibility for the scheme, but that his title is nonetheless at risk.... Since the duty to defend exists whenever there is a possibility that the insurer will be liable to compensate for the underlying claims, and First American may turn out to be liable on those claims that do not allege Gottesman's knowledge of or participation in the forgery scheme, First American owes Gottesman a duty to defend those claims which do not depend upon Gottesman's knowledge or participation." Id. at *2. In *Lawyers Title Ins. Corp. v. Stribling*, 294 Ga.App. 382, 670 S.E.2d 154 (Ga.App. 2008), the insurer was found obligated to defend a lawsuit in which the vague complaint alleged the right to use a driveway or road, despite the fact that the policy excepted one recorded easement across the insured property and also contained a general exception for unrecorded easements. The court said the complaint might encompass some other right in the insured property. In *Investors Warranty of America, Inc. v. Chicago Title Ins. Co*., 2018 WL 3992147 (Cal.App. 4 Dist.) (unpublished), the court held that the insurer had a duty to defend the insured although most claims and potential outcomes in the suit fell under the exclusions and the potential coverage depended on a loose reading of a vague complaint. In *Banner Bank v. First American Title Ins. Co.*, 916 F.3d 1323 (10th Cir. (Utah) 2019), the court observed the Utah formulation of the rule that, when the complaint is ambiguous about the nature of the legal basis for the claim made, the insurer owes a duty to defend at least "until those uncertainties can be resolved against coverage." It cited *Benjamin v. Amica Mut. Ins. Co*., 140 P.3d 1210, 1215 (Utah 2006). The court said that the nature of the claim made against the insured was not uncertain, and plainly invoked Exclusion 6, the creditors' rights exclusion.

[50] See, for example, *Lawyers Title Ins. Corp. v. Graham Mortgage Corp.*, 2010 WL 2635074 (E.D.Tex.) (unpublished), report adopted by 2010 WL 2635089 (E.D.Tex.) (unpublished), in which a seller holding a purchase money mortgage alleged that she subordinated her lien to three later mortgages based on misrepresentations by the buyer "and/or" the insured lender; the court found that the insurer had a duty to defend the lender against the ambiguous pleading that did not clearly describe any conduct attributable to the lender that would invoke the exclusion. See *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, (7th Cir. 1990); modified 979 F.2d 1187 (7th Cir. 1992), in which the insurer was found to have a duty to defend a complaint that did not specify the cause of action or legal theory on which it was based, although the cause of action identified by the insurer would be excluded. In *Perry v. Fidelity Nat'l Title Ins. Co*., 48 N.E.3d 1168, 2015 IL App (2d) 150168, 2015 WL 6859167 (Ill.App. 2 Dist. 2015), the court found a duty to defend based on the faulty logic that a complaint that sought to prohibit the insureds from paving an easement path was tantamount to a blockade of the access right, although the plaintiff did not attack the recorded easement grant, and therefore the insurer had a duty to defend the action, under the general rubric that the duty to defend is broader than the duty to indemnify. The same faulty argument was rejected in *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co*., 830 F.3d 1195 (10th Cir. (Utah) 2016). In that case, the court held that the ambiguous pleading rule was not invoked by a claimed ambiguity in the policy language as opposed to the complaint, and that a mere election to read the policy broadly did not create the potential for coverage that would trigger a duty to defend.

claim that would trigger a covered risk, or clearly invoke an exclusion, there is no duty to defend the action.[51]

4.4.3 Extrinsic Evidence

The duty to defend is ordinarily determined solely from the pleadings and the policy terms. However, if the insurer also has knowledge of facts extrinsic to the pleading that would bring the action within coverage, many jurisdictions require that the insurer defend.[52] The purpose of the extrinsic evidence rule is to assure that the words used in the complaint do not negate a duty to defend an action in which the substance of the dispute invokes the potential for coverage. Thus, if the complaint does not make a covered allegation, and the insurer has no independent knowledge that such fact exists, there is no duty to defend the insured on the mere assertion that the complaint could be amended to make the covered allegation.

In many jurisdictions, an insurer may not base its decision to deny a defense on information it learns that is contrary to what is alleged in the complaint.[53] Certain other jurisdictions permit the

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[51] *Miller v. First American Title Ins. Co.*, 2006 WL 2440850 (Cal.App. 2 Dist.) (unpublished) (when complaint could not even be amended to bring the pleading within potential coverage, insurer had no duty to defend).

[52] See Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §§4.4, 4.5 and 4.6, Thomson Reuters. See also, *Ogden Corp. v. Travelers Indemnity Co.*, 681 F.Supp. 169, 173 (S.D.N.Y. 1988); *McMahon & Baker, Inc. v. Continental Casualty Co.*, 68 Wash.App. 573, 843 P.2d 1133, 1137 (1993); *Spivey v. Safeco Ins. Co.*, 254 Kan. 237, 865 P.2d 182, 188 (1993); *Pacific Group v. First State Ins. Co.*, 841 F.Supp. 922, 936 (N.D.Cal. 1993); *Rosen v. Nations Title Ins. Co.*, 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714, 97 Cal. Daily Op.Serv. 6444 (Cal.App. 2 Dist. 1997); *Truck Ins. Exchange v. Bennett*, 53 Cal.App.4th 75, 61 Cal.Rptr.2d 497 (Cal.App. 2 Dist. 1997). In *Weber v. Chicago Title Ins. Co.*, 169 Or.App. 24, 7 P.3d 714 (Or.App. 2000), the insured was sued by neighbors claiming an easement over his land to taxi their airplanes to a private airport. The insurer denied the defense based on an exception for "unrecorded easements." The court held that there was a duty to defend because the plaintiff claimed a *recorded* easement. Although most states that have adopted the extrinsic evidence rule limit such evidence to facts known by the insurer at the time the tender is made or which the insured tells the insurer at the time of tender, some states also require that the insurer "further investigate the potential claim" when appropriate. *Associated Bank, N.A. v. Stewart Title Guar. Co*., 881 F.Supp.2d 1058 (D.Minn. 2012). See also; *Fischer v. First American Title Ins. Co*., 388 S.W.3d 181 (Mo.App. W.D. 2012) (insurer has duty to investigate facts beyond four corners of complaint and defend if investigation reveals facts creating potential for coverage; no such potential in this case). The danger of abuse of this investigation doctrine is illustrated in *Morgan v. Chicago Title Ins. Co.*, 65 Fed.Appx. 184, 2003 WL 21212656 (9th Cir.(Hawai'i) 2003) (unpublished), in which the court found a duty to defend despite the complaint's allegation that the insureds had knowledge of her interest in the property, based on the fact that further investigation *might* have disclosed that the insureds disputed the allegation. In *Haley v. Hume*, 448 P.3d 803 (Wash.App. 1 Div. 2019), the court noted that Washington follows the rule that an insurer is required to consider evidence beyond the four corners of the complaint that suggests the potential for coverage, but cannot use such extrinsic evidence as a basis to deny a defense. The court said that the insurer was not using extrinsic evidence in denying the defense by analyzing the scope of the survey exception based on the ALTA/NSPS survey standards.

[53] Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §4.4, Thomson Reuters; see also *Penney v. Capitol City Transfer, Inc.*, 707 A.2d 387 (Me. 1998) (insurer may not deny defense on extrinsic evidence that land in dispute was only mistakenly included in policy). In *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. Cal.) (unpublished), the insured asserted that the trial court had violated the "no hindsight" rule. In that case, a policy endorsement contained an exception for construction work "in progress or recently completed." The insured argued that the court found no duty to defend against a construction lien based on testimony as to the date on which the work was performed. The appellate

insurer to rely on at least undisputed extrinsic facts in addition to the four corners of the complaint.[54] Other states have refused to expand the duty to defend to cover facts beyond the allegations in the complaint that suggest the potential for coverage.[55]

4.4.4 Frivolous Claims

The duty to defend is triggered even when the covered count or allegations are frivolous, meritless or asserted in bad faith.[56] There is such a duty even though the policy does not explicitly say that the insurer will defend groundless claims:

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court found no evidence that the court relied on such testimony. Rather, the complaint's allegation that the claimant "achieved substantial completion" five days after the endorsement date meant that, as of the endorsement date, "work would still be considered to be 'in progress'... as of September 20th as the term is ordinarily understood." Thus, there was no need to resort to extrinsic evidence to establish the lack of policy coverage.

[54] California adopted this position in *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 24 Cal.Rptr.2d 467 (1993). Indiana permits the insurer to consider extrinsic evidence both to support a duty to defend or to suggest that such duty is negated by an exclusion. See *Schram v. Fidelity Nat'l Title Ins. Co*., 2017 WL 168920 (N.D.Ind.) (unpublished). Cases from all jurisdictions are collected in Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §4.4, Thomson Reuters.

[55] The Pennsylvania Supreme Court so refused, in *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co*., 589 Pa. 317, 908 A.2d 888 (2006), as noted in the title insurance decision of *Lupu v. Loan City, LLC*, 903 F.3d 382 (3rd Cir. (Pa.) 2018). A federal court in Pennsylvania also refused to broaden the duty to defend based on extrinsic evidence in *631 North Broad Street, LP v. Commonwealth Land Title Ins. Co.*, 2018 WL 4051798 (E.D.Pa. 2018) (unpublished), aff'd 2019 WL 3383878, 778 Fed.Appx. 164 (3rd Cir. (Pa.) 2019) (unpublished), in which the court also refused to consider statements made in a letter attached to the complaint when those same assertions were not made in the allegations of the complaint.

[56] In *McFarland v. First American Title Ins. Co.*, 595 F.Supp. 630 (D.Mont. 1984), for example, the court stated: "The duty to defend exists whether or not the adverse claim has merit. The title insurer must assume that the allegations of the adverse claimant have merit in deciding whether to defend. If the claim does not have merit, the insurer still bears the risk of paying the litigation costs to establish the lack of merit to the adverse claim." In *Lawyers Title Ins. Corp. v. Stribling*, 294 Ga.App. 382, 670 S.E.2d 154 (Ga.App. 2008), the insurer was found obligated to defend a lawsuit in which the vague complaint alleged the right to use a driveway or road, despite the fact that the policy excepted one recorded easement across the insured property and also contained a general exception for unrecorded easements. The court said the complaint might encompass some other right in the insured property, or might simply be making a frivolous claim to an easement that was not excepted. Thus, in *McMinn v. Damurjian*, 105 N.J.Super. 132, 251 A.2d 310, 315 (Ch. 1969), the court found the insurer's refusal to defend the insured was wrongful because the denial was based solely on the grounds that the claimed adverse interest was void or unenforceable: "[i]t is immaterial that the McMinns' claim against the Damurjians proved to be baseless; the fact remains that defendant did nothing to protect plaintiffs' title when it was put in dispute." In accord is *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (1975). *Jarchow* involved a claimed duty to clear rather than defend title. However, it drew upon existing case law on the duty to defend in reaching its conclusion. In *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F.Supp.2d 110 (D.Mass. 1999), the insurer accepted a defense with a reservation of rights based on an allegation that the insured was not a bona fide purchaser for value without notice. The insured's motion for summary judgment was denied, after which the insurer retendered the defense. The insured then settled the case and sued for breach of the duty to defend. The court found the insurer was obligated to pay for the insured's defense that the allegations were untrue. If the defense had succeeded, the insured would have proven the falsity of the allegations that raised a question about policy coverage. Therefore, the insurer retendered prematurely. The court detected that the bona fide purchaser allegation was made "merely because [the plaintiff] anticipated" that it needed to make such a claim to dislodge the insured from title. The

> Noting that the title policy contains no provision requiring the Company to defend against "groundless, false or fraudulent" claims, the Company argues that it breached no duty to defend against these patently insubstantial claims. This contention is rather weak. The policy provides that the Title Company shall defend "in all litigation" of the relevant type, not simply that which involves a "viable claim." Beyond this, while the purportedly trivial claims may not have had much to recommend them, they had to be met by Jesko in order to avoid default judgment. The Title Company's refusal to offer a defense certainly did not mean that a defense was unnecessary. We therefore reject the Title Company's argument that the estate's claims were outside the scope of its duty to defend Jesko.[57]

4.5 Defense Of Certain Typical Classes Of Title-Related Lawsuits

Certain types of title-related lawsuits recur with some frequency, and thus have generated case law regarding whether or not the policy obligates the insurer to defend those classes of suits. This section reviews the most common of these types of suits. A complete review of the classes of matters protected against by the policy is found in Chapter 9, which discusses the insuring provisions. Exclusions are discussed in Chapter 11, exceptions in Chapter 12.

4.5.1 Fraud And Related Torts

FORM 38, Appendix A
Denial of "Moskopoulos" defense

FORM 26, Appendix A
Letter cancelling commitment because of fraud, and returning premium

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court thus seemed confident that the allegation was not only false but made in bad faith, although there were no facts to support the statement. In *Countrywide Home Loans, Inc. v. Commonwealth Land Title Ins. Co.*, 2011 WL 666188 (W.D.Pa.) (unpublished), an insurer was found obligated to defend an insured in a quiet title action in which the seller and borrower-buyer claimed a deed and mortgage were invalid, after having been rejected for recording because they conveyed a parcel created by a land division map that was not approved and filed. The court said the duty to defend was triggered by the allegation that the mortgage was invalid, even if there was no good faith basis for the seller to disclaim the conveyance.

[57] *Jesko v. American-First Title & Trust Co.*, 603 F.2d 815 (10th Cir. 1979) (footnote omitted).

A complaint alleging that the insured obtained title by fraud does not create a duty to defend.[58] The leading modern case is *Safeco Title Ins. Co. v. Moskopoulos,*[59] in which the insured obtained title by first slandering it and then forcing a sale to himself. He was found not to be entitled to a defense in the subsequent suit for rescission, fraud and similar remedies. The court held:

> The allegations in the Klass complaint allege intentionally tortious conduct by appellant, not a defect in his title. There is not a suggestion in the record or the briefs of any matter constituting a defect in or lien or encumbrance on the record title to the Mulholland property, except as disclosed in the policy. Nor is there any suggestion of any off-record risk in the chain of title coming within the policy coverage, such as a forged, altered or improperly delivered deed, incompetency, incapacity, marital rights, or irregularities in any probate proceeding.[60]

Thus, the lawsuit was found not to allege a defect in title at all, and therefore was not within the scope of the insuring provisions. Further, the court found that the action was removed from any possible coverage by Exclusion 3(a). *Moskopoulos* and its progeny are also discussed under Exclusion 3(a), at §11.2.7.

The title insurer also has been found not to have a duty to defend the insured in litigation asserting that the insured was alleged to have conducted fraud or intentional torts related to the title to the property, or entered into an agreement about title that would divest it of the insured title interest.[61] The insurer has no duty to defend a lender against a claim that the insured mortgage is a fraud on creditors.[62] Further, a local church which bought title insurance to cover actions it took to

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[58] *Rosenblatt v. Louisville Title Co.*, 218 Ky. 714, 292 S.W. 333 (Ky.App. 1927); *Queens Organization, LLC v. First American Title Ins. Co*., 172 A.D.3d 932, 99 N.Y.S.3d 411 (N.Y.A.D. 2 Dept. 2019) (title insurer had no duty to defend its insured in lawsuit claiming that insured altered deed to add itself as the grantee of a half interest in the property).

[59] 116 Cal.App. 3d 658, 172 Cal.Rptr. 248 (1981).

[60] 172 Cal.Rptr. at 252.

[61] The insurer was found to have no duty to defend an action to set aside the insured deed as a fraud on creditors or because it was obtained by undue influence, in *Ginger v. American Title Ins. Co*., 29 Mich. App. 279, 185 N.W.2d 54 (1970); *Mattson v. St. Paul Title Co. of the South*, 641 S.W.2d 16 (Ark. 1982); *Barczewski v. Commonwealth Land Title Ins. Co*., 210 Cal.App.3d 406, 258 Cal.Rptr. 386 (Cal.App. 4 Dist. 1989); *Brick Realty Corp. v. Title Guarantee & Trust Co.*, 161 Misc. 296, 291 N.Y.S. 637 (N.Y. City Ct. 1936); and *Farrington v. Commonwealth Land Title Ins. Co.*, 86 Wash.App. 399, 936 P.2d 1157 (1997) (transfer into corporation in fraud of creditors). Also, in *Carrington v. Chicago Title Ins. Co.*, 2015 WL 6758365 (N.J.A.D.) (unpublished), the court found that the insurer had no duty to defend its insured in a lawsuit brought by her four siblings in which they said the sister broke an agreement to give them each one-fifth interests in the property after their credit scores improved. The court said the insured "created" the agreement and failed to disclose it to the insurer, invoking Exclusion 3(a).

[62] In *Banner Bank v. First American Title Ins. Co.*, 916 F.3d 1323 (10th Cir. (Utah) 2019), the Tenth Circuit held that a title insurer had no duty to defend a lender against a lawsuit brought by a receiver appointed by the SEC, who attacked the insured mortgage as being part of a Ponzi scheme that defrauded investors. The court held that the receiver's allegations fell under the creditors' rights exclusion.

claim title to land in a dispute with the denomination, and which became the subject of a lawsuit, was not entitled to a defense because it was "not alleged that there was some defect in the title when the policy was issued." Rather, the dispute involved the actions of the local church to put itself in title.[63] Also, a lender that obtained title by foreclosure and was accused of an unconscionable failure to disclose to the former owner that he could have obtained a release of his property from the mortgage was not entitled to a defense.[64] Similarly, an insured whose seller sued for rescission based on fraud and economic coercion involving a deed/option back transaction was not entitled to a defense.[65] A suit to overturn a deed based on allegations of fraud and undue influence was found excluded by Exclusion 3(a).[66] The insurer was found not to have a duty to defend the insured against claims grounded in fraud, claiming that the insured conspired with others to strip the seller of his equity in the property.[67] However, the court ruled that the insurer did have a duty to defend the insured against a claim that the equity-stripping or "foreclosure rescue" transaction was unconscionable, because that cause of action does not require proof of intentional tortious conduct by the insured.[68]

When it was claimed that the insured intended to obtain a different title interest than the one insured, and the claim was to recharacterize the interest, the insured was not entitled to be defended.[69] There is also no duty to defend against a claim that the insured negligently

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[63] *First Assembly Church of West Plains v. Ticor Title Ins. Co.*, 872 S.W.2d 577 (Mo.App. S.D. 1994).

[64] *Conway v. Title Ins. Co.*, 277 So.2d 890 (Ala. 1973).

[65] *Bidart v. American Title Ins. Co.*, 734 P.2d 732 (Nev. 1987).

[66] *Mayo v. Title Ins. Co.*, 423 So.2d 1357 (Ala. 1982). The court found no duty to defend even though the insured successfully defended the action. Ignoring the result, the court focused on the allegations of the complaint in determining the duty to defend, saying: "[i]n testing the pleadings to determine if they state a claim within the policy coverage we resolve any doubt in favor of the insured. Under the pleadings in this case there was no possibility that any loss could fall within coverage because the insurer is not required to compensate the insured for a loss which she brought upon herself. Thus there was no duty to defend."

[67] *Szelc v. Stanger*, 2009 WL 4573425 (D.N.J.) (unpublished) (finding such claims excluded under the Residential policy equivalent of Exclusions 3(a) and 3(b), which the court termed the "created-or-known" exclusion); *266 Summit, LLC v. Lawyers Title Ins. Corp.*, 2011 WL 3020301 (D.Minn.) (unpublished) (complicated double sale with seller financing and lease-option that seller sought to unwind excluded).

[68] The court referred to New Jersey decisions that have held that "the word 'create' connotes 'the idea of knowledge, the performance of some affirmative act by the insured, a conscious or deliberate causation.'" *Keown v. W. Jersey Title and Guar. Co.*, 161 N.J.Super. 19, 25, 390 A.2d 715 (App.Div.1978) (quoting *Feldman v. Urban Commercial, Inc.*, 87 N.J.Super. 520, 532 (App.Div.1965)). It said that "[n]egligence on the part of the insured will not trigger a "created-or-known" exclusion. … [A] claim of unconscionability does not require such proof, so it is plausible that Gottesman may be entitled to coverage on this count." The court did not analyze the other 3(a) terms, such as matters "agreed to" by the insured. The court found its conclusion bolstered by the doctrine that an insurer has a duty to defend an ambiguous pleading that might create the potential for coverage.

[69] *Bidart v. American Title Ins. Co.*, 734 P.2d 732 (Nev. 1987); *Transamerica Title Ins. Co. v. Alaska Federal Savings & Loan Ass'n*, 833 F.2d 775 (9th Cir. 1987).

misrepresented the status of title.[70] An action by a borrower against the insured lender based on negligence, constructive fraud and RICO, claiming that the lender forged signatures and altered loan documents, did not create a duty to defend.[71]

However, when the allegations are couched in alternative counts of fraud, one excluded and the other not, the insurer will ordinarily have a duty to defend the covered count.[72] Barring special circumstances, the fact that the insured successfully defends against the allegations of fraud does not change this conclusion.[73]

The policy also does not obligate the insurer to defend the insured against allegations that the insured has tortiously or intentionally interfered with property rights of others. Such lawsuits concern the insured's conduct, not the title to the property. Examples include slander of title, forgery, trespass, and damage to neighbors' property.[74] See §9.2 regarding forgery, and §9.3 regarding trespass in the context of the scope of the insuring provisions. In *Sabatino v. First American Title Ins. Co.*,[75] the insureds built an addition to their home. They were sued by their neighbor, Mr. Hershenhorn, for cutting, rerouting and generally playing havoc with his sanitary sewer line, which ran under the surface of the Sabatino property. Hershenhorn sought an injunction against the

[70] *Somerset South Properties, Inc. v. American Title Ins. Co*., 873 F.Supp. 355 (S.D.Cal. 1994).

[71] *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994).

[72] *Title Ins. Corp. of Penn. v. Wagner*, 179 N.J.Super 234, 431 A.2d 179 (N.J.Super.Ch. 1981) (fraud and mistake); *Polsfoot v. Transamerica Title Ins. Co.*, 47 Or. App. 261, 614 P.2d 1173 (1980) (fraud and mistake); *Security Title & Trust Co. v. Tower Land & Investment Co.*, 560 S.W.2d 208 (Tex.App. 1977) (fraud, breach of fiduciary duty and lack of authority to convey). A suit premised entirely on mutual mistake triggered the duty to defend. *Chanoux v. Title Ins. Co.*, 258 S.W.2d 866 (Tex. App. 1953). See also *Szelc v. Stanger*, 2009 WL 4573425 (D.N.J.) (unpublished) (fraud claims excluded but unconscionability claim created duty to defend because not based on intentional tortious conduct); *Royale Westminster Retirement, LLC v. Commonwealth Land Title Ins. Co.*, 2011 WL 2582101 (Cal.App. 4 Dist.) (unpublished) (no duty to defend slander of title claim; disparagement of title cause of action requires proof of intentional actions, not mere negligence, invoking Exclusion 3(a)).

[73] *Mattson v. St. Paul Title Ins. Co. of the South*, 641 S.W.2d 16 (Ark. 1982).

[74] *Soluk v. Security Union Title Insurance Co.*, Case No. B131586, Cal.App. 2 Dist., Div. 2, 9/25/00 (unpublished) (no duty to defend or indemnify against claimed trespass on an easement right when exception disclosed the easement). A title insurer had no duty to defend an insured accused of slandering another person's title. The court noted that "[s]lander of title is a tort action based on malicious publication of false matter that disparages the title to property," *Fells v. Stewart Title Guar. Co.*, 2010 WL 2197693 (E.D.Ark.) (unpublished), aff'd 400 Fed.Appx. 121, 2010 WL 4398071 (8th Cir. (Ark.) Nov 08, 2010) (unpublished). In *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co*., 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), the court held that the insurer had no duty to defend its insured lender against a suit by a junior lien holder asserting that the insured entity was controlled by the property owner, and was a strategic lien intended to frustrate the junior lender's ability to foreclose on the property. The court found that the claims invoked Exclusion 3(a). In *Cherry Hills Farm Court, LLC v. First American Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 6682835 (D.Colo. 2019) (not yet released for publication), appeal filed January 6, 2020, the court held that an insurer was not required to defend the insured owner against the neighbors' claim of set-off, for the value of structures they had built on the insured parcel, because that claim for money did not assert an interest in the title to the property and thus did not invoke policy coverage.

[75] 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999).

Sabatinos' "deliberate, wrongful and intentional" disruption of the easement, but not a declaration of the easement itself. The court held that the lawsuit concerned the insured's interference with the claimed easement, rather than a judicial determination of the encumbrance's existence, and therefore did not trigger policy coverage. In addition, it found that the tortious conduct complained of all occurred after the date of policy and was thus excluded by the post-policy exclusion:

> First, the underlying complaint does not seek a judicial determination of the existence of an implied easement. Rather, Hershenhorn seeks injunctive relief due to plaintiffs' intentional interference with his easement. Moreover, the purpose of title insurance is to protect a transfer of real estate from the possibilities of loss through defects that may cloud title. ... In this case, Hershenhorn's claims are not made against plaintiffs because defendant failed to find an unrecorded easement. Hershenhorn's claims against plaintiffs have arisen because of plaintiffs' allegedly tortious conduct in interfering with Hershenhorn's easement. Such claims are ancillary to the purpose of the title insurance policy. ...
>
> *   *   *   *   *
>
> In sum, the gravamen of the complaint is not the allegation of an unrecorded easement, but the redress for plaintiffs' intentional and wrongful conduct that occurred after the date of the policy. The complaint in the underlying action presumes the existence of an unrecorded easement by implication and only seeks injunctive relief due to intentional actions that occurred after the policy was issued. Because the policy excludes the type of conduct complained of and provides defendant with the option of establishing a value reflecting the impact of the unrecorded easement on plaintiffs' property, defendant's rejection of plaintiffs' tender of defense was proper. Accordingly, we find that defendant has no duty to defend ... .[76]

Similarly, in *Miller v. First American Title Ins. Co.*,[77] the title insurer was found not to have a duty to defend an insured and former owner of the property against allegations that he misrepresented and concealed facts about a neighbor's claim to an easement for the use of some expensive beachfront. Although the lawsuit concerned an easement, as in *Sabatino*, the complaint asserted concealment and misrepresentation, and did not attack the insured based on covenants of warranty. The court said this took the lawsuit outside of coverage:

> The omission of the word "fraud" from the text does not change the basis for both easement related causes of action, which stem from appellant's alleged conduct in concealing and/or failing to disclose the easement. The fact that evidence suggested that the easement at issue was in fact a recorded easement does not change the fundamental nature of the allegations or give rise to a duty to defend. The trial court

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[76] Id. at 3, 4.

[77] 2006 WL 2440850 (Cal.App. 2 Dist.) (unpublished).

properly determined that the allegations based on fraud, concealment, and failure to disclose, were outside of the possible coverage of appellant's title insurance policy.

4.5.2 No Title Defect

There is no duty to defend an action which does not attack title.[78] Nor is there a duty to defend the insured lender when the borrower asserts that the insured mortgage may not be foreclosed due to the invalidity of the debt or other matters that do not attack the insured lien.[79] For example, when the priority of two deeds of trust was challenged on the grounds that the lender had negligently disbursed the loans for the wrong purpose, there was no duty to defend, since the complaint "did not allege any defects or liens at the time Nations' title policy took effect."[80] There was also no duty to defend an insured lender against a suit claiming money owed to the plaintiff subdivision owners, but not contesting the lender's mortgage lien.[81] There was no duty to defend a suit brought by the subdivision developer for the cost of providing water service, which did not affect title to the land.[82] Likewise, in *Steinle v. Knowles*,[83] the insured seller took back a mortgage. The buyers sued the seller-insureds for misrepresentation in the sale of the property, because they had conveyed more land than they owned. The lien of the insureds' mortgage was not attacked, however, and the real estate had sufficient value to secure it, and thus the insurer was not obligated to defend the insured. The Kansas Supreme Court adopted the trial judge's statement that the insured had "two hats on. And she was sued in that suit, as the seller in the transaction, not as the mortgagor ... ."

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[78] *Bailey v. State Farm Ins. Co.*, 810 F.Supp 267 (N.D.Cal. 1992) (action seeking to establish party's rights in an easement did not attack the insured's non-exclusive rights in the same parcel); *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999) (action for claimed tortious interference with easement, but which did not seek declaration of the easement right, did not attack title). In *Carrington v. Chicago Title Ins. Co*., 2015 WL 6758365 (N.J.A.D.) (unpublished), the court held that a title insurer had no duty to defend its insured in a lawsuit brought by her four siblings in which they said the sister broke an agreement to give them each one-fifth interests in the property after their credit scores improved. The court said the insured "created" the agreement and failed to disclose it to the insurer.

[79] *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 52 F.3d 1575 (11th Cir. 1995) (borrower's allegation that lender had no right to foreclose because it was a partner with the borrower in ownership of land did not attack the insured lien and did not create duty to defend); *Deutsche Bank Nat'l Ass'n v. First American Title Ins. Co*., 465 Mass. 741, 991 N.E.2d 638 (Mass. 2013) (no duty to defend lender in borrower's claim to rescind insured mortgage based on claimed predatory loan underwriting and misrepresentation of loan terms, which asserted "defects with the underlying mortgage debt ... rather than defects concerning the execution of the mortgage lien"); *Stewart Title Guar. Co. v. McClain*, 2016 WL 1436613 (Penn.Super. 2016) (unpublished), reargument denied June 16, 2016, 145 A.3d 777 (Table) (title insurer not required to "defend" an owner insured against his lender's claim that its mortgage should be reformed to include an additional parcel, because reformation claim did not "attack" title).

[80] *Rosen v. Nations Title Ins. Co.*, 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714, 97 Cal. Daily Op.Serv. 6444 (Cal.App. 2 Dist. 1997).

[81] *Chicago Title Ins. Co. v. CV REIT, Inc.*, 588 So.2d 1075 (Fla.App. 1991).

[82] *Spencer v. Anderson*, 669 S.W.2d 862 (Tex.App. 1984).

[83] 265 Kan. 545, 961 P.2d 1228 (Kan. 1998), rev'g 24 Kan.App.2d 568, 948 P.2d 670 (1997).

Duty to Defend

An insurer has been found not to be required to defend an insured against the assertion of an instrument that would affect title, but which is void and unenforceable.[84] The insurer also has no duty to defend the insured against a matter excepted in Schedule B of the policy.[85]

The insurer is not obligated to prosecute a suit on behalf of the insured.[86] This is especially true as to actions that do not have as their main object the clearing of title. In *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*,[87] the insured sued the seller for breach of warranties. The seller had conveyed to the insured a railroad spur track parcel that it did not own. The court found that the policy does not create an obligation to prosecute a lawsuit, and the action did not affect title:

> SPP asks us to extend the insurer's duty to defend to include a duty to prosecute claims on the insured's behalf. ... But the policy in this case imposes the duty to provide only "the defense" of the insured when a third party asserts a claim adverse to the insured's title as covered by the policy. …Transamerica is obligated to pay SPP's legal expenses "in defense of the title, as insured[.]" But rather than suing WWA to quiet title or to otherwise protect its title, SPP merely sought damages based on the seller's admitted mistake in conveying land that it did not own. … SPP's lawsuit against WWA did nothing to establish its right to coverage under the title policy, and its expenses were not incurred "in defense of title[.]" SPP had no basis under the policy to recover its WWA litigation fees and costs from Transamerica.[88]

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[84] In *Hauck Holdings Columbia SC, LLC v. Target Corp.*, 2010 WL 1258103 (S.D. Ohio) (unpublished), the court said there was no duty to defend or indemnify the insured as to a supplement to a declaration of restrictions, because it was unrecorded and thus not effective, either by law or under the terms of the original declaration. The court said the supplement could only be enforced against the insured if the plaintiff alleged and proved that the insured had actual knowledge of the document, which would invoke Exclusion 3(b). It thus rejected the insured's assertion that the insurer should have to defend the action, because the complaint did not invoke a covered risk and would have to invoke an exclusion to succeed. See §4.4.4 regarding defense of frivolous claims.

[85] *GC Finance, LLC v. Old Republic Nat'l Title Ins. Co.*, 2011 WL 5966512 (6th Cir. (Tenn.)) (unpublished).

[86] See *Cohn v. Commonwealth Land Title Ins. Co.*, 254 A.D.2d 241, 678 N.Y.S.2d 268, 1998 N.Y. Slip Op. 08497 (N.Y.A.D. 2 Dept. 1998), in which the insured filed two lawsuits to clear its title, and then sued the title insurer for its legal fees in the quiet title actions. The court held: "The plain language of the insurance policy issued to the plaintiffs does not impose a duty on the defendant to initiate or prosecute a declaratory action on behalf of the insured to clear title (see, *Eliopoulos v. Nations Title Ins. of New York, Inc*., 912 F.Supp. 28)." The *Eliopoulos* case is further discussed at §3.4, regarding the insurer's option to clear title.

[87] 1998 WL 283052 (Wash.App.Div. 1) (unpublished).

[88] Id. at 6.

4.5.3 Survey And Possession Matters

Several courts have held that, when the policy contains the standard exceptions for survey matters, a complaint based on a boundary line dispute, gap parcel or overlap does not give rise to a duty to defend.[89] However, an insurer was found not entitled to summary judgment as to the duty to defend an overlap, when the dispute was created by a recorded deed.[90]

Similarly, a complaint based on either a claim of prescriptive easement[91] or accretion not described in Schedule A[92] is beyond the duty to defend when the policy contains the survey exception. There is also no duty to defend an action based on an unrecorded easement, when the standard exception for unrecorded easements is in Schedule B.[93] Likewise, when the standard exceptions are in the policy, there is no duty to defend an action in which the plaintiff claims either by adverse possession or an easement by implication.[94]

There was no duty to bring or pay for an action against a trespasser.[95] An ambiguous

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[89] *Stearns v. Title Ins. & Trust Co.*, 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (1971); *Downing v. Eubanks*, 557 N.E.2d 1027 (Ind.App. 1990); *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 397 S.E. 2d 100 (1990); *Walters v. Marler*, 147 Cal.Rptr. 655 (Cal.App. 1978); *American Title Ins. Co. v. Carter*, 670 So.2d 1115 (Fla.App. 1996), *later appeal*, 710 So.2d 1020 (no duty to defend boundary line dispute caused by surveys setting government section corner at different locations; trial court erroneously entered judgment finding duty to defend after parties agreed that insured's surveyor's corner was correct); *631 North Broad Street, LP v. Commonwealth Land Title Ins. Co.*, 2018 WL 4051798 (E.D.Pa. 2018) (unpublished), aff'd 2019 WL 3383878, 778 Fed.Appx. 164 (3rd Cir. (Pa.) 2019) (unpublished) (no duty to defend insured sued by neighbor in dispute about party wall when policy contained survey exception); *Mortazavi v. Federal Ins. Co*., 2019 WL 2609779 (Cal.App. 4 Dist.) (unpublished) (no duty to defend insured former owner in lawsuit by purchaser alleging failure to disclose existence of encroaching structures built after the policy date). In In *Haley v. Hume*, 448 P.3d 803 (Wash.App. 1 Div. 2019), the court held that there was no possibility of coverage for the abandonment of an insured easement because the evidence of that physical abandonment would have been depicted on an accurate survey, and the policy contained a survey exception; therefore, the insurer had no duty to defend.

[90] *Crawford v. Safeco Title Ins. Co.*, 585 So.2d 952 (Fla.App. 1991); *Pentecost v. Lawyers Title Ins. Corp.*, 704 So.2d 1103, 23 Fla.L. Weekly D199 (Fla.App. 1 Dist. 1997), rev.den. 718 So.2d 169 (1998).

[91] "The Flagg litigation asserted a right to the easement by prescription, implication, balancing of hardships, and estoppel. None of these would appear in the public records. Strictly construing the policy exclusion against Fidelity, the claims in the litigation are plainly excluded from coverage under the policy." *Bailey v. State Farm Ins. Co.*, 810 F.Supp 267, 271 (N.D.Cal. 1992). The same result was reached in *Louisville Title Ins. Co. v. Guerard*, 409 So.2d 514 (Fla.App. 1982) and *Gebrayel v. Transamerica Title Ins. Co.*, 888 P.2d 83 (Or.App. 1995).

[92] *Bernhard v. Reischman*, 33 Wash.App. 569, 658 P.2d 2 (1983).

[93] *Louisville Title Ins. Co. v. Guerard*, 409 So.2d 514 (Fla.App. 1982); *Gebrayel v. Transamerica Title Ins. Co*., 888 P.2d 83 (Or.App. 1995). However, in *Schram v. Fidelity Nat'l Title Ins. Co*., 2017 WL 168920 (N.D.Ind.) (unpublished), the court held that the unrecorded easement exception was not invoked to negate a duty to defend merely because the plaintiff did not specifically allege a recorded easement over the insured parcel.

[94] *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 642 A.2d 285, 100 Md.App. 606 (Md.App. 1993); *Zimmerman v. Chicago Title Ins. Co.*, 28 S.W.3d 584 (Tex.App.-Austin 1999) (no duty to defend adverse possession case when policy contained exception for rights of parties in possession).

[95] *Southwest Title Ins. Co. v. Woods*, 449 S.W.2d 773 (Tex. 1970). In *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993), the court found an underground foundation to be an encumbrance, as well as a trespass. However, the court specifically held that the issue of the duty to defend was not before the court.

counterclaim probably based on adverse possession, in the insured's action for trespass, was found to create a duty to defend, however. The duty was triggered by the fact that the basis for the counterclaim could not be definitely limited to an off-record claim of interest.[96]

4.5.4 Suit By Insured Against Insurer

The policy duty to defend is limited to defending the insured when it is named as a defendant in a lawsuit filed by another that invokes policy coverage. The insurer has no duty to reimburse the insured for attorneys' fees incurred in making a policy claim or in suing the insurer for coverage.[97] In one such case, an insured demanded that the insurer remove a lien, which it declined to do. The insured sued the insurer, and the insurer satisfied the lien. The insured sought the cost of its action against the insurer. The court refused, stating:

> There is no provision in the policy by which Safeco agreed to pay attorney's fees incurred in litigation against the insurer itself. By paragraph 6(b) Safeco agreed to pay only such fees incurred in litigation against third parties as is specifically authorized by the insurer.[98]

4.5.5 Affirmative Assurances

When the insurer is willing to indemnify against a defect, but not until there is a court order establishing that the defect exists, the assurance is commonly phrased as protection against a "final order of a court of competent jurisdiction." In *BancOhio Nat'l Bank, N.A. v. Security Union Title Ins. Co.*,[99] the court held that such a coverage also creates a duty to defend the insured. The *BancOhio* policy excepted an existing lawsuit affecting the property, but contained an affirmative "note" assurance using the above phrase. The court held:

> While this provision is exclusionary in part, it expressly provides coverage for any loss sustained by way of a final order in Katz. Reading all provisions together, it is clear that the policy "insures against" loss arising out of a Katz decision. Paragraph 3(A) specifically obligates Security Union to defend in matters "insured against" by the policy. Security Union cannot now avoid its obligation by denying BancOhio a

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[96] *Cooper v. Commonwealth Land Title Ins. Co.*, 73 Or.App. 539, 699 P.2d 1128 (Md.App. 1985).

[97] See *Marcantel v. Stewart Title Guar. Co*., 2017 WL 5991734 (D. Utah 2017) (unpublished), which held that the title insurer was not required to pay the insured the attorneys' fees it expended in making a claim on the policy. The insured based this demand on Condition 8(c) of the 2006 ALTA owner's policy, which says that the insurer will "pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions." Condition 5 is the duty to defend provision. Condition 7 says the insurer may pay a loss to the insured, and in doing so will also pay any attorneys' fees it had authorized and that were incurred before the loss was paid. Thus, none of the policy provisions stated that the insurer would pay the fees incurred by the insured in making a policy claim.

[98] *Espinoza v. Safeco Title Ins. Co*., 598 P.2d 346 (Utah 1979).

[99] 1993 WL 524890 (Ohio App. 10 Dist.) (unpublished).

defense in the Katz case.[100]

In *BancOhio*, the insured was immediately made a party to the excepted lawsuit, which both insurer and insured apparently anticipated at the time the "note" assurance was given. The insurer was found not to be responsible for reimbursing the insured for its voluntary settlement of the case short of any adverse final order.

4.6 Parties For Whom Defense Is Owed

The duty to defend is a policy benefit enjoyed only by the insured. The policy provides that a transferee by operation of law becomes the insured, and thus is entitled to a defense. In addition, the insurer may owe a defense duty to parties related to the named insured who are sued in connection with the real estate. These subjects are fully discussed in Chapter 7.

4.7 Defense Of Covered Claims Only

FORM 66, Appendix A
Apportionment of fees

FORM 6, Appendix A
Acceptance of partial defense--retention of separate counsel

FORM 7, Appendix A
Acceptance of partial defense--apportionment of fees--one counsel

The current ALTA policies limit the insurer's duty to defend the insured in litigation to those "stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy." The 1970 ALTA policy was found to permit the insurer to provide a defense of covered counts only.[101]

The policy language is opposed to the public policy adopted in many states as to general liability insurance policies that requires the insurer to defend all claims if any of them invoke coverage, known as the "in-for-one, in-for-all" or "complete defense" rule. A leading commentator notes that the reasoning often given for imposing the "complete defense" rule as a matter of public policy is not very strong.[102]

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[100] Id. at 1.

[101] *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 818 F.Supp. 1543 (S.D. Fla. 1993), affirmed 52 F.3d 1575 (11th Cir. 1995). The court relied on the phrase in Conditions & Stipulations 3(a) stating that the insurer need only provide a defense "to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy." Id. at 1545.

[102] "Courts rarely discuss the rationale behind the general rule requiring a 'complete' defense. Two reasons, however, can be offered in support of that rule. First, ordinarily, there is no reasonable means of prorating costs of defense between covered and noncovered items. Second, separate representation for covered and noncovered items is not feasible. The latter problem is insoluble. The former problem, however, depending on the circumstances, may not be." Allan D. Windt,

Most states that have considered the issue have found the policy's covered-counts-only provision to be enforceable as written, and have refused to invoke the "complete defense" rule to override the policy's plain defense limitation.[103] One federal court gave this survey of the jurisdictions:

> We note that courts have taken a strong stand against holding insurers liable for the defense costs of claims their policies do not cover, even when those claims are joined with covered claims. For example, the Fifth Circuit has joined the Sixth Circuit in holding that an insurer should be held liable for the defense of covered and

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Insurance Claims and Disputes: Representation of Insurance Companies and Insureds, Sixth Edition, §4.13, pp. 4-155 to 4-156, Thomson Reuters (footnotes and citations omitted).

[103] In *GMAC Mortgage, LLC v. First American Title Ins. Co.*, 464 Mass. 733, 985 N.E.2d 823 (Mass. 2013), the Massachusetts Supreme Judicial Court held that that title insurance is "fundamentally different" from general liability insurance in that it eliminates or reduces existing risks rather than assumes future risks. It ruled that the in- for-one, in-for-all rule does not apply in the "unique title insurance context." The Massachusetts high court reiterated this ruling in *Deutsche Bank Nat'l Ass'n v. First American Title Ins. Co*., 465 Mass. 741, 991 N.E.2d 638 (Mass. 2013). The Seventh Circuit Court of Appeals also held that the rationale of the in-for-one rule does not apply to title insurance. The court said: "[t]he complete-defense rule reflects and enforces the broad defense promise in standard general liability policies and makes sense given the comprehensive coverage provided by this kind of insurance. Title insurance is much narrower. A title insurer only assumes risks associated with defects in property title." *Philadelphia Indem. Ins. Co. v. Chicago Title Ins. Co*., 771 F.3d 391 (7th Cir. (Ill.) 2014). That court was influenced by the *GMAC* decision. New Jersey also has held that the title insurer is required to defend covered counts only. *Szelc v. Stanger*, 2009 WL 4573425 (D.N.J.) (unpublished), later decision 2010 WL 2925847 (D.N.J.) (unpublished) (allocation permitted; court to apportion fees when case is done); *Szelc v. Stanger*, 2011 WL 5864047 (D.N.J.) (unpublished) (court makes apportionment of attorneys' fees based on complicated but logical formula). Similarly, in *Lupu v. Loan City, LLC*, 903 F.3d 382 (3rd Cir. (Pa.) 2018), the Third Circuit Court of Appeals predicted that Pennsylvania would disagree with the *GMAC* and *Philadelphia* decisions, and would impose the in-for-one rule on title insurers. The public policy underpinning the in-for-one rule is that, by "preventing insurers from breaking a case into covered and non-covered pieces, courts avoid the potential waste and impracticality of a bifurcated defense." However, the Third Circuit noted that Massachusetts and Illinois courts have already rejected the in-for-one rule as to title insurance because it is not as difficult in a title lawsuit to have two different lawyers defend different claims. It relied on the Massachusetts Supreme Court decision of *GMAC Mortgage, LLC v. First American Title Ins. Co*., 464 Mass. 733, 985 N.E.2d 823 (2013), which said that "title issues are discrete, [and] they can be bifurcated fairly easily from related claims." The court also noted that the limited defense provided by a title insurance policy is one reason why "title insurance premiums are remarkably low." In *Cherry Hills Farm Court, LLC v. First American Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6682835 (D.Colo. 2019) (not yet released for publication), appeal filed January 6, 2020, the court held that the complete-defense rule adopted in Colorado for liability policies does not apply to title insurance, "which differs from general liability insurance in significant ways." It adopted what it termed the majority rule of *GMAC*, *Philadelphia Indemnity* and *Lupu* and rejected the reasoning of *Little Italy* and *Lawyers Title v. Graham* that had imposed the complete-defense rule on title insurers. The court also noted that the rationale behind the complete-defense rule does not apply in the context of title insurance, saying: "[t]he complete defense rule is premised on the idea that it is not feasible to bifurcate multiple claims in a single suit. See 1 Allan D. Windt, *Insurance Claims and Disputes* § 4:13 (5th ed. 2010). Yet as the Massachusetts Supreme Judicial Court noted in *GMAC Mortgage*, 'because title issues are discrete, they can be bifurcated fairly easily from related claims.' 985 N.E.2d at 829." See also *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978); *Native Sun Investment Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (1987); and *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F. 2d 307 (8th Cir. 1991). Also see Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, §4.13, *Provision of partial defense*, Thomson Reuters.

> noncovered claims only where "there is no reasonable means of prorating the costs of defense between the covered and not-covered items."[104]

However, other states have imposed the "in-for-one, in-for-all" rule on title insurers, finding that title insurance is not sufficiently different from general liability insurance as to warrant different treatment.[105] California requires an insurer to defend non-covered counts, but permits the insurer to reserve the right to seek reimbursement from the insured for those fees and expenses.[106] Some courts

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[104] *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F. 2d 307, 311 (8th Cir. 1991) (decided under Virgin Islands law), citing *EEOC v. Southern Publishing Co*., 894 F.2d 785, 791 (5th Cir.1990); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc*., 633 F.2d 1212, 1224 (6th Cir.1980), cert. denied, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981)); *Okada v. MGIC Indem. Corp*., 823 F.2d 276, 282 (9th Cir.1986); and *Harborside Refrigerated Svcs., Inc. v. IARW Ins. Co*., 759 F.2d 829, 831 (11th Cir.1985).

[105] In *City of Sharonville v. American Employers Ins. Co.,* the Ohio Supreme Court held, similarly: "[a]n insurer has an absolute duty to defend an action when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy, even in part and even if the allegations are groundless, false, or fraudulent. Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage. An insurer need not defend any action or any claims within the complaint when all the claims are clearly and indisputably outside of the contracted policy coverage." 109 Ohio St.3d 186, 846 N.E.2d 833, 837 (Ohio 2006). *Sharonville* was followed in *Little Italy Development, LLC v. Chicago Title Ins. Co.*, 2011 WL 2532663 (N.D.Ohio) (unpublished), in which the court, also citing *Buss*, held that the language of the ALTA policy providing a defense for covered counts only had been trumped by Ohio's public policy statement that all insurers in Ohio must defend all counts: "Chicago Title argues that, pursuant to the express terms of the policy, it agreed to provide less coverage than the coverage required by *City of Sharonville.* In other words, Chicago Title claims that the Ohio Supreme Court's pronouncement may be modified by agreement between the parties. This Court disagrees. Chicago Title's argument would be meritorious if the Ohio Supreme Court based its decision on contract interpretation principles. If the decision relied on the underlying insurance agreement to determine the scope of the duty to defend, then the parties would be free to contract for varying degrees of coverage in that regard. The court, however, does not even reference the policy language in its opinion. The holding in *City of Sharonville* is undoubtedly broad--it expressly requires insurers to defend claims 'even if they bear no relation to the insurance policy coverage.'" 2011 WL 2532663 at *3. *Little Italy* was rejected by the Seventh Circuit in the *GMAC Mortgage* decision and by a Colorado court, as is discussed above. In *Lawyers Title Ins. Corp. v. Graham Mortg. Corp*., 2010 WL 2635074 (E.D. Tex. Apr. 16, 2010), report and recommendation adopted, 2010 WL 2635089 (E.D. Tex. June 28, 2010), the court also applied the complete-defense rule to a title insurance policy. However, in *Cherry Hills Farm Court, LLC v. First American Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6682835 (D.Colo. 2019) (not yet released for publication), appeal filed January 6, 2020, the court refused to follow that decision, stating that the *Graham* court had "merely stated the complete defense rule without any analysis, including any explanation of its applicability in the context of title insurance."

[106] In *Buss v. Transamerica Ins. Co.*, 65 Cal.Rptr.2d 366, 939 P.2d 766 (1997), the California Supreme Court held that the insurer is entitled to be reimbursed by the insured for the cost of the defense of claims not potentially within coverage. The court reasoned: "Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs." In *Bar-K, Inc. v. Security Title Corp.,* 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished), First American provided its insured with a full defense, including the defense of numerous non-covered counts. It appealed the trial court's refusal to order the insured to reimburse First American for the cost of litigating the non-covered issues. The appeals court affirmed, however, stating that *Buss* requires the insurer to reserve this right of reimbursement when it accepts the defense, or it is waived. The court found that First American had not made the reservation, and thus had waived its right to reimbursement.

have not acknowledged the express policy limitation of the duty to defend to covered claims only.[107]

In those jurisdictions in which the law is not settled on apportionment of fees or the right to defend the insured as to covered claims only, the insurer may wish to immediately seek a declaration by the court on the issue. Otherwise, an insured might argue that the insurer's acceptance of some claims only, and apportionment of fees, is a rejection of the tender or a bad faith act.[108] See §4.14 regarding declaratory judgment actions.

There are two means by which the insurer can provide a partial defense: by providing separate counsel for the covered counts only, or by apportioning the counsel's fees between covered and non-covered counts. Each approach has advantages and disadvantages.

Separate "covered matter" counsel is appropriate when the covered and non-covered counts are sufficiently distinct so that duties can be broken down between two counsels.[109] The advantage to the insured in such an arrangement is that it can retain counsel of its choice for the non-covered counts. That counsel may also advise the insured on coverage matters.[110] The insurer may, in most jurisdictions, choose counsel for the covered counts. See §4.8 regarding choice of counsel. This kind of arrangement usually causes discovery and resolution of the covered matters to progress expeditiously. If the matters are resolved in the insured's favor, the insured is then free to conduct the balance of the litigation without any supervision of or duty of cooperation to the insurer. If the insured loses the dispute, the insurer settles with the insured or the plaintiff, and frequently the litigation is effectively concluded.

Apportionment of one counsel's fees is less difficult to coordinate. For the counsel, the process can be cumbersome and may present real or perceived ethical dilemmas. Most problems are overcome if the insurer and insured agree on a flat percentage split of fees at the beginning of the case. The ratio can be adjusted if the relative amount of time spent on covered and non-covered matters changes.

There is no right to seek apportionment of a settlement between covered and non-covered

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[107] In *212 Marin Boulevard, LLC v. Chicago Title Ins. Co*., 2014 WL 8849641 (N.J.A.D. 2015) (unpublished), cert.den. 223 N.J. 280 (Oct. 5, 2015), the court held that the insurer was required to pay for a counterclaim by the insured against the plaintiff city for malicious prosecution, and for non-litigation work including attendance at public meetings, lobbying work, and tax advice. The court incorrectly said that "[t]here is nothing about the policy language to suggest that the promise to pay costs incurred in the defense of title would be strictly limited to the particular confines of the underlying lawsuits and would not extend to other efforts to vindicate the title conveyed."

[108] In *Brown v. Guarantee Title & Trust/ARTA*, 1996 WL 488004 (Ohio App. 5 Dist.) (unpublished), the insured's experts opined that the entire suit was covered by the policy, and further that the refusal to accept the full defense "was unreasonable, contrary to industry standards, and constituted bad faith." To this, the experts added that the insurer had failed to "meaningfully respond" to the insured's demand for payment. The court affirmed the finding of the jury that the insurer had acted in bad faith, and its award of attorney's fees.

[109] In *First Clover Leaf Bank v. National Land Title Ins. Co*., 2015 WL 392728, 2015 IL App (5th) 120442-U (Ill.App. 5 Dist.) (unpublished), app.den. 32 N.E.3d 673 (Table) (May 27, 2015), the court affirmed the insurer's right to select separate counsel for an insured lender to defend against a covered counterclaim by the borrower in the foreclosure action. The lender's foreclosure counsel continued his representation of the lender for the prosecution of the action and against non-covered counterclaims by the borrower.

[110] This arrangement was made in *KL Group v. Case, Kay & Lynch*, 829 F.2d 909 (9th Cir. (Hawaii) 1987).

counts if the insurer has refused the defense, however.[111] This is in keeping with the rule that the wrongful rejection of a defense makes the insurer liable for the full settlement amount. See §4.15 regarding the effects of a wrongful rejection of a defense.

Unless a partial defense is barred by state case law, the insurer should propose a practical means of apportionment. It should seek to obtain a written agreement with the insured.[112] The insurer must be plain and practical in the method it suggests for division of labor and billing, or the intent of the agreement and the splitting of the fees can become a contentious matter.[113] If there is a dispute, the insurer must prove that it was possible to allocate fees as requested.[114]

4.8 Insurer's Right To Select Counsel

The 1992 and 2006 ALTA policy forms state that the insurer has the right to select counsel to defend the insured when the insurer assumes an obligation to defend, and to manage and direct that defense.[115] When the insurer appoints counsel to defend the insured, it is not also obligated to pay the fees incurred by the insured for privately-retained counsel who represents the insured concurrently with the insurer-retained counsel.[116] Many states consider the insurer to be an interested party in the suit against its insured, so that counsel represents the interests of both insurer and insured.[117]

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[111] *Nautilus, Inc. v. Transamerica Title Ins. Co.*, 13 Wash.App. 345, 534 P.2d 1388 (1975).

[112] See *KL Group v. Case, Kay & Lynch*, 829 F.2d 909 (Hawaii 9th Cir. 1987), which quotes from the defense letter.

[113] See *KL Group v. Case, Kay & Lynch*, 829 F.2d 909 (Hawaii 9th Cir. 1987).

[114] "If Western had proved that the fees were partly allocable to non-covered causes, it would have been entitled to assume less than the whole defense. (Hogan v. Midland National Ins. Co. (1970) 3 Cal.3d 553, 564, 91 Cal.Rptr. 153, 476 P.2d 825.) Western did not demonstrate that the fees could be logically allocated between covered and non-covered claims." *Stalberg v. Western Title Ins. Co.*, 282 Cal.Rptr.43, 50 (1991).

[115] Condition 5(a), 2006 ALTA policies; Conditions & Stipulations 4(a), 1992 ALTA Owner's policy. The Residential policy states that the insurer has the right to choose counsel (Condition 5), as does the Homeowner's policy (Condition 5(d)). The 1970 policy was silent on the subject (Conditions & Stipulations 3(a)). In *First Clover Leaf Bank v. National Land Title Ins. Co*., 2015 WL 392728, 2015 IL App (5th) 120442-U (Ill.App. 5 Dist.) (unpublished), app.den. 32 N.E.3d 673 (Table) (May 27, 2015), the court acknowledged the insurer's right to select separate counsel for an insured lender to defend against a covered counterclaim by the borrower in the foreclosure action, while the lender's foreclosure counsel continued his representation of the lender for the prosecution of the action and against non-covered counterclaims by the borrower. In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.*, 883 F.3d 1038 (8th Cir. (Mo.) 2018), the court held that the insurer had the right to manage the defense of mechanic lien litigation, and that the insured had failed to prove its claim that the insurer tortuously interfered in the relationship between insurer-appointed counsel and the insured.

[116] *CH Properties, Inc. v. First American Title Ins. Co.*, 204 F.Supp.3d 416 (D.P.R. 2016); *In re D'Anna*, 548 B.R. 155 (Bkcy.E.D.La. 2016).

[117] This tripartite relationship is discussed, for example, in *Atlanta Title & Trust Co. v. Fulkalb, Inc.*, 56 Ga. App. 742, 193 S.E. 796 (1937). See also, Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §4:19, Thomson Reuters; *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999) (holding that insurer is "co-client" with insured when insurer undertakes defense of insured).

When the insurer defends the insured without a reservation of rights, most courts agree that the insurer's and insured's interests are sufficiently aligned so that one counsel may represent the interests of both.[118] The counsel retained by the insurer to defend the insured in litigation has an attorney-client relationship with the insurer also, and the attorney-client privilege applies to communication between that counsel and the insurer.[119] In these cases, most issues about possible conflicts can be resolved by following the local ethical rules on informed consent. Most states that have considered the issue have held that insurer staff attorneys may defend insureds when they are sued by parties other than the insurer in litigation covered by the policy.[120]

Under certain circumstances discussed below, typically when the insurer reserves rights, the insurer and insured may have conflicting interests as to how the suit should be defended. This conflict may be actual or presumed by law. In many jurisdictions, the insurer is obligated to pay for either the insured's own choice of counsel or "independent" counsel when there is a conflict of interest, despite the policy language.[121] Under such circumstances, the insurer also typically loses the right to control the defense.[122]

A conflict may be created by a complaint which alleges alternate causes of action, one covered and one not. A conflict is also found when the action is not covered if the plaintiff prevails, but is covered if the insured wins. An example is when the plaintiff alleges that the insured was not a

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[118] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §4:19, Thomson Reuters; *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999).

[119] *Commonwealth Land Title Ins. Co. v. Funk*, 2015 WL 3863192 (Del.Super. 2015) (unpublished) (e-mails between title insurance claim administrator and lawyer hired by insurer to defend its insured's lien priority were privileged attorney-client communications, and insurer had no duty to turn them over to party it sued in recoupment action).

[120] See *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999), approving the practice subject to compliance with ethical rules, and discussing cases on the same issue from ten other jurisdictions. See also *Unauthorized Practice of Law Committee v. American Home Assurance Co., Inc*., 261 S.W.3d 24, 51 Tex. Sup. Ct. J. 590 (2008), holding that an insurer may use staff attorneys to defend insureds in litigation without violating Texas unauthorized practice of law rules, but only when the insurer's interest is in line with that of its insured. The staff attorney must fully disclose to an insured his or her affiliation with the insurer. The 39-page decision traces the history of insurers' use of in-house litigation counsel, and recites ABA opinions, law review articles and numerous decisions from other jurisdictions, noting that a number of states permit the practice, by court decision, ethics rules or statutes, but that courts in two states—Kentucky and North Carolina—have issued ethics opinions concluding that the use of staff attorneys to defend insureds is prohibited as the unauthorized practice of law by a corporation.

[121] See Richmond and Douglas, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, Nebraska L.Rev. 1994, Vol. 73, p. 285; also, see Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §4:20, *Conflict of interest between insured and insurer*, Thomson Reuters.

[122] *Stonewell Corp. v. Conestoga Title Ins. Co*., 2009 WL 3075661 (S.D.N.Y.) (unpublished), later decision 678 F.Supp.2d 203 (S.D.N.Y. 2010), for example, recited the rule in New Jersey that "'if [an insurance] carrier wishes to control the defense [of a claim against the insured] and simultaneously reserve a right to dispute liability, it can do so only with the consent of the insured.' … The insurer can infer consent from 'an insured's failure to reject an offer to defend' upon the terms set forth by the insurer. … However, 'to spell out acquiescence by silence, the letter [in which the insurer offers coverage] must fairly inform the insured that the offer may be accepted or rejected.'"

bona fide purchaser for value because he or she knew of the disputed matter; but the insured defends on the basis that it had no such knowledge, and record title is free of the plaintiff's claim. In this type of situation, the courts presume that if the insurer directs the counsel, its own self-interest will incline it to encourage the litigator to skew the defense so that the matter is ultimately not covered.

Some courts go further, finding that a conflict of interest exists whenever the insurer reserves rights because of a possible coverage defense.[123] However, not every reservation of rights creates an actual conflict of interest. For example, if the suit involved a construction lien, and the coverage question was whether or not the tendering parties took by operation of law from the named insured, the coverage defense would not create an actual conflict of interest for defense counsel. The facts surrounding the transfer to the defendants would not be litigated in the construction lien suit. No amount of direction from the insurer in the litigation would have an effect on coverage.

The "automatic conflict" view begins with the false assumption that the insurer will always act against the interest of the insured. The "automatic conflict" rule has the practical effect of denying the insurer its contractual right to control the insured's defense whenever it makes a reservation of rights.[124] If the jurisdiction follows this rule, the claims handler will likely be required to retain either independent counsel or the insured's own counsel whenever the insurer reserves rights.

The majority, and more logical, view is that the reservation of rights creates a conflict of interest only when the lawsuit against the insured will turn on the same issues as does the coverage question, creating a "true" conflict of interest.[125]

When a conflict of interest exists between insurer and insured, most jurisdictions hold that the attorney for the insured may not represent the insurer.[126] Thus, to the extent that the insurer has a separate interest in the lawsuit or in subrogation or recoupment later, it must retain separate counsel to represent itself. Counsel for the insured is retained for the limited purpose of representing the insured in the action attacking title.

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[123] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §4:20, *Conflict of interest between insured and insurer*, Thomson Reuters.

[124] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:20, *Conflict of interest between insured and insurer*, § 4:22, *Conflict of interest between insured and insurer—Satisfying duty to defend* (reviewing the positions of the various jurisdictions on the issue of reservation of rights and conflict of interest), and § 4:26, *Insured's refusal to accept defense offered by insurer—Defense offered subject to a reservations of rights*, Thomson Reuters.

[125] The "true conflict" position was adopted, for example, in *Native Sun Investment Group v. Ticor Title Insurance Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (1987), in which the court so limited the holding of *San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (Cal.App. 4 Dist. 1984). Also, see *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.*, 883 F.3d 1038 (8th Cir. (Mo.) 2018), in which the court held that the insurer had the right to manage the defense of mechanic lien litigation conducted under a reservation of rights, and that the insured had failed to prove its claim that the insurer tortuously interfered in the relationship between insurer-appointed counsel and the insured, when the coverage issue had no bearing on the way the mechanic lien defense should be conducted.

[126] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:20, *Conflict of interest between insured and insurer*, Thomson Reuters.

Counsel retained for the insured should not advise either the insurer or the insured as to coverage matters. That counsel is typically ethically bound not to disclose to the insurer any client communication that could have an impact on coverage.[127] Counsel's disclosure of such privileged information may even be imputed to the insurer to make it liable to the insured for consequential and punitive damages.[128]

A New York case held that the insured had the right to control its defense because the court assumed that the insured and insurer would have different interests in the urgency with which the litigation should be pursued, creating a conflict of interest. In *69th Street & 2nd Avenue Garage Associates v. Ticor Title Guar. Co.*,[129] the insurer offered to defend the matter, but on the condition that the insurer have control of the suit, including choice of counsel. The insured's lawyer was willing to allow the insurer's chosen counsel to act as co-counsel, but would not substitute out of the suit. When neither side relented, the insured defended the matter itself and then sued the insurer for its fees. The court required that the insurer pay the fees. It found that the insured's desire for quick resolution, to keep the title matter from interfering with use of the property, would "conflict" with the insurer's assumed proclivity to "proceed leisurely" with defense of the title, and that therefore the insured had no duty to surrender control of the suit to the insurer.

69th Street & 2nd Avenue Garage Associates provides an interesting counterpoint to *Allison v. Ticor Title Ins. Co.*[130] The *Allison* court held that an insurer had a duty to defend insureds who did not tender their defense, as long as they gave up control of the suit to the insurer. The *Allison* court read the policy to mean that "[i]f Ticor appears, the insureds shall secure to Ticor the control of the defense, but this language does not imply formal tender. It means only that the insureds must move over, must cede control to Ticor."[131] These inapposite results illustrate the extent to which the duty to defend is molded by state law, despite the fact that the policy forms are essentially uniform

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[127] See *Eureka Investors Corp. N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932 (1984); *Historic Smithville Dev. Co. v. Chelsea Title & Guaranty Co.*, 184 N.J.Super. 282, 445 A.2d 1174 (Ch. 1981), aff'd in part, rev'd in part, 190 N.J.Super. 567, 464 A.2d 1177 (App.Div. 1983). In *Historic Smithville*, the counsel hired by the insurer then brought a cross-claim against the insurer. The insurer sought to review attorney-client documents, on the grounds that the attorney represented both insured and insurer. The court found that the conflict of interest precluded the insurer from seeing the documents.

[128] For example, in *Lake Havasu Community Hosp. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 687 P.2d 371 (App. 1984), the attorney warned the insurer that his client might be arranging a collusive settlement. He urged the insurer to make a reservation of rights regarding Exclusion 3(a). The court found the attorney to be the insurer's agent. It found it likely that the attorney swayed the insurer not to settle for policy limits. The court held: "[W]hen an attorney, who is an insurance company's agent, uses the confidential relationship between an attorney and a client to gather information so as to deny an insured coverage under the policy[FN5], such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy. This applies to liability above the policy limits, as well as cases defended under a reservation of rights." "[FN5] The same rationale applies where the information is utilized to reduce the amount of indemnification due the insured." 687 P.2d at 384-5.

[129] 207 A.D.2d 225, 622 N.Y.S.2d 13 (N.Y.A.D. 1995), rev.den. 87 N.Y.2d 802 (1995).

[130] 907 F.2d 645 (7th Cir. (Wis.) 1990).

[131] 907 F.2d at 650.

nationwide. California has developed an elaborate set of rules regarding conflict of interest and defense, stemming in large part from the decision in *San Diego Navy Federal Credit Union v. Cumis Ins. Society*.[132] The *Cumis* case and its progeny have been much debated and elucidated,[133] and are beyond the scope of this work.

An insured's counsel faces an ethical issue when he or she receives information that would support a coverage defense against the insured client. Ethics rules prohibit the attorney from revealing information relating to representation of the client unless the client gives informed consent.[134] Based on a review of case law and codes of ethics, one scholar offers the following options:

> 1. If the information relates to information which the insurer is entitled to know and is detrimental to the insured's separate interests, then the insured client must be advised as to the ramifications of maintaining secrecy as a possible breach of the insured's contractual obligation to cooperate. The defense counsel must also disclose her own relationship to the insurer. If the insured consents to disclosure after advice, then the attorney has met her ethical obligations and she may disclose the information and continue in the relationship.
> 2. If the insured will not consent to disclosure, then the defense counsel must assess whether consent to withhold the information to the insurer can be obtained without violating the insured's right to confidentiality. If such consent can be obtained, then the defense counsel can continue in the relationship.
> 3. If the defense counsel cannot make the request for consent because to do so would violate the right to confidentiality, then defense counsel must advise the insured to retain separate coverage counsel to protect the insured's rights in an eventual breach

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[132] *San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (Cal.App. 4 Dist. 1984). The *Cumis* decision has been codified in California by Cal.Civ. Code §2860, which states that an insured must be offered independent counsel "at the time the insured is informed that a possible conflict may arise or does exist." It adopts the "true conflict" position that "a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist." The insurer may require that "counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage." The insurer's duty to pay fees "is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended." Fee disputes must be arbitrated, even when insured suing for bad faith. See *Compulink Mgmt. Center, Inc. v. St. Paul Fire & Marine Ins. Co*., 169 Cal.App.4th 289, 87 Cal.Rptr.3d 72 (Cal.App. 2 Dist. 2008). In *Bank of America, N.A. v. Superior Court of Orange County*, 212 Cal.App.4th 1076, 151 Cal.Rptr.3d 526 (Cal.App. 4 Dist. 2013), the court found that counsel retained to file an action to clear title under a reservation of rights was not *Cumis* counsel, because no actual conflict existed.

[133] See, for example, Saxon, *Conflicts of Interest: Insurers' Expanding Duty to Defend and the Impact of 'Cumis' Counsel*, 23 Idaho L.Rev. 351 (1987).

[134] See ABA Model Rule of Professional Conduct 1.6.

of cooperation action brought by the insurer. The defense counsel must maintain the insured's request for secrecy, but cannot continue in the tripartite relationship. Defense counsel must determine whether withdrawal can be sought without violating the insured's right to confidentiality.[135]

Mr. Windt takes a similar but not identical view.[136] Notwithstanding these helpful formulations of rules, the attorney must always follow the ethical code and case law of the jurisdiction. There can also be a disclosure issue for defense counsel asked to disclose attorney's fee statements to the insurer's outside bill auditor. The time entries on the invoices may signal a coverage defense, and the auditor is not a client.[137]

4.9 Reservations of Rights

FORM 3, Appendix A
Reservation of rights--to insured

FORM 4, Appendix A
Reservation of rights--to counsel

FORM 5, Appendix A
Reservation of rights--to California Cumis counsel

FORM 8, Appendix A
Retender of defense accepted under reservation of rights

FORM 85, Appendix A
Reservation of right to recoup attorney fees

If the insurer's investigation of the claim discloses a coverage defense which may apply, it should promptly reserve the right not to pay a judgment against the insured. If such facts or allegations are available at the time defense is tendered, the reservation of rights should be made in

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[135] Berkeley, *Tripartite Ethics*, 26 The Brief (ABA Tort and Insurance Practice Section) 23, 24 (Spring 1997).

[136] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:19A, *Attorney-client privilege*, § 4:21, *Ethical considerations*, and § 4.22, *Conflict of interest between insured and insurer—Satisfying duty to defend*, Thomson Reuters.

[137] See, for example, In the Matter of Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2000 MT 110, 2 P.3d 806 (Mont. 2000); Ethical Risks Inherent in Representing Both Insurers and Insureds, Ethics Opinion E-99-1, Wisconsin State Bar Professional Ethics Committee, Wisconsin Lawyer, August, 1999, p. 28. The Wisconsin ethics opinion states that a total of 21 other states have adopted similar positions.

the acceptance of the defense.[138] While the reservation may be oral,[139] it is much preferable to put it in writing.

As discussed above, the reservation of rights may create a conflict of interest, and in some states it is considered an automatic conflict. In many or most states, the insurer loses the right to control litigation when it accepts the insured's defense under a reservation of rights.[140] If a conflict exists, the insurer is obligated to hire "independent" counsel for the insured, as further discussed above.[141]

Most courts hold that an insurer's acceptance of the defense with a specific reservation of rights is not a rejection of the defense.[142] One commentator has said this, in support of this view:

> An insured should not be allowed, without breaching the contract, to reject a tendered defense that is otherwise proper simply because the carrier sends the insured a reservation of rights letter. Whether or not the reservations specified are justified, absent a breach of contract by the carrier, ... the insured should be obligated to accept the defense. By reserving its rights, the insurer is not imposing conditions on its defense. The defense remains unqualified; the insurer, by reserving its rights, is merely putting the insured on notice of what the insurer believes are its existing rights under the policy.[143]

However, some states have formed rules regarding the type of disclosures that must be made to the insured in such a reservation of rights, so that the insured's acceptance of the defense is deemed informed, and the failure to so inform the insured has been deemed by some such courts as a

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[138] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 2:7 through 2:18 concerning reservations of rights, and particularly § 2:14, *Contents of reservation of rights letter*, Thomson Reuters.

[139] *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978).

[140] In *Anastasi v. Fidelity Nat'l Title Ins. Co*., 137 Hawai'i 104, 366 P.3d 160 (Hawaii 2016), the Hawaiian Supreme Court ruled that a title insurer defending under a reservation of rights has an "enhanced" duty of good faith, which it can breach if it instructs counsel to defend the insured in litigation after the insurer has determined that there is no meritorious defense, particularly if its motivation in so doing is to delay payment to the insured. The *Anastasi* court did not find that Fidelity acted in bad faith, but only that there was a genuine issue of material fact "as to whether Fidelity met the enhanced standard of good faith." Thus, it sent the case back down to the trial court.

[141] See Bradford, *Reserving Rights of Title Insurers in Third Party Actions*, Probate & Property, January/February, 1997, p. 16, for an excellent discussion of this subject in the context of title insurance policies.

[142] See, for example, *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*, 793 F. Supp. 265 (D. Colo. 1992); aff'd 19 F.3d 528 (10th Cir. 1994).

[143] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:26, pp. 4-228 to 4-229, Thomson Reuters.

rejection of the defense.[144] Some states follow the principle that the insured may reject a defense under a reservation of rights, if the defense offered is by the insurer's choice of counsel.[145] Therefore, the insurer must be conscious of applicable state law regarding the reservation of rights before seeking to make such a reservation. Similarly, when an insurer sent a reservation letter that suggested that the insured hire an attorney, and the insurer did not agree to pay for independent counsel, the court deemed the reservation a rejection of the defense.[146]

Further, in some jurisdictions, the insurer may not require the insured to enter into a nonwaiver agreement as a condition to the insurer's provision of a defense. In a nonwaiver agreement, the insurer and insured agree that the insurer may raise any defense to coverage later, and the provision of an attorney waives no coverage defenses. Such an agreement is generally not considered to be an unconditional offer of a defense in some jurisdictions. In those states, the insured may refuse the offered defense, or the nonwaiver agreement itself may be found unenforceable.[147] Thus, in those jurisdictions, the insurer may not avoid making a specific reservation of rights.[148]

Coverage defenses not reserved may be waived. If the insurer is aware of facts which form a basis for a coverage defense when the defense is tendered, its failure to reserve rights may preclude the insurer from raising the defense later.[149] However, the corollary to this rule is that policy

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[144] See, for example, *Stonewell Corp. v. Conestoga Title Ins. Co*., 2009 WL 3075661 (S.D.N.Y.) (unpublished), which recited the rule in New Jersey that "'if [an insurance] carrier wishes to control the defense [of a claim against the insured] and simultaneously reserve a right to dispute liability, it can do so only with the consent of the insured.' … The insurer can infer consent from 'an insured's failure to reject an offer to defend' upon the terms set forth by the insurer. … However, 'to spell out acquiescence by silence, the letter [in which the insurer offers coverage] must fairly inform the insured that the offer may be accepted or rejected.'"

[145] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:26, Thomson Reuters.

[146] *Jones v. Southern Surety Co.*, 210 Iowa 61, 230 N.W. 381 (1930).

[147] *National Mortgage Corp. v. American Title Ins. Co*., 299 N.C. 369, 261 S.E.2d 844 (1980); see also, Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds,* Sixth Edition, § 2:19, *The nonwaiver agreement,* Thomson Reuters.

[148] In *Houston Title Guaranty Co. v. Fontenot,* 339 S.W. 2d 347 (Tex.App. 1960), the court held: "The offer of appellant to work with appellees' counsel, provided a non-waiver agreement in form acceptable to it was executed, was not an offer to defend. The obligation "to defend" was clearly intended to mean that the title company would relieve the insureds of the duty and expense of having counsel in court, and that such company would assume the responsibility and burden of the defense. An offer merely to help was in effect a refusal to defend, especially in view of the statement that appellant recognized no liability in the matter under the circumstances. ... [A]ppellant in its offer to work with appellees' counsel, attached a condition not contained in the policy, namely that a nonwaiver agreement in from acceptable to the company be furnished."

[149] "When the appellant undertook the appellees' defense in the Bailey lawsuit, with full knowledge of the facts and without disclaimer, it was precluded from subsequently avoiding liability on the grounds of non-coverage." *Arizona Title Ins. & Trust Co. v. Pace,* 8 Ariz. App. 269, 445 P.2d 471 (1968). Similarly, in *Sisco v. Nations Title Ins. Co.,* 278 A.D.2d 479, 718 N.Y.S.2d 82, 2000 N.Y. Slip Op. 11841 (N.Y.A.D. 2 Dept. 2000), the court held that the insurer's "failure to assert the general exclusion in its original disclaimer letter may give rise to an estoppel, if the insured suffered prejudice ... [T]he notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or

coverage cannot be created merely by estoppel. One court explained that:

> The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrines in this respect is therefore to be distinguished from the waiver of, or estoppel to assert, grounds of forfeiture. ... Accordingly, plaintiffs' reliance on the fact that defendant's staff attorney who handled plaintiff's claim testified that he never reserved rights or denied coverage and that he acted consistent with the contractual duties of the insurer in the event of a claim for which the defendant might have been liable, not only fails to establish the prerequisite element of reliance for the doctrine of estoppel ... , but most significantly is of no consequence because of the inapplicability of the doctrines of estoppel or waiver.[150]

Thus, the insurer's failure to reserve rights may not create coverage where none would otherwise exist.

On the other hand, the insurer should not make a reservation when no basis exists for a coverage defense. By reserving rights, in some jurisdictions, the insurer loses its right to control and direct the litigation. Therefore, the insurer should not make a reservation based on conjecture. See §4.8 regarding the right to direct counsel.

The reservation of rights letter must be calculated to inform the insured of the basis for and effect of the reservation. The letter should clearly state the facts and policy terms on which the reservation is based. It should then plainly state that the insurer will not pay a judgment or settlement if there is no coverage.

Insurers sometimes reserve the right to retender the defense to the insured. The insurer may withdraw a defense under certain circumstances, as further discussed at §4.11. The right to retender defense ordinarily may be exercised whether or not such right has been reserved.

In certain jurisdictions, an insurer may be reimbursed for its defense costs, if it is later determined that there is no coverage.[151] The allowance of recovery of defense costs is a minority rule, however.[152] Where the rule does apply, the insurer may have the obligation to specifically

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grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully."

[150] *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771, 777 (Cal.App. 2 Dist. 1994).

[151] See discussion in Bradford, *Reserving Rights of Title Insurers in Third Party Actions*, Probate & Property, January/February, 1997, p. 16.

[152] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:28, *Insurer's withdrawal of defense of insured*, Thomson Reuters.

retain this right in either its reservation of rights letter or a nonwaiver agreement.[153] The rule has been stated thus:

> Reimbursement is available to an insurer if it has either secured a nonwaiver agreement from the insured [footnote omitted] or made an adequate reservation of rights ... . When an insurer chooses to defend a lawsuit under reservation of rights, it typically sends a letter to the insured stating its intention to assert noncoverage and seek reimbursement if it later shows it had no duty to defend the action. In such cases, "[t]he insurer need only notify, or attempt to notify, the assured that is conducting the investigation and defense ... under a reservation of the right to assert policy defenses at a later time, and the assured's silence will usually be deemed acquiescence.[154]

Thus, in jurisdictions which permit reimbursement of defense costs, the acceptance by the insured of the defense with this reservation is considered to be "an implied agreement to the right to reimbursement... ."[155]

4.10 Cooperation Of Insured

The insured has a duty to cooperate with the insurer in the conduct of his or her defense. The insured's duties are described in some detail in Condition 6 of the 2006 ALTA policies (Conditions & Stipulations 4(d) of the 1992 ALTA policies). If the insured fails to cooperate, that breach cancels the insurer's further duties under the policy.[156] However, the insurer may not assert the insured's breach of the cooperation provision if it has already breached its duty to defend the insured.[157]

Coverage is voided by intentional conduct by the insured to frustrate the insurer-retained counsel's efforts to solve the title problem. For example, in *Monterey Development Corp. v. Lawyers*

[153] *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F.Supp. 1169, 1171 (D.C.Minn. 1996) [relying on *Walbrook Ins. Co. Ltd. v. Goshgarian & Goshgarian*, 726 F.Supp. 777 (C.D.Cal. 1989) and *Gossard v. Ohio Casualty Group of Ins. Co's*, 39 Cal.App.4th 450, 35 Cal.Rptr.2d 190 (6 Dist. 1994)]. However, other California decisions are contra: *State Farm Fire & Cas. Co. v. Thomas*, 756 F.Supp. 440, 445-6 (N.D.Cal. 1991); *Reliance Ins. Co. v. Alan*, 222 Cal.App.3d 702, 272 Cal.Rptr. 65, 69-70 (Cal.App. 4 Dist. 1990).

[154] *Gossard v. Ohio Casualty Group of Ins. Co's*, 39 Cal.App.4th 450, 35 Cal.Rptr.2d 190, 191 (Cal.App. 6 Dist. 1994), quoted with approval in *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F.Supp. 1169, 1172 (D.C.Minn. 1996). Reimbursement of attorneys' fees and the *Knapp* case are discussed in Comment, *The Title Insurance Law Newsletter*, August-September 1996, p. 2, published by American Land Title Association.

[155] *Knapp v. Commonwealth Land Title Ins. Co.*, 932 F.Supp. 1169, 1171 (D.C.Minn. 1996).

[156] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:28, *Insurer's withdrawal of defense of insured*, Thomson Reuters.

[157] For example, the insurer's belated acceptance of defense was found to be a breach, precluding any argument that the insured breached its duty to cooperate, in *Rajchandra Corp. v. Title Guaranty Co.*, 558 N.Y.S.2d 1001 (Sup.Ct.A.D. 1990).

Title Ins. Corp.,[158] the insureds manipulated the situation, after counsel was retained for them, in order to avoid having an order entered clearing their title. They then filed suit to collect from the insurer for the "loss." The court held that the insureds "have attempted to make a mockery of the district court's judgment," and denied their claim. The appeals court also affirmed the district court's Rule 11 sanctions against the insureds.[159]

The insurer and insured may differ as to what the insured must do to cooperate. Several decisions have held that an insured holding a junior mortgage does not have to bid in at the foreclosure sale of the senior mortgage in order to preserve its position while the insurer litigates the title issue:

> The defendant has ... provided neither contractual nor case law authority which equates the "duty to aid" with a duty to bid in at a foreclosure sale. Rather, plaintiff has cited case law from other jurisdictions to wit: *Trigiani v. American Title Ins. Co.*, 392 Pa.Super 427, 573 A. 2d 230 (Pa. Super. 1990) and *Wheeler v. Equitable Trust Co.*, 206 Pa. 428, 55 A. 1065 (1908), which reject the argument that an insured junior mortgagee is obligated to bid at a foreclosure sale of a senior mortgage.[160]

The court thus denied the insurer summary judgment as to its duty to indemnify.

The insurer must show actual prejudice caused by the insured's failure to cooperate.[161] In four reported cases, "defense" was tendered after judgment had been entered against the insured. In three out of four cases, the cooperation and tardy notice defenses were found ineffective, albeit on differing grounds.

In the first case, *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*,[162] tender of a defense after judgment was entered in a foreclosure action, compounded by the insured's attendance at the sheriff's sale without bidding, was found to cause prejudice:

> The delay of plaintiff in giving defendant notice of this foreclosure action prejudiced defendant as a matter of law since defendant was improperly deprived under condition 2(b) of the policy, of its right to defend said foreclosure action, and of its right to prevent or reduce any loss. Under the circumstances, the defendant is relieved of any liability in the second cause of action.[163]

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[158] 4 F.3d 605 (8th Cir. 1993).

[159] Id. at 610.

[160] 595 N.Y.S.2d at 308.

[161] *Northwestern Title Security Co. v. Flack*, 6 Cal.App.3d 134, 85 Cal.Rptr. 693 (Cal.App. 1 Dist. 1970).

[162] 595 N.Y.S.2d 302 (Sup.Ct. 1993).

[163] 595 N.Y.S.2d at 307.

However, the same decision found a delay in tender of six months as to a second foreclosure action not prejudicial, since there were still five months remaining before the foreclosure sales.[164] In *Griffith v. Safeco Title Ins. Co.*,[165] even the fact that a default judgment was entered against the insured was not automatically prejudicial. The insured argued that the insurer had some notice of the suit before judgment was taken. This allowed the insured to survive summary judgment, with the court ruling that:

> [T]he evidence created a question of fact as to whether defendant was sufficiently apprised of the action, whether it took reasonable measures in response to the information and whether it was prejudiced by any noncompliance with the policy on [the insured's] part.[166]

Similarly, in *Costagliola v. Lawyers Title Insurance Corp.*,[167] the court refused to negate the duty to defend, because the insurer did not prove that the late notice caused it "appreciable harm." Rather, the court found that the insured avoided prejudice by prevailing in the underlying suit.[168] In *Worthey v. Sedillo Title Guaranty Inc.*,[169] the court found prejudice because the lawsuit was first tendered a month after judgment was entered against the insured, denying the insurer its "right to protect the title it insured and also to mitigate its damages."[170] However, the court required the insurer to prove the dollar value of the rights lost by the insured:

> We agree with [the insureds] that the prejudice with which we are here concerned is prejudice measured in terms of money, since the Title Company's obligation under its policy was expressed in terms of dollars. Plaintiffs have asserted, the Title Company takes no issue therewith, and we agree that the burden was on the Title Company to establish actual prejudice to it and the extent of such prejudice.[171]

Thus, to prevail on the prejudice issue, the insurer commonly must establish that it would have been better able to defend the title, or would have incurred less expense had it obtained prompt notice of the suit. See §4.3 regarding the insured's duty to promptly tender his or her defense in

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[164] Id.

[165] 812 P.2d 420 (Or.App. 1991).

[166] 812 P.2d at 421.

[167] *Costagliola v. Lawyers Title Ins. Corp*., 560 A.2d 1285 (N.J. Super. 1989).

[168] 560 A.2d at 1289.

[169] 512 P.2d 667 (N.M. 1973).

[170] 512 P.2d at 670.

[171] Id.

litigation to the insurer.

4.11 Withdrawal Of Defense; Pay-And-Walk Provision

There are several circumstances in which the insurer has the right to cease to defend its insured in litigation. The insured's refusal to cooperate in its own defense may justify the insurer in withdrawing that defense, as further discussed in §4.10. Also, in some jurisdictions, the duty to defend will cease if the allegations which created the potential for coverage are removed or, in some jurisdictions, negated by discovery or admission.[172] In such cases, when the jurisdiction so permits, the insurer has the right to withdraw its defense of the insured.[173] The same reasoning applies when the plaintiff clarifies an ambiguous pleading so that it clearly does not invoke coverage. Since the pleading invoked the duty to defend, its removal or modification may dispatch the duty. Thus, the insurer may work out of a duty to defend an ambiguous pleading. Conclusory or vague pleadings normally are refined to identifiable causes of action during the discovery process or by summary judgment motion. If the cause of action as later stated by the plaintiff in an amended pleading no longer makes allegations that create the potential for coverage, the insurer typically has the right to cease to defend of the insured.

However, proof through discovery that the plaintiff's position is without a valid basis in fact or law does not cause the pleading to cease to invoke the potential for coverage, and thus such evidence that the plaintiff's claim is groundless does not permit the insurer to withdraw from the defense of its insured. In such cases, the duty to defend is extinguished only when the insured obtains a final judgment defeating the plaintiff's claim. See §4.4.4 above regarding frivolous claims against the insured in litigation.

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[172] For example, in *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 911 P.2d 209 (1996), an insured had brought suit to quiet its title. The insurer then offered the insured the land for which it had contracted. However, the insured elected to pursue its lawsuit to attempt to also obtain title to another parcel, which the insured had added to its deed by alteration. The insurer retendered the suit to the insured, and the court approved that action. It said: "As McDonald himself points out, an insurer may step out of a suit once it clearly and unequivocally demonstrates that the plaintiff's claim against the insured no longer falls within the policy's coverage. [citations omitted] Further, TRW argues that the case does not involve a duty to defend, rather, it involves TRW's prosecution of a quiet title action on McDonald's behalf. We conclude that the District Court did not err in determining that by negotiating the two acre settlement with Jones, TRW had satisfied its obligations under the policy and it did not breach its duties." 911 P.2d at 212. In *Premier Homes, Inc. v. Lawyers Title Ins. Corp.*, 76 F.Supp.2d 110 (D.Mass. 1999), the insurer accepted a defense with a reservation of rights based on an allegation that the insured was not a bona fide purchaser for value without notice. The insured's motion for summary judgment was denied, after which the insurer retendered the defense. The insured then settled the case and sued for breach of the duty to defend. The court found the dismissal of some of the complaint and the ruling on summary judgment did not amount to a judicial determination of facts which would establish coverage or lack thereof. Rather, the insurer was obligated to pay for the insured's defense that the allegations were untrue. If the defense had succeeded, the insured would have proven the falsity of the allegations that raised a question about policy coverage. Therefore, the court held, the insurer retendered prematurely. It called the insurer's action "hollow opportunism."

[173] For example, in *Kirwan v. Chicago Title Ins. Co.*, 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001), the insurer withdrew from defending the insured when discovery established that there was no potential for coverage because the adverse title claim had been disclosed to the insured before closing and not revealed to the title insurer. The insurer did not bring a declaratory judgment action. The insured sued for breach. The court approved the insurer's withdrawal, finding no duty to defend or indemnify.

Duty to Defend

The insurer is permitted to withdraw from defending a party in litigation when that party ceases to be the insured under the policy.[174] See §7.3 on termination of the owner's policy. The ALTA loan policy states that each successor owner of the Indebtedness becomes a successor insured. When an insured sells the loan, the assignee becomes the insured, and the insurer's duty to defend the assignor ceases, as discussed in full at §7.4.

The 2006 and 1992 ALTA policies also permit the insurer to withdraw from the defense of an insured when the insurer pays the insured either policy limits or its actual loss.[175] This is sometimes known as a pay-and-walk provision. The Homeowner's policy contains language similar to that found in the 2006 and 1992 ALTA policies.[176] The Residential policy contains a less specific provision, which suggests that the duty to defend terminates only on payment of policy limits.[177]

The language of the policy on pay-and-walk has changed over time, and the policy provisions have been interpreted differently. In *Batdorf v. Transamerica Title Ins. Co.*,[178] the policy stated that "[t]he Company may at any time pay this policy in full, whereupon all liability of the Company shall terminate." The insurer defended the insured for a time, then paid policy limits and retendered defense to the insured. The court permitted the insurer to exercise the pay-and-walk provision on payment of policy limits, saying: "By paying up, the insurer removed all of its further liability. Therefore, attorneys' fees, incurred after the payment, were incurred about a 'claim' which was no longer covered by the policy."

However, an older form of title insurance policy was found not to have a clear-cut pay-and-walk provision, and therefore the insurer was not entitled to withdraw its defense of the insured on payment of policy limits. In *Chicago Title Ins. Co. v. The Kent School Corp.*, [179] the policy stated

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[174] *Fidelity Nat'l Title Ins. Co. v. Butler*, 2017 WL 2774337 (Cal.App. 3 Dist.) (unpublished) (insurer had no duty to defend insured owners who were sued about title issue years after they conveyed property; all policy duties ended on voluntary transfer of property).

[175] See *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp*., 282 F.R.D. 423 (N.D.Ill. 2012) (duty to defend insured ceases on payment of policy limits). In *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 235 P.3d 387 (Idaho 2010), the Idaho Supreme Court held that a 1992 owner's policy allowed the insurer to pay policy limits and refuse to appeal a decision adverse to the insured. The court also said that the policy gave the insurer the right to choose whether or not to appeal. The court quoted Conditions & Stipulations § 4(c) regarding appeals, and § 6 concerning pay-and-walk, and concluded that "[u]nder the plain language in the insurance policy, Stewart Title had the contractual ability to abandon Mortensen's appeal and to instead tender full payment of the policy to Mortensen."

[176] The ALTA Homeowner's policy describes the insurer's various choices in resolving a covered claim, which include: "(5) End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay. …(7) End all coverage of this Policy by paying You the Policy Amount then in force, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay. … When We choose the options in paragraphs 4.a. (5), (6) or (7), all Our obligations for the claim end, including Our obligation to defend, or continue to defend, any legal action."

[177] The ALTA Residential policy says that one of the insurer's options is to "[c]ancel this policy by paying the Policy Amount, then in force, and only those costs, attorneys' fees and expenses incurred up to that time which we are obligated to pay."

[178] 41 Wash.App. 254, 702 P.2d 1211 (1985).

[179] 361 F.Supp.2d 4 (D.Conn. 2005).

"[i]n every case where claim is made for loss or damages this company … (2) may terminate its liability hereunder by paying or tendering the full amount of this policy… ."[180] The court found that the term "liability," as used in that policy, was undefined and referred only to the insurer's indemnity obligation. Thus, the insurer was deemed not to be entitled to terminate its separate duty to defend even on payment of policy limits. The court rejected *Batdorf* because the policy in that case had different language. However, the court acknowledged that the language of the 1992 ALTA policy contains an enforceable pay-and-walk provision.[181]

The 1992 and 2006 ALTA policy forms also say that the insurer is released from its defense obligation on payment to the insured of the loss caused by a defect, lien or encumbrance, in an amount that is less than policy limits. Often, in neighbor dispute cases, the cost of defense will far exceed the value of the property rights at issue, but is still less than policy limits. The insurer typically wishes to pay the insured the diminution in value, as if the insured had lost the disputed property. Conditions & Stipulations 6(b)(ii) of the 1992 ALTA policy and Condition 7(b)(i) of the 2006 ALTA policy permit the insurer "to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay." When the insurer has paid "the loss or damage" to the insured,

> … the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

Conditions & Stipulations 6(b), 1992 ALTA policy; Condition 7(b), 2006 ALTA policy.

One court upheld the insurer's right to withdraw from defense of an insured on payment of the amount of the diminution in value.[182] Another court, however, issued a series of decisions in which it wavered in its rulings about the insurer's right to withdraw from defense after paying a loss of less than policy limits. In *Fleishour v. Stewart Title Guar. Co.*,[183] the insureds were sued by their neighbor over a minor disputed strip of land. They tendered their defense to Stewart Title, which offered to pay them $1,000 for diminution in value in lieu of defending them. The insureds sued Stewart Title, seeking an order requiring it to defend them. In a 2009 decision issued before trial, the court seemed to declare that Stewart Title was entitled to pay diminution and walk. The court noted

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[180] 361 F.Supp.2d at 8.

[181] "Of course, the parties could have agreed to specific language permitting termination of the duty to defend. In fact, Chicago Title subsequently adopted language in its standard form for title policies addressing this situation." 361 F.Supp.2d at fn. 8.

[182] In *Toste v. First American Title Ins. Co*., 2012 WL 1023360 (Cal.App. 3 Dist.) (unpublished), the court construed an ALTA Residential policy. It said that the insurer was not required to appeal an adverse decision for the insureds because it paid the loss: "When this option is exercised, First American's obligations toward the claim ends, including its obligation to defend any legal action. First American chose this option. Upon doing so, First American had no duty to appeal the adverse judgment against the Tostes."

[183] 640 F.Supp.2d 1088 (E.D.Mo. 2009).

that Condition 5, which creates the duty to defend, "clearly indicates that there are some limitations on Defendant's duty to defend, as it expressly states that the obligation is subject to the options detailed in Section 7 of the Policy." The court also said that Condition 7 warns the insured of the insurer's right to pay diminution and walk. The court said that it needed evidence in order to determine if the payment tendered by Stewart Title had fully compensated the insured for the loss. It reiterated, however, that if Stewart is later found to have paid the full loss, "the Policy unambiguously states that the duty to defend terminated." After trial, however, the court issued a second decision,[184] ruling that the insurer was not entitled to pay diminution in lieu of defense, because the final determination clause says that no loss is payable until the lawsuit is over:

> … [Stewart Title] had no option to pay the amount of Plaintiffs' "loss or damage" in the face of Silberman's threatened or pending lawsuit because until that suit was concluded, Plaintiffs had not sustained any actual "loss or damage" under the policy—a contract of indemnity—for which Defendant could indemnify them. … The plain language of the policy supports this conclusion. The portion of Section 8 that precedes the means of calculating "loss or damage" states that "this policy is a contract of indemnity against *actual monetary loss or damage sustained or incurred by the Insured Claimant* who has suffered loss or damage by reason of matters insured against by this policy." (emphasis added). Thus, Defendant could not elect its Section 7(b)(ii) option--paying to the insured the "loss or damage" provided for in the policy--and then resort to Section 8(a) to calculate the extent of its liability for "loss or damage," because no "actual monetary loss or damage" had at that point been sustained. …
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> If Defendant's interpretation were correct--that it is entitled to pay the anticipated loss to satisfy its duty to defend--then it would only ever provide an insured's defense in cases in which it concludes both that (1) the third party's claim has no merit; and (2) the anticipated litigation costs are less than the insured's anticipated loss--an absurd result that is contrary to a title insurance purchaser's understanding of the product. … Generally speaking, in situations in which Defendant concludes that a claim has merit, it would never have any reason to incur any litigation expenses under its interpretation because it could simply pay the amount of the insured's loss should the claimant's suit be successful. In cases in which it believes that the claim has no merit, Defendant would look to the anticipated litigation costs, and if those costs are greater than the anticipated loss, it would likewise choose to pay the anticipated loss. This result seems especially unfair in cases such as this where the insureds are faced with a pending lawsuit that they cannot settle. … In short, the Court finds that an interpretation of this policy that precludes a duty to defend against meritorious claims, and against meritless claims where the anticipated litigation costs are greater than the anticipated loss, would be an "absurd" result that distorts the purpose of title insurance.

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[184] *Fleishour v. Stewart Title Guar. Co.* 743 F.Supp.2d 1060 (E.D.Mo. 2010).

> The Court therefore finds that Defendant could not relieve itself of its duty to defend against Silberman's adverse possession suit by paying to Plaintiffs, its insured, their anticipated loss should Silberman's claim have been successful. The plain language of the policy does not give Defendant the option to indemnify its insureds for losses that have not yet been sustained, and this interpretation is supported by common sense and the reasonable expectations of purchasers of title insurance.[185]

The *Fleishour* conclusion is *not* mandated by the policy's language, and in fact renders the entire provision meaningless.

The purpose of the diminution pay-and-walk provision is exactly as *Fleishour* stated it, to allow the title insurer to pay the insured the value of the disputed land in lieu of spending many times that amount to litigate over its ownership, and when the disputed land is worth far less than policy limits. That issue was highlighted in *First American Title Ins. Co. v. Grafton Partners, LLC*.[186] That case involved a 1992 policy in the amount of $16 million. There was a dispute over a small strip of land. The insurer got a diminution appraisal valuing the disputed land at $26,300, and tendered that amount to the insured. The court issued a decision, but for some reason only addressed Conditions & Stipulations 6(a), which permits the insurer to retender defense on payment of "the amount of insurance under this policy." Not surprisingly, the court found that First American would have to pay policy limits to extinguish its duty to defend under *that* provision:

> First American assumes…that 'the amount of insurance' is equivalent to the amount of 'loss' that Grafton would suffer, [which First American] asserts is determined by the appraised value it obtained for the disputed portion of the Property. … Reading Section 6(a) according to the provision's plain meaning, "[t]o pay or tender payment of the amount of insurance under this policy" would require First American to tender $16,000,000 to Grafton.

The court simply addressed the wrong policy provision. At the end of the decision, the court wrote: "As discussed with the parties at the hearing on this motion, the potential exists that summary judgment may be available under Section 6(b)(ii) if First American can establish as a matter of law that its tender, while less than the amount of insurance required under Section 6(a), nevertheless constitutes the loss or damage provided under the policy." The court set a new briefing schedule on paragraph 6(b)(ii), but never issued a second decision.

The title insurer's right to pay and walk as specified in the policy may be tempered by a state law that limits such provisions. Some states do not permit an insurer to cease defending an insured on payment of policy limits, or impose limitations on that right, such as that tender cannot be made an unreasonably short time before trial. Other states permit such provisions to be enforced only when

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[185] 743 F.Supp.2d at 1069-1070.

[186] 2009 WL 792263 (D.Mass.) (unpublished).

they are highlighted in the text of the policy.[187] The rationale employed by some such states is that the duty to defend is independent of the duty to indemnify, and therefore cannot be terminated by payment of policy limits.

Note, also, that the settlement of a lawsuit against the insured is not the same as payment to the insured of policy limits. Therefore, such a settlement has been found not to extinguish the duty to defend a second suit against the insured.[188]

4.12 Right Or Duty To Appeal

The insurer may wish to appeal an adverse ruling because a reversal will establish title as insured. The policy gives the insurer that right.[189] See §3.4.8 for a full analysis of the right to pursue litigation to a final determination, including the right to appeal.

4.13 Insurer's Settlement Of Lawsuit

Generally, an insurer has a duty to settle a lawsuit against the insured, based on a covered cause of action, which could otherwise result in a money judgment in excess of policy limits. This duty comes into play more frequently with general liability policies than title policies, given the fact that an adverse ruling in a title suit does not ordinarily result in a money judgment against the insured. Further, it is well established that the title insurer has the right in its sole discretion to establish title as insured. Therefore, the "duty to settle" does not apply in most title insurance cases.

When there is the possibility of a money judgment against the insured in excess of policy limits, the title insurer has a duty to settle if there is no reasonable basis for contesting the suit. However, when there are reasonable grounds to contest, the insurer may insist on litigating to a judgment.[190]

Construction liens are a frequent subject of the claimed duty to settle. Many times, there are valid defenses to the liens. However, lien claims also tend to hang up construction projects in mid-stream, creating time pressure. It is well established, however, that the insurer has the right to dispute the liens as long as it acts with reasonable alacrity. For example, an insured did not have a right to an

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[187] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 4:32, Thomson Reuters, discussing the right to pay and walk primarily as to liability policies.

[188] *Paramount Properties Co. v. Transamerica Title Ins. Co.*, 1 Cal.3d 562, 83 Cal.Rptr. 394, 463 P.2d 746 (Cal. 1970). However, the result should be different under the terms of the 1992 or 2006 ALTA policy forms. Condition 7(b)(i) of the 2006 ALTA policies (Conditions & Stipulations 6(b)(i) of the 1992 ALTA Owner's policy) permits the insurer "to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy," upon which all policy duties are extinguished.

[189] Condition 5(c) of the 2006 ALTA policies states: "[w]henever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order." Conditions & Stipulations 4(c) of the 1992 ALTA policies contained a very similar provision.

[190] *Lake Havasu Community Hosp. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 687 P.2d 371 (App. 1984) ("the extent of Arizona Title's liability to Community Hospital was 'fairly debatable' and ... there existed a 'reasonable basis' for Arizona Title's refusal to pay over the policy limit.").

injunction precluding the insurer from interposing the voluntary settlement defense as to an insured's settlement of construction lien claims, when the insurer wished to litigate the lien claims instead.[191] The insurer's right to clear title is not a duty, and the insurer is not required to settle an adverse lien claim rather than defend the litigation.[192] See §3.4 for a full analysis of the right to clear title, and the conditions under which that right can become a duty. When the insurer retained counsel to defend the insured's position against liens that were apparently invalid, it had no duty to pay the liens instead as demanded by the insured.[193]

An insurer is not obligated to settle claims not covered by the policy. This is particularly so when there is little likelihood of liability on the covered counts. The insurer may consider its own economic interest in such a situation.[194] The insurer may not enter into a settlement designed to let the insurer profit at the insured's expense.[195]

4.14 Refusal Of Defense And Declaratory Judgment Action

FORM 8, Appendix A
Retender of defense accepted under reservation of rights

FORM 9, Appendix A
Denial of defense

FORM 10, Appendix A
Denial of defense and filing of declaratory judgment

When the insurer believes it has no duty to defend, its response to the insured will depend on the requirements of the law of the jurisdiction. In many jurisdictions, the only response required is a letter explaining the basis for the company's decision. In other states, however, a simple declination is not enough.

In some jurisdictions, an insurer is required to bring a declaratory judgment action to determine its duty to defend whenever it rejects a tender of defense, or face the possibility that it will

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[191] *Diversified Mortgage Investors v. U.S. Life Title Ins. Co*., 544 F.2d 571 (2d Cir. 1976).

[192] *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978).

[193] *Willow Ridge Ltd. v. Stewart Title Guar. Co.*, 706 F.Supp. 477 (S.D. Miss. 1988).

[194] *Native Sun Investment Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (1987). Quoting from *McCormick v. Sentinel Life Ins. Co.*, 153 Cal.App.3d 1030, 200 Cal.Rptr. 732 (1984), the *Native Sun* court held: "Obviously the duty of good faith and fair dealing does not require an insurer to honor 'every claim presented to it.' [citation omitted] Nor does it require an insurer to pay 'meritless claims.'" 235 Cal.Rptr. at 41.

[195] Thus, when the insurer settled that part of the lawsuit affecting title, in exchange for the plaintiff's agreement to repay the insurer by diligently pursuing non-title claims in the same lawsuit, the insurer violated its "duty of 'a fiduciary nature' not to benefit at the expense of its insured." *Matison v. Transamerica Title Ins. Co*., 845 F.2d 867 (9th Cir. (Cal.) 1988).

be estopped to deny coverage. In such states, the insurer must defend the insured until a ruling is made as to the duty to defend. See §4.13 regarding estoppel to deny coverage. In other states, the insurer may wish to bring a declaratory action if it appears likely that it will also need a ruling as to the duty to indemnify. The declaratory judgment suit is often consolidated with the main action.[196] The insurer may be further required by state law to seek a ruling on coverage in advance of trial on the underlying action, by bifurcated trial if necessary.[197] The majority rule is that attorney's fees are not awarded to the prevailing party in a declaratory judgment suit. However, some states have specific statutes on the subject or case law granting fees in certain circumstances. State law should always be consulted on the subject.[198]

The insurer sometimes brings a declaratory judgment action as to the duty to indemnify, especially when the claim presents complicated or untested issues about policy coverage. By asking for a court declaration about coverage, the insurer is putting the issue of its duty to the insured in the hands of the court. Because the insurer has not denied the claim, it cannot have refused to pay the claim in bad faith.[199]

A declaratory judgment action may be brought in federal court if the court would have jurisdiction over the matter.[200] If the action is brought in state court, the policy dictates the

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[196] In *David & Sheri Elter, LLC v. Stewart Title Guar. Co.*, 2016 WL 6472647 (W.D.La. 2016) (unpublished), report and recommendation adopted by 2016 WL 6462170 (W.D.La.) (unpublished), the insurer brought a declaratory judgment in federal court. The insured resisted, seeking to drive the case back to the state court that would hear the underlying action. The federal court ruled that it did not have jurisdiction because the insurer could not establish objectively that there was at least $75,000 at issue. The court ruled that the claimed diminution in value, not the policy amount, was the basis for the amount in controversy.

[197] For example, in *Penney v. Capitol City Transfer, Inc.*, 707 A.2d 387 (Me. 1998), the court recited the bifurcation method used in Maine, which is to decide the duty to defend, then the underlying action, and finally the duty to indemnify.

[198] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 9:24, Thomson Reuters. The majority rule was followed in the title insurance case of *Yaffie v. Lawyers Title Ins. Corp.*, 1998 Me. 77, 710 A.2d 886 (Me. 1998).

[199] In *Terry v. Stewart Title Guar. Co.*, 390 S.E.2d 123 (Ga.App. 1990), the insurer accepted defense under a reservation of rights and a non-waiver agreement. It then filed a declaratory judgment action as to the duty to defend. The insured counterclaimed in the declaratory relief action, claiming that the suit had been brought in bad faith "without cause, without any basis, for the purpose of delay and harassment, and for the purpose of causing this defendant unnecessary trouble and expense." The court found that it was proper for the insurer to bring the action, even though it had accepted the defense under a reservation of rights. Similarly, in *Transamerica Title Ins. Co. v. Superior Court*, 188 Cal.App.3d 1047, 233 Cal.Rptr. 825 (Cal.App. 6 Dist. 1987), the insured sued for bad faith when the insurer filed a declaratory judgment action. The court did not address the merits of the bad faith claim, but did decide that the insurer's communications with its attorneys during the course of the lawsuit were not discoverable. The insured had sought to defeat the privilege because the insurer asserted that it had filed the declaratory judgment action on the advice of counsel.

[200] In *Jury v. WFG Nat'l Title Ins. Co.*, 2018 WL 1912713 (N.D.Tex. 2018) (unpublished), which concerned an insurer's duty to issue a policy, the federal court had diversity jurisdiction under 28 U.S.C. § 1332 because all parties were residents of different states. The court ruled that the $75,000 amount-in-controversy threshold was satisfied based on the face amount of the policy demanded by the claimant. The court said that the usual rule that "the jurisdictional amount in controversy is measured by the value of the underlying claim—not the face amount of the policy," as stated in

appropriate venue and choice of law as to claims on the policy.[201] As to claims not controlled by a policy choice of forum provision, the parties must establish that venue in a particular state court is appropriate, and that the state has jurisdiction over all of the parties.[202]

The insurer may assert in a declaratory judgment action that it has no duty to defend or indemnify the insured for a variety of reasons. Those bases include, but are not limited to, the following: the lack of policy coverage for the asserted matter (see Chapter 9 concerning policy coverage and §4.5); that the claimant is not an insured (see Chapter 7); that the claimant has not established the existence of a policy (see §2.3.4); that the insured has submitted a tardy tender of defense or notice of claim (see §2.3.3 regarding tardy notice of claim and §4.3 concerning policy term stating that insurer has no duty to pay for pre-tender defense costs); that the applicable statute of limitation has run (see §2.15); that the insured has voided coverage by failing to cooperate with the insurer in clearing title (see §2.8); that the insurer has cleared title, which extinguishes all policy duties (see §3.4.5); that the insured released the insurer for the subject matter of the claim (see §2.11); or that coverage for the insured's claim is barred by an applicable policy exclusion (see Chapter 11) or exception (see Chapter 12).

The insurer may also assert that the insured is barred as a matter of law from making a claim under the policy.[203] The insured may also lose the right to sue the insurer based on doctrines intended to bring finality to litigation.[204] The insurer may be entitled to a setoff in the amount of the

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Hartford Insurance Group v. Lou-Con, Inc., 293 F.3d 908, 911 (5th Cir. 2002)), did not apply, because in this case the essence of the dispute was the existence and validity of the insurance contract.

[201] Condition 17 of the 2006 ALTA policies, entitled Choice of Law; Forum, says: "(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located. Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law. (b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction." The 2015 versions of the ALTA closing protection letter has a similar provision. The 1992 and 1970 versions of the ALTA policies did not contain a choice of law and forum provision.

[202] In *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 61 Tex. Sup. Ct. J. 1288 (Tex. 2018), involving a fraudulent transfer action brought by a title insurer, the Texas Supreme Court said that Texas had no personal jurisdiction over the defendant, who lived in Louisiana, despite the fact that she received the proceeds from the sale of Texas real estate, lent money to a Texas woman secured by Texas property, and repeatedly wired money to the woman in Texas. In *Buhl Building, L.L.C. v. Commonwealth Land Title Ins. Co.*, 2019 WL 3916615 (Del.Super.) (unpublished), in construing an ALTA policy that did not contain a choice of law provision, a Delaware court ruled that the law that controlled a bad faith claim was that of the state in which the insured property was located.

[203] In *Agha-Khan v. Mortgage Electronic Registration Systems Inc.*, 2018 WL 3745814 (D.Nev. 2018) (unpublished), appeal filed August 17, 2018, the court held that an insured was estopped from suing a title insurer and title agent for title-related claims because she had not disclosed those claims in her bankruptcy schedules.

[204] For example, in *Mocco v. Frumento*, 710 Fed.Appx. 535, 2017 WL 4231556 (3rd Cir. (N.J.)) (unpublished), the court employed the "entire controversy" doctrine to bar the insured from adding the title insurer to longstanding litigation

insured's recovery from other parties for the same claimed loss.[205]

A declaratory judgment action is expensive and time-consuming for both insurer and insured. To some extent, it makes the insurer and insured adversaries. It also may affect the underlying action, or determine the insured's property rights vis-à-vis other parties.[206] In discovery, the facts favorable to the insurer are often also beneficial to the adverse party, which causes the insurer to build the case against the insured as it seeks to determine coverage. Given these disadvantages to the insured, it is often preferable to the insured as well as the insurer to settle any disagreement as to the duty to defend. The insured may release the insurer from the duty to provide the defense. Such a release should state that the insurer does not waive the policy provisions regarding voluntary settlement or prejudice of the insured's rights by its conduct in the litigation. The release may further state that any claimed duty to indemnify is not being released, or provide a mechanism by which the duty to indemnify will be resolved (which could include by arbitration).

4.15 Damages For Breach Of Duty To Defend

When the insurer denies a defense without a sufficient basis, it may become liable for several types of damages. First, the insurer is responsible for a judgment entered against the insured in the litigation that is based on a claim covered by the policy. Second, an insurer that wrongfully refuses to defend an insured must pay the cost of that defense.[207] This merely reimburses the insured for the defense cost incurred by the insured that the court has determined the insurer should have paid.

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over title on the eve of trial. New Jersey's entire controversy doctrine dictates that "a party cannot withhold part of a controversy for separate later litigation even when the withheld component is a separate and independently cognizable cause of action." The doctrine "applies in federal courts when there was a previous state-court action involving the same transaction." The purposes of the rule are to avoid piecemeal decisions about the same controversy, to promote fairness to all parties in the dispute and to avoid waste and delay. The court noted that the insurer had been harmed by being named years into the litigation in part because all claims that it might have brought against others were already time-barred.

[205] In *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 61 Tex.Sup.Ct.J. 1268 (Tex. 2018), a lender sought to collect its debt from various parties, under assorted theories. The court held that the money it collected from the title insurer and others was properly credited against the judgment the lender obtained against the borrower. Setoff should apply in the other direction also. In *Sky View*, the Texas Supreme Court provided a lengthy analysis of both the one-satisfaction rule and the collateral source rule.

[206] In *Swinger v. Vanderpol*, 2016 WL 7470091 (Wash.App. 1 Div.) (unpublished), the insured filed suit against the insurer to assert coverage for the insured's claim that he did not have access to three acres of land on the other side of the river from his main parcel. Swinger claimed to own the three acres because he said that area was an oxbow that was cut off when the river changed course in an avulsive movement. The court ruled that Swinger had not established that he owned the oxbow. Later, Swinger sued the owner of the land on the other side of the river, and the court held that the ruling about title in the coverage action was collateral estoppel binding on Swinger, and was in effect a ruling that he was not the owner of the disputed land. The coverage action thus had a dispositive adverse effect on the insured's rights in the property.

[207] See *Banner Bank v. First American Title Ins. Co.*, 2017 WL 1378021 (D. Utah) (unpublished), which found the insurer liable for the cost of defending the insured in an action that the court said the insurer wrongly refused. The decision was on appeal as of January 5, 2019. However, the Tenth Circuit reversed, finding no duty to defend and no duty to pay the cost of that defense. 916 F.3d 1323 (10th Cir. (Utah) 2019).

An insurer that wrongly rejects a defense also typically becomes liable for paying the amount of a settlement entered into by the insured, absent evidence of collusion.[208] See §2.14.4 for a discussion of settlement after rejection of a defense.

Also, several jurisdictions hold that the insurer is precluded from enforcing certain policy terms after a wrongful rejection of defense, under a doctrine termed estoppel to deny coverage.[209] This principle is based on the idea that an insurer that wrongfully rejects a defense is later estopped to contest policy coverage. In states that have adopted the estoppel rule, an insurer that wrongly rejects a defense may also be liable for a judgment against the insured even in excess of policy limits.[210]

Finally, in jurisdictions recognizing the tort of bad faith breach of an insurance contract, the insurer may also be sued for bad faith penalties or punitive damages for its failure to defend. See Chapter 16 for a full discussion of bad faith actions.

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[208] See *Banner Bank v. First American Title Ins. Co.*, 2017 WL 1378021 (D. Utah) (unpublished), which held the insurer liable for the amount paid by the insured to settle a lawsuit, after the court held that the insurer breached its duty to defend that action. The decision was on appeal as of January 5, 2019. However, the Tenth Circuit reversed, finding no duty to defend and no duty to reimburse the insured for the settlement amount. 916 F.3d 1323 (10th Cir. (Utah) 2019).

[209] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 4:33 through 4:38, Thomson Reuters. In Gary L. Gassman, Seth D. Lamden and Le G Trieu, *Potential Consequences of Breaching the Duty to Defend: Key Considerations for Insurers and Their Attorneys*, The Brief, Volume 45, No. 1, ABA Tort Trial & Insurance Practice Section, Fall 2015, p. 30, the authors analyze the estoppel to deny coverage doctrine, and identify eight states that have adopted some variant of it. The authors point out that the doctrine has different ramifications in each state. The states they list as having adopted estoppel to deny are Alaska (citing *Sauer v. Home Indem. Co.*, 841 P.2d 176, 183 (Alaska 1992)), Connecticut (citing *Black v. Goodwin, Loomis & Britton, Inc.*, 681 A.2d 293, 298-99 (Conn. 1996)), Illinois (citing *Emp'rs Ins. Of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122, 1134-35 (Ill. 1999)), Montana (citing *Swank Enterprises, Inc. v. All Purpose Services, Ltd.*, 154 P.3d 52, 57-58 (Mont. 2007)), New Mexico (citing *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 799 P.2d 1113, 1117-8 (N.M. 1990)), North Carolina (citing *Pulte Home Corp. v. Am. S. Ins. Co.*, 647 S.E.2d 614, 617 (N.C.App. 2007)), Washington (citing *Truck Ins. Co. v. Vanport Homes, Inc.*, 58 P.3d 276, 281 (Wash. 2002)) and Wisconsin (citing *Southeast Wis. Professional Baseball Park Dist. v. Mitsubishi Heavy Indus. Am., Inc.*, 738 Wis.2d 87, 107 (Wis.App. 2007)). The authors also point out that 16 states have rejected the doctrine.

[210] See *Title Industry Assurance Co., R.R.G. v. First American Title Ins. Co.*, 853 F.3d 876 (7th Cir. (Ill.) 2017), which imposed estoppel to deny on an errors and omissions carrier that refused to defend the title agent, obligating it for both the cost of defense and a judgment and settlement amount paid by the title agent and its underwriter to resolve the dispute.

5 Recoupment

This chapter discusses the three main means of recoupment of a loss payment by an insurer: subrogation rights, salvage, and enforcement of indemnities. The underlying principles of subrogation claims are discussed in §5.1 through §5.6. The insurer's subrogation rights against various classes of third parties are described in detail at §5.7. Recovery against a bankruptcy debtor, including the issue of whether or not the debt is dischargeable, is covered in §5.11. The related subject of an insurer's rights in pursuing indemnitors is discussed at §5.10. Section 5.13 discusses recovery for policy losses under reinsurance treaties or contracts, liability policies issued to title insurers and letters of indemnity issued by one insurer to another. Another related subject, recovery by the title insurer against a title agent and/or its errors and omissions carrier, is discussed in §17.8.

5.1 Subrogation

Subrogation is an equitable remedy applied according to the facts of the particular case. State law varies in some respects as to an insurer's rights of subrogation. Thus, every case in which the insurer considers pursuing third parties by subrogation must begin with a careful analysis of the basic equities of the case between the insured, insurer and third party. Each case must also take into account any particular variations on the subrogation doctrine which exist in the state.

This chapter discusses the following subjects:

1. Has the insured been made "whole"?

2. Does the policy provide for subrogation rights against the third party in question?

3. Does the insured have any rights to pursue against the third party?

4. What defenses does the third party have against the insured?

5. What defenses does the third party have against the insurer as subrogee?

5.2 Principles Of Subrogation Generally

Subrogation is an equitable doctrine. When a party (the subrogor) suffers damage, and is entitled to compensation from two different parties, the party making compensation (the subrogee) "stands in the shoes of" the subrogor.[1] As stated in *Fidelity National Title Ins. Co. v. Miller*,

> "[E]quitable assignment or right of subrogation is a creature of equity and applies to all cases where one party involuntarily pays a debt for which another is primarily liable and which in equity and good conscience should have been paid by the latter [citations]." (In re Marriage of Shore (1977) 71 Cal. App. 3d 290, 297, 139 Cal. Rptr. 349.) "Subrogation carries with it the right of the subrogee to pursue an equitable lien possessed by the subrogor." [Citation.][2]

The equitable purpose of subrogation is to prevent unjust enrichment.

> An equitable lien, like a constructive trust, is a remedy designed to enforce restitution so as to prevent unjust enrichment.[3]

For example, recovery against a seller was permitted when the deed to the seller was declared a mere mortgage, and moreover was void even as a mortgage because the underlying debt had been paid. The sellers would have been unjustly enriched if allowed to keep the proceeds on a sale of the property.[4] Also, an insurer was permitted to recover against a buyer who paid too little as a result of the escrowee's mistake on the closing statement.[5] Likewise, an insurer was allowed to recover from the owners for a lien missed on a title commitment.[6] The owners, the Nissells, were the daughter and

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[1] "'Subrogation is a purely equitable doctrine, a fiction invented for the purpose of arriving at an obviously equitable result. Omicron Co., Inc. et al. v. United States Fidelity & Guar. Co., 21 Wash.2d 703, 708, 152 P.2d 716 (1944). It is founded in the facts and circumstances of each particular case and on the principles of natural justice. In general, it will be applied wherever any person, other than a mere volunteer, will suffer damage because of the unjust enrichment of another. The doctrine, however, will not be applied if it would work injustice to the rights of those having equal or superior equities; nor will it be enforced against a bona fide purchaser for value without notice or one who, in good faith, has changed his position in reliance upon the act which subsequently is claimed to have been a mistake.' Subrogation is a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends upon the equities and attending facts and circumstances of each case." *Coy v. Raabe*, 69 Wash.2d 346, 418 P.2d 728, 731 (1966) [quoting *Credit Bureau Corp. v. Beckstead*, 63 Wash.2d 183, 385 P.2d 864 (1963)].

[2] 264 Cal. Rptr. 17, 22 (App. 1989). To the same effect, see *Couch on Insurance 2d*, §61:18-20.

[3] *Fidelity National Title Ins. Co. v. Miller*, 215 Cal.App.3d 1163, 264 Cal.Rptr. 17 (Cal.App. 4 Dist. 1989) [citing *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 Cal. App. 3d 371, 376, 144 Cal. Rptr. 189].

[4] *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24 (Cal.App. 2 Dist. 1975).

[5] *Castleman Construction Co. v. Pennington*, 432 S.W.2d 669 (Tenn. 1968).

[6] *Ticor Title Ins. Co. v. Nissell*, 871 P.2d 652 (Wash.App.Div. 2 1994).

son-in-law of Swartz, the former owner who created the lien, and Swartz had advanced the Nissells the funds to buy the property at trustee's sale.

> [T]he Nissells have not shown that they have the "clean hands" required to obtain equitable relief. [citation omitted] ... While [Swartz] owned the property, it was subject to Ticor's lien. It would be inequitable if the law allowed her to finance her daughter's purchase of the property free of the lien after she had defaulted on her debt to Ticor.[7]

Similarly, an insurer was allowed to collect as assignee of a note and mortgage rather than as subrogee, in order to avoid unjust enrichment to a borrower. The court rejected the borrower's claim that the insurer was estopped from enforcing the debt because it failed to discover a senior federal tax lien.[8]

Because subrogation is rooted in basic equity, it does not depend on contract, statute or the common law.[9]

> Subrogation may be defined as the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.
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> * * * *
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> Subrogation does not owe its origin to statute or custom; nor is it a doctrine of the common law. It originated in equity and is a creature of equity, a doctrine of equity jurisprudence which was adopted by equity from the Roman or the civil law.[10]

Recoupment by subrogation will be denied if the subrogee is determined in equity to be the party which should ultimately bear the loss. The subject of the insurer's negligence in omitting an encumbrance, and its effect on the insurer's equitable right to recover, is discussed generally at §5.8 and at §5.9 specifically as to sellers of property. Whenever an insurer seeks subrogation, it is because both the insurer and another party have an obligation to compensate the insured.[11] Once the insured

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[7] 871 P.2d at 656.

[8] *Chicago Title Ins. Co. v. Mertens*, 878 S.W.2d 899 (Mo.App.E.D. 1994).

[9] *American Title Ins. Co. v. Burke & Herbert Bank & Trust Co.*, 813 F.Supp. 423, 430 (E.D.Va. 1993); *Kansas City Title & Trust Co. v. Fourth Nat'l Bank*, 135 Kan. 414, 10 P.2d 896 (Kan. 1932).

[10] 83 C.J.S. Subrogation §§1 and 2, quoted in *Castleman Construction Co. v. Pennington*, 432 S.W.2d 669 (Tenn. 1968).

[11] "Subrogation is the substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt. Federal Land Bank of Baltimore v. Joynes, 179 Va. 394, 18 S.E.2d 917, 920 (1942). The purpose of subrogation is to ensure that when one is more fundamentally liable for a debt that another is obligated to pay, that person cannot enrich himself by escaping his obligation. Id." *Meridian Title Ins. Co. v. Lilly Homes Inc.*, 735 F.Supp. 182, 186 (E.D. Va 1990). In California, an insurer must prove eight elements to establish its right of subrogation: that the

is made whole, the issue is which of the two responsible parties should wind up with the ultimate loss. This analysis is made in equity, and may be thought of in terms of which party owes indemnity to the other.[12] See §5.10 regarding recoupment under indemnities.

In determining who should bear the ultimate loss, the fact that one party stepped in first to make the insured whole is not a factor.[13] However, when the insurer pays the insured without being able to clearly identify the source of its duty, the court may construe payment as voluntary or for goodwill, making the insurer ultimately responsible. Thus, when an insurer made payment on a closing protection letter after an attorney defalcation, the court found the payment "an effort to continue the goodwill of the lender." It held the insurer responsible for the loss, in its suit against the note maker.[14]

An insurer has the right to seek recoupment after paying its insured.[15] The title insurance policy provides subrogation rights against various parties. See §5.5 regarding the language contained in the policy and the insurer's rights under the policy.

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insured suffered a loss, that the insurer was not primarily liable for the loss, that it paid the insured, that payment was not as a volunteer, that the insured had a cause of action it could assign, that its loss was caused by the other party, that the insurer's loss can be quantified, and that "justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer… ." *Fireman's Fund Ins. Co. v. Maryland Cas. Co*., 65 Cal.App.4th 1279, 1292, 77 Cal.Rptr.2d 296 (1998); *Horn, D.D.S. v. High Point Services, Inc*., 2014 WL 198715 (C.D.Cal. 2014) (unpublished).

[12] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985), permitted recovery against a surveyor whose faulty surveyor the insurer relied on in giving coverage, stating: "The general rule for indemnity is stated in the Restatement, Restitution, § 76 (1937): A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payer is barred by the wrongful nature of his conduct. The right of indemnity rests upon a difference between the primary and secondary liability of two persons, each of whom is made responsible under the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. [citations omitted] The Title Company is responsible to the Enrights by virtue of its contractual obligation on its policy of title insurance. The obligation of the Title Company to pay stems solely from the error by Bailey in his survey in mislocating the utility easements. Under the circumstances the Title Company is entitled to full indemnity... ."

[13] "It is well established that where two parties are obligated to indemnify the same person for the same loss, the payment of the obligation by one does not create a right in him superior to the nonpaying party which would justify subrogation if the latter did not cause the loss. (Patent Scaffolding Co. v. William Simpson Constr. Co., 256 Cal.App.2d 506, 64 Cal.Rptr. 187.) In other words, and more simply stated, equity will not by the use of the remedy of subrogation permit one obligor to shift his obligation to another by being the first to pay unless the equities of the situation dictate that the latter ought to bear the onus of the obligation." *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24, 26 (Cal.App. 2 Dist. 1975).

[14] *Lawyers Title Ins. Corp. v. Edmar Const. Co., Inc.*, 294 A.2d 865, 868 (D.C.App. 1972).

[15] *Couch on Insurance*, 2d Edition, § 61:4, p. 77; Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 10:5 through 10:10, Thomson Reuters.

5.3 Making The Insured Whole

Most states have adopted the principle that an insurer's subrogation rights do not vest until the insured has been made whole, which means that the insured has recovered his or her entire loss.[16] In a "made whole" doctrine jurisdiction, a payment by the insurer to the insured of less than the insured's full loss, even when such payment is the full amount owed under the policy, may be found to preclude the insurer from standing in the insured's shoes to pursue subrogation rights. Alternately, the insurer's payment to the insured of less than the "made whole" amount may limit the insurer's subrogation rights so that it must share pro rata with the insured from what is recovered from a third party.

The ALTA title insurance policies do not make the insurer's subrogation rights conditional on the insured having been "made whole" by the insurer. The policy states that the insurer is subrogated "[w]henever the Company shall have settled and paid a claim" under the policy. The 1992 ALTA policies stated that the insurer had a pro rata subrogation right if its payment did not make the insured whole:

> If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.[17]

Therefore, that policy form clearly asserted that the insurer has the right of subrogation on partial payment to the insured. That statement was modified in the 2006 ALTA policies. Conditions 13(a) of the later policies states:

> If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

The ALTA Homeowner's Policy states that the insurer is subrogated to the insured's rights to the extent of a loss payment made. It goes further by identifying the order in which recoupment

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[16] *Couch*, supra; § 61:46, p. 128; *Windt*, supra, § 10.06, p. 533; *Fox Chase Bank v. Wayne Junction Trust Co.*, 258 Pa. 272, 101 A. 979 (1917). In *Menasha Forest Products Corp. v. Transnation Title Ins. Co.*, 234 Or.App. 115, 227 P.3d 770 (Or.App. 2010), a title insurer's demand that a seller reimburse it for a loss that it had not yet paid led the seller to seek a declaratory judgment that the loss should be borne by the title agent that searched title. The court ruled that the lawsuit was premature until the loss was paid. In *Marchetti v. Chicago Title Ins. Co*., 829 F.3d 498 (7th Cir. (Ill.) 2016), the title insurer was found to have made the insureds whole, and thus to be entitled to subrogation. The insurer defended the insured owners in a quiet title suit. When the insureds lost that action and were divested of title, the insurer paid off their lender and obtained a release of the insureds' personal liability on the loan. The loan amount was more than the value of the real estate, which meant that the insured owners were not entitled to be paid any additional money in order to be made whole for the loss of the title to the property. In *Fidelity Nat'l Title Ins. Co. v. Wooden*, 2017 WL 2243032 (N.D.Ala.) (unpublished), the court held that the insurer was not vested with subrogation rights against a third party until it made a payment to the insured, citing the made-whole doctrine.

[17] Conditions & Stipulations 13(a), 1992 ALTA Owner's policy; ¶ 12(a), 1992 ALTA Loan policy.

payments will be applied to reimburse the insured and insurer for their losses and expenses. See §5.5 for a complete discussion of the policy provision concerning pro rata recovery by the insurer through subrogation.

The "made whole" rule could be argued as a basis to preclude an insurer from bringing a claim against a third party to recover for an expected policy loss before the insurer pays a loss to the insured. Such claims against third parties should be brought in the name of the insured, and belong to the insured unless and until the insurer pays a loss to the insured or on its behalf. However, some courts permit the insurer to join a third party based on the insurer's contingent liability to the insured, the goal being to expedite and consolidate related litigation.[18] Also, the insurer was found not to have a subrogation claim against the IRS when the insurer had not paid off either the IRS or the insured, but rather had put money in escrow in exchange for the IRS's release of its lien.[19]

An insurer pleading a cause of action against a third party in the insurer's name should be careful to allege that the insured suffered a loss, and that the insurer made it whole. The policy should be attached as an exhibit to the complaint, and/or the subrogation clause quoted in the complaint, to prove the contractual basis for the right of subrogation.[20]

An insurer entitled to subrogation may not collect from a third party more than the amount of loss it has paid.[21] The insurer delivers any such excess recovery to its insured.

The policy does not require the insurer to purchase the insured's interest in the property at the insured's demand, which is properly termed salvage and not subrogation. As one court explained, "subrogation is an option to be exercised at [the insurer's] discretion."[22] If the insurer elects to purchase the insured's interest in the real estate, it obtains either full title or full subrogation rights. See §5.5 regarding the policy's subrogation provisions and §5.12 regarding the insurer's exercise of its salvage rights.

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[18] *Attorneys' Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc.*, 547 So. 2d 1250 (Fla. App. 1989) (considering Florida Rule of Civil Procedure 1.180 and recognizing a conflict between state Courts of Appeal Districts).

[19] *Universal Title Ins. Co. v. U.S.*, 942 F.2d 1311 (8th Cir. 1991).

[20] See *California Land Title Co. v. Emslie*, 175 Cal.App.3d 1001, 221 Cal.Rptr. 332 (Cal.App. 4 Dist. 1986), finding the complaint sufficient because it alleged that the insurer had "indemnified" the insured "pursuant to the terms of" the policy. Conventional (contract) subrogation was denied in *Lawyers Title Ins. Corp. v. Capp*, 174 Ind.App. 633, 369 N.E.2d 672 (Ind.App. 1 Dist. 1977), because the insurer failed to attach the policy to the complaint or otherwise recite the subrogation provision of the policy in the complaint.

[21] *Couch*, supra, at § 61:46, p. 128; *L. Smirlock Realty Corp. v. Title Guaranty Co.*, 421 N.Y.S.2d 232, 70 A.D.2d 455 (Sup.Ct.App.Div. 1979); 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650, 17 A.L.R. 4th 1067 (1981); subsequent appeal, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984); *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24 (Cal.App. 2 Dist. 1975).

[22] *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1063 (1st Cir. 1990).

5.4 Suit In Insured's Name; Insured's Duty To Cooperate

The insurer stands in the insured's shoes in making claims against third parties to recover a loss paid to or on behalf of its insured. A formal assignment of the insured's rights is normally not necessary, because the policy states that subrogation works an automatic assignment of rights from the insured to the insurer. However, the insurer is entitled to an assignment of the insured's rights, and may enforce those rights against third parties as an assignee.[23] The insurer's claims against third parties as subrogee are not barred under the notion that the insurer is not in privity with that third party, as long as there was privity between the insured and that party.[24]

Some states have adopted the rule that the insurer should bring suit in the name of the insured.[25] In other states, an insurer may sue in either the insured's name or its own.[26] Still others require that the insurer sue in its own name if the insured has been made whole, or jointly with the insured if not.[27]

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[23] *Concrete Services, Inc. v. Kanany*, 174 Wash.App. 1077, 2013 WL 2181521 (Wash.App. Div. 1) (unpublished) (insurer that took assignment of judgment was an assignee, and did not extinguish the debt as if it were paid in full as asserted by the debtor as a claimed bar to recovery). A court rejected the insurer's argument that rights taken by assignment are "legal" in nature rather than equitable, stripping the third party of its equitable defenses, in *Bank of Fort Mill v. Lawyers Title Ins. Corp.*, 268 F.2d 313 (4th Cir. 1959). A California court held that the "common interest" doctrine applies when the insurer has made an indemnity payment to the insured and is seeking recoupment as the insured's subrogee at the same time the insured is suing the insurer seeking a further payment. The court said the doctrine permitted the insured to see the communication between recoupment counsel and the insurer, despite the lack of an intentional waiver of attorney-client privilege. *Feduniak v. Old Republic Nat'l Title Ins. Co*., 2014 WL 3921372 (N.D.Cal.) (unpublished).

[24] In *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex.App. 1961), the insurer paid off liens for the insured, then took an assignment against the seller and sued on warranties. The seller objected that its warranties ran only to the insured. The court dismissed the argument: "Appellees [insurer], who were called upon by said grantees to discharge such liens, were compelled to do so in order to fulfill their contractual obligations under the title policies they had issued. They became subrogated to the rights of the grantees upon payment of the amounts necessary to secure releases of the liens. Having furnished the money for the benefit of their title policyholders and having secured releases of the encumbrances at the request of the grantees as they were required to do, appellees had the legal right to sue appellant in their own names, since under the subrogation provisions in the policies they became, in effect, assignees of the claims, or choose an action accruing to the grantees upon discharge of the liens." Id. at 568. In *Commonwealth Land Title Ins. Co. v. R&S Rose Creditor Group*, 2017 WL 4683968 (D.Nev.) (unpublished), the court held that a title insurer was not in privity with its insured and was not barred by claim preclusion from making misrepresentation claims against a junior lender after the lender insured lost on similar claims. However, in *Bank of New York Mellon v. Georg*, 175 A.3d 720, 456 Md.App. 616 (Md.App. 2017), the court held that a title insurer that bought the insured lender's loan was not entitled to bring a second action to reform the mortgage because the insured had already brought such an action and the first court had denied reformation. The court held that the insurer and insured were in privity, making the earlier judgment binding on the insurer also.

[25] See *Douberley v. Angelini*, 240 So.2d 98 (Fla.App. 1970) and Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 10:9, Thomson Reuters.

[26] See *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409 693 P.2d 697 (1985).

[27] *Commonwealth Land Title Ins. Co. v. Stephenson*, 97 N.C.App. 123, 387 S.E.2d 77 (1990) (insurer and insured must both sue if insured not fully reimbursed); *DeCarli v. O'Brien*, 41 P.2d 411 (1935) (same holding); *McDonald v. Grassle*, 740 P.2d 1122 (Mont. 1987) (insurer must sue in own name after making insured whole); *Wolff v. Commercial*

The ALTA Homeowner's Policy states that the insurer is subrogated to the insured's rights to the extent of a loss payment made. It goes further by identifying the order in which recoupment payments will be applied to reimburse the insured and insurer for their losses and expenses.

When the insurer takes title to the insured property, it should consider whether title is being transferred merely as an incident to its payment of the claim, or as a purchase in salvage. See §5.12 regarding salvage. The insurer should pursue a breach of warranty claim in the insured's shoes, not in its own right.[28] Therefore, if such a claim is contemplated, the settlement documents should clearly state that the insurer shall have the right by subrogation to pursue all of the insured's rights against the seller for breach of its warranties of title.[29]

An insurer should not attempt to do things "in the insured's shoes" which are beyond the purpose of the subrogation doctrine. For example, the insurer should not attempt to clear the insured's title in the insurer's name, on the notion that it is proceeding by right of subrogation. Such a suit should be brought in the name of the insured, not the insurer. Otherwise, the suit will be open to attack that the insurer does not have a sufficient interest in the property to permit it to bring suit.[30] See §3.4 regarding the insurer's right to clear title, generally.

The insured has a duty to assist the insurer in pursuing it rights of subrogation. If it loses or harms the insurer's ability to recoup, the insured may forfeit its own right to be paid under the policy. See §2.3.3 regarding prejudice.

5.5 Subrogation Rights Under Title Insurance Policies

The title insurance policies contain explicit subrogation rights.[31] The insurer becomes a subrogee on payment of a claim; however, insurers sometimes take specific assignments of subrogated rights from their insureds.[32] An insurer may proceed in the insured's name or its own.[33] In the insurer pursues rights in its own name, it should plead and attach the policy's subrogation provision to establish its conventional (contractual) subrogation rights.[34] See §5.6 regarding conventional or contractual subrogation versus equitable subrogation.

Standard Ins. Co., 345 S.W.2d 565 (Tex.App. 1961) (insurer had right to sue in own name on making insured whole, and after taking assignment of rights); *Haueter v. Peguillan*, 586 P.2d 403 (Utah 1978) (after insured is made whole, insurer is real party in interest in suit on warranties, and insured may not prosecute that suit).

[28] See *American Title Ins. Co. v. M-H Enterprises*, 815 P.2d 1219 (Okla. App. 1991) (denying rights as assignee).

[29] See *Spalitta v. Silvey*, 526 So. 2d 471 (La.App. 1988) (subrogation rights preserved although insured made a "cash sale" to the insurer for a settlement amount).

[30] For example, the insurer's contractual subrogation right did not give it the right to bring a quiet title action to clear an IRS lien. The court found that the insurer had no interest in the real estate, because it had not paid a claim of loss to the insured. Further, it found that there was not even a contingent liability yet, because no loss was payable yet. Therefore, the court dismissed the suit. *Commonwealth Land Title Ins. Co. v. U.S.*, 759 F.Supp. 87 (D.Conn. 1991).

[31] For example, Conditions 13 of the 2006 ALTA Owner's policy says: "(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The

Recoupment

The ALTA 1992 policy permits pro-rata subrogation when the insurer has made a payment to the insured that does not make the insured whole.[35] This policy provision alters the general rule that the insured must be made whole before any right of subrogation vests in the insurer. See §5.3 regarding making the insured whole. The 1992 policy provision states that the insurer and insured share pro rata in a recovery from a third party. The 2006 ALTA policies do not contain a pro-rata recovery provision, but rather state that "[i]f a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss." This deferral provision is more in keeping with the made-whole doctrine, although some states' formulation of that doctrine may still preclude subrogation by an insurer that did not, by its payment, make the insured whole.

The policy also specifies some of the third parties against whom the insurer may seek recovery. This listing of third parties is partly informational. More importantly, perhaps, the policy makes it clear that the title insurer has rights in any "other insurance" available as to the same risk. Under earlier versions of the title insurance policy which were not as specific about "other insurance," title insurers sometimes were unequally matched in pursuing other insurance policies. Some other types of policies state that coverage under such policies is void or limited if an otherwise covered loss is paid by "other insurance." Some title agent errors and omissions policies include provisions of this type. The reference to "other insurance" in the 1992 and later policy forms clearly establishes that the other insurance provisions cancel each other out and make both insurers liable for the loss.[36]

Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss. (b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights."

[32] *Chicago Title Ins. Co. v. Mazula*, 38 A.D.3d 1114, 832 N.Y.S.2d 685, 2007 N.Y. Slip Op. 02454 (N.Y.A.D. 3 Dept. 2007) (insurer subrogated to insured's rights reassigned rights to insured but insured later assigned rights to insurer, and insurer found entitled to proceed as subrogee of insured).

[33] *Dennis v. Stanhope*, 2008 WL 4560100 (Cal.App. 2 Dist.) (unpublished) (insurer that proceeded in insured's name entitled to collect from liable party for the full amount of its payment).

[34] See *Lawyers Title Ins. Corp. v. Capp*, 174 Ind.App. 633, 369 N.E.2d 672 (Ind.App. 1 Dist. 1977), in which the insurer's failure to attach the policy caused the court to rule that the insurer had not proven its contractual right to bring claims in its own name.

[35] Conditions & Stipulations 13(a) of the 1992 ALTA policy states: "If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss."

[36] An insurer may be paid by a malpractice carrier, then assign its rights to the carrier. In such a case, the carrier may pursue the insured's rights against others. *Douberley v. Angelini*, 240 So.2d 98 (Fla.App. 1970). In *Borg v. Transamerica Ins. Co.*, 47 Cal.App.4th 448, 54 Cal.Rptr.2d 811 (1996), for example, the insurer on a homeowner's policy was found obligated to defend a suit for removal of encroachments by the insured's improvements onto the neighbor's property. As is pointed out in the letter of James N. Laichas, Esq., in the *Guest Quarters* of *The Title Insurance Law Newsletter*,

Concomitantly, under the loan policy, a party which becomes an owner of the indebtedness because it was obligated to the insured by a bond, insurance policy, indemnity or guaranty does not become an insured. The only exception is for guarantors which are governmental agencies or instrumentalities (VA, FHA, SBA and HUD, principally).[37] Excluded from recovery, therefore, are private mortgage insurers, guarantors who purchase the debt, and sureties on construction loans.

Finally, the subrogation provision states that, if the insured voluntarily gives away its rights against others to recoup the loss, the insurer's duty to pay is either nullified or reduced by the amount of recovery lost. This type of provision has been enforced.[38]

The loan policy provides that the insurer may purchase the indebtedness from the lender.[39] If the insurer elects to purchase the debt, it is both an assignee of the loan and a subrogee; courts sometimes confuse the roles and limit the insurer's rights as a result.[40]

December, 1996, a title insurer should thus consider seeking contribution or recoupment from a homeowner's insurance carrier if a similar action is tendered to the title insurer for defense.

[37] Condition 12(c) of the 2006 ALTA Loan Policy states: "The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights. The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy."

[38] See *Seymour v. Tradesmen's Trust & Saving Fund Co.*, 52 A. 125 (Pa. 1902) (policy voided by second mortgagee-insured's conveyance of foreclosed property to first lender for no consideration); *Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 512 P.2d 667 (1973) (18-month delay in presenting claim prohibited insurer from catching fraud perpetrators, prejudicing subrogation rights and thus voiding coverage). However, the insurer was not harmed when the insured paid off real estate taxes without notice to the insurer and failed to get an assignment of rights to the insurer. The court found there **was** no subrogation right against the seller, because the real estate taxes were in rem only, with no personal liability of the owner. *Atlanta Title & Trust Co. v. Allied Mortg. Co.*, 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940). See also other cases cited at §2.3.3 above regarding prejudice to insurer because of late notice.

[39] Condition 7(a)(ii) of the 2006 ALTA Loan Policy permits the insurer to " purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay. When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security." The 2006 policy has an extensive definition of Indebtedness, a term not defined in earlier policies.

[40] In discussing this provision, one court said: "Upon exercising the option, Ticor becomes subrogated to the Bank's rights according to Paragraph 10. The language of the policy makes it clear that subrogation is an option to be exercised at Ticor's discretion." *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990). In *LandAmerica Commonwealth Land Title Ins. Co. v. Kolozetski*, 159 N.H. 689, 992 A.2d 681 (2010), when a husband used a forged power of attorney to sign a mortgage for his wife on their homestead, the mortgage was valid as to the husband's half interest. The title insurer stepped into his shoes on payment of the loan and was entitled to half of the sale proceeds, over the wife's protests. Another opinion, however, missed the subtleties of the relationships created by subrogation, and held that an insurer was not subrogated when it took an assignment of the loan. In *American Title Ins. Co. v. M-H Enterprises*, 815 P. 2d 1219 (Okla. App. 1991), the insurer missed a mortgage. It paid off the insured lender and pursued the mortgagor on his warranties. The court refused to admit that the insurer was a subrogee, and held that the insurer was not an assignee of the mortgage and note. It said "American did not purchase the note and mortgage. The payment by

5.6 Contractual Versus Equitable Subrogation

Subrogation is equitable in nature. Subrogation is termed "conventional" when the source of the relationship between the subrogor and subrogee is contractual. In most cases, conventional subrogation involves insurance. Subrogation may also be used to permit one who has paid another's debt, for the benefit of an innocent party, to recover from the debtor. This is termed "equitable" subrogation. Equitable subrogation is imposed to prevent a windfall to the debtor.[41]

Conventional (contractual) subrogation rights must be proven. If the insurer fails to introduce the insurance contract into evidence, and establish that the conditions for contractual subrogation have been met, it will have to rely exclusively on equitable subrogation.[42] The analysis should be the same under either form of subrogation.[43] As explained in *Universal Title Ins. Co. v. U.S.*,[44]

> While subrogation is generally defined as Athe substitution of one person in the place of another with reference to a lawful claim or right, 73 Am.Jur.2d *Subrogation* § 1 (1974), there are actually two distinct types of subrogation, "conventional subrogation" and "legal subrogation," which is often confusingly called "equitable subrogation," due to its origin and basis in equity. Conventional subrogation "occurs where one having no interest or any relation to the matter pays the debt of another, and by agreement is entitled to the rights and securities of the creditor so paid." *Id.* § 9. Legal subrogation, however, "has for its purpose the working out of an equitable adjustment and the doing of complete and perfect justice between the parties by

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American to Brookwood merely satisfied its obligation under its title policy. American's rights against Appellants are non-existent." 815 P.2d at 1222.

[41] See §3.4.7.3 regarding the use of equitable subrogation to assert that the insured lender or purchaser has stepped into the shoes of a lender whose lien has been paid off by the insured's funds.

[42] The insurer's separate right of equitable subrogation was recognized in *Title Ins. Co. of Minnesota v. Costain, Inc.*, 164 Ariz. 203, 791 P. 2d 1086 (Ariz. App. 1990): "Moreover, an insurer may be entitled to subrogation under proper circumstances, not only when its contract with its insured so provides, but also through the equitable doctrine of subrogation, even in the absence of express provision. See Mosher v. Conway, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935), cert. denied, 305 U.S. 599, 59 S.Ct. 77, 83 L.Ed. 380 (1938)."

[43] *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409 693 P.2d 697 (1985) stated: "Defendant also argues that the trial court erred in refusing to consider equitable defenses to this contractual subrogation claim. Some courts distinguish between legal and conventional or contractual subrogation. With conventional subrogation, subrogation given by agreement or stipulation, those courts measure the parties' rights by the agreement and find that equity has no power to change or unsettle such rights. Mid-Continent Cas. Co. v. First Nat'l Bank & Trust Co., 531 P.2d 1370 (Okla.1975); 16 G. Couch, Insurance SS 61:2 (2d ed. 1983). We, however, follow those courts which hold that 'the better rule is that regardless of the source of the right of subrogation, the right will only be enforced in favor of a meritorious claim and after a balancing of the equities.' Castleman Constr. Co. v. Pennington, 222 Tenn. 82, 97, 432 S.W.2d 669 (1968). We hold that whether arising by operation of law or under contract, subrogation is an equitable remedy subject to equitable defenses."

[44] 942 F.2d 1311 (8th Cir. 1991).

> securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it." *Id.* § 3 (footnotes omitted). Unlike conventional subrogation, legal subrogation does not depend on contract, assignment, or privity. *Id.* In either case, however, the right to subrogation is predicated on the full payment of the debt or claim of another by one who is not a mere volunteer or intermeddler. ... Although legal subrogation is a highly favored doctrine, it is not an absolute right, but rather, one that depends on the equities and attending facts and circumstances of each case.[45]

For clarity's sake, this treatise uses the phrase "equitable subrogation" in place of "legal subrogation."

The insurer's failure to prove conventional subrogation rights can be fatal to its claims.[46] For example, in *Lawyers Title Ins. Corp. v. Capp*,[47] the insurer did not prove up its policy subrogation rights:

> Lawyers' asserted right of subrogation must originate from either the policy of insurance, or from the operation of the equitable doctrine of subrogation (substitution). Lawyers has failed to include the policy of insurance in the record, and we may therefore look only to the equitable basis of their asserted subrogation, as we are unable to construe documents which are not before us.[48]

The insurer was denied equitable subrogation because the court elected to focus on the insurer's passive error rather than the seller's unjust enrichment. The court found that the insurer's own negligence in accepting a faulty survey for the legal description caused it to assume the risk, and become the ultimate bearer of loss. *Capp* was cited and expanded in *First Federal Savings Bank of Wabash v. United States*,[49] which held that an insured-mortgagee was not entitled to equitable subrogation as to a mortgage debt it paid off. The court refused to allow equitable subrogation

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[45] 942 F.2d at 1315 (footnotes omitted). A more succinct statement of the doctrine is found in *Lange v. Lawyers Title Ins. Corp.*, 741 P.2d 109 (Wyo. 1987): "Legal subrogation is an equitable doctrine and will be used only to further an equitable result. ... 'Moreover, the equity of the party seeking subrogation must be strong and his rights clear.' 73 Am.Jur.2d, Subrogation § 14 at 608 (1974)."

[46] Courts sometimes seem exasperated by an insurer attempting to be reimbursed by the party who caused the loss. One court expressed the view that "it is the general view that a paid surety has fewer equities than an innocent bank, since the surety company is paid to assume the specific risk. [citations omitted]" *Bank of Fort Mill v. Lawyers Title Insurance Corp.*, 268 F.2d 313 (4th Cir. 1959). "Innocent" in that case meant a bank which paid on a forged endorsement, but not intentionally.

[47] 174 Ind.App. 633, 369 N.E.2d 672 (1977).

[48] 369 N.E.2d at 674.

[49] 118 F.3d 532 (7th Cir. (Ind.) 1997).

because "Indiana courts have been more reluctant to invoke the doctrine [of legal subrogation] in cases where to do so would benefit a negligent title insurer."[50] However, a later Indiana decision, *Kelly v. National Attorneys Title Assurance Fund*,[51] held that a seller was obligated to reimburse the title insurer for federal tax liens not excepted in his warranty deed.

Most states do not prevent subrogation based on a defense of title search negligence. For example, California holds that an insured's status as a bona fide purchaser for value is not forfeited simply because the title insurer is "behind" the lawsuit to cure title. In *Cooper v. Cano,*[52] insureds named Cooper brought suit to quiet title as to their seller, Larry, and his ex-wife, Susan. At issue was the legal effect of a quit claim deed Susan had given. Susan argued that the Coopers could not claim the presumption that the deed was a full conveyance because they were not bona fide purchasers. The sole basis for this argument was that the insurer was paying for the lawsuit. The court disagreed:

> Just because the Coopers' title insurer may be behind their lawsuit is no reason to reject the basic legal rules in favor of an equity of subjective intent. Subrogation is not a license to disregard the most basic rules on which stable property titles depend. And it is meaningless that the statement of tentative decision said the Coopers had "no notice" while the actual statement of decision said they had "constructive notice" of Susan's deed of trust; the fact remains that an ordinary person searching title would think that the deed of trust had been released in light of the actual language used in the quitclaim deed. Likewise any negligence on the part of a title insurer really is irrelevant in this case, because the quitclaim deed is the dispositive fact.[53]

In *Castleman Construction Co. v. Pennington,*[54] the insurer was permitted to recover from the seller despite its error in omitting a deed of trust and an adverse title claim. The court quoted 83 C.J.S. Subrogation § 6, which says:

> Negligence of the subrogee must be more than ordinary negligence, however, in order to bar application of the principle of subrogation, and relief may be allowed notwithstanding the suitor's mistakes and ignorance... .[55]

It concluded that the insurer's negligence in not detecting the title defects did not prevent it from recovering from the seller on warranties:

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[50] Id at 6.

[51] 955 N.E.2d 224 (Ind.App. 2011).

[52] 72 Cal.App.4th 672, 84 Cal.Rptr.2d 922 (Cal.App. 4 Dist. 1999).

[53] 84 Cal.Rptr.2d at 926.

[54] 432 S.W.2d 669 (Tenn. 1968).

[55] Id.

> We do not say that ordinary negligence of the subrogee may not be taken into consideration in ascertaining whether he be entitled to the equitable relief of subrogation. What we do say is that ordinary negligence alone will not be held to be a complete bar to subrogation where in spite of such negligence the equities are still in favor of the subrogee.[56]

Thus, since the seller would have netted a windfall had the insurer borne the ultimate loss, the insurer was permitted to recoup against the seller. Further, there was no evidence that the insurer's mistake changed the seller's position or enticed her to give the warranties.

An insurer may pursue an equitable subrogation claim against a bankruptcy debtor. This right does not depend on any specific authorization from within the Bankruptcy Code, although certain subrogation rights are codified in Section 509:

> The concept of equitable subrogation is a well recognized principle of equity jurisprudence. ... Equitable subrogation is a creation of equity, not statute and should not be confused with the subrogation rights specifically set forth in section 509.[57]

Thus, an insurer was permitted subrogation against the mortgagor, under the terms of the note and mortgage, for its attorney fees incurred in defending an insured mortgage.

A second equitable theory of recovery is unjust enrichment. An insurer may pursue a party as having been unjustly enriched by the insurer's payment to an insured. However, the insurer must establish all of the elements of unjust enrichment: that the insurer conferred a benefit on the defendant, that the defendant accepted the benefit and that, under the circumstances, it would be inequitable for the defendant to keep the benefit without paying for it.[58] In *Chicago Title Ins. Co. v. Farmers Ins. Co.,*[59] an insurer paid a lender insured the full amount due on the note in satisfaction of a claim. Later, it discovered that the value of the property at the time payment was made was significantly less than the amount of the debt. It sought the difference between the value and the amount paid in an action based on unjust enrichment. The court disagreed, however, finding no unjust enrichment since the lender was paid no more than it was owed on the note, and the insurer paid it willingly to avoid potential liability in litigation pending at the time the payment was made. In *Castania v. Ticor Title Ins. Co. of California,*[60] by contrast, Ticor as escrowee paid the seller too

[56] 432 S.W.2d at 677.

[57] *In re Spirtos*, 103 B.R. 240, 245 (C.D.Cal. 1989).

[58] In *Fito v. Attorneys' Title Ins. Fund, Inc.*, 83 So.3d 755, 36 Fla. L. Weekly D1732 (Fla.App. 3 Dist. 2011), the appeals court reversed a judgment in favor of a title insurer based on unjust enrichment, against a woman who perpetrated significant loan fraud, because the court found no evidence that the insurer had yet paid losses to its insureds as a result of the fraud.

[59] 734 S.W.2d 887 (Mo.App. 1987).

[60] 409 S.E.2d 286 (Ga.App. 1991).

much at closing because of a math error on the seller's mortgage payoff. In the transaction, the seller took back a mortgage, which was insured by Ticor. The insurer made up the difference in the seller's loan payoff, then sought to collect from the seller on a theory of subrogation. The court rejected the insurer's demand, citing the rule that:

> [s]ubrogation does not arise ... in favor of the insurer against its insured since by definition subrogation arises only with respect to the rights of the insured against third persons to whom the insurer owes no duty.[61]

The quoted rule is merely an enunciation of the verity that, in subrogation, the insurer stands in the insured's shoes to recover from others. The court did not explain why the mere fortuity of Ticor's issuance of a loan policy to the sellers should cut off its right to reimbursement for a claim under the separate owner's policy issued to the purchasers. In any event, the insurer should have been able to avoid the result by seeking recovery as unjust enrichment, since the sellers did not dispute that the money paid by the insurer was their personal debt.

5.7 Classes Of Parties Against Whom Insurer May Claim

The insurer who has made the insured whole obtains to all of the insured's rights against third parties who are obligated to the insured for the same loss.[62] The most common source of recoupment is against the seller based on deed covenants. See §5.9 regarding recoupment against sellers, including the different causes of action which may exist, and the defenses to such actions. Recovery is by no means limited to rights against the seller, however. Reported decisions involve claims against the following classes of third parties:

- Abstractors and agents.[63]

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[61] Id.

[62] *McDonald v. Grassle*, 740 P.2d 1122 (Mont. 1987).

[63] See §17.8 for a full discussion of recovery against agents and abstractors and §15.1 for a discussion of abstractor liability. Representative cases include: *Safeco Title Ins. Co. v. Attorneys' Title Services, Inc.*, 460 So.2d 518 (Fla.App. 1984), rev.den. 467 So.2d 999 (Fla. 1985); *First American Title Insurance Co. v. First Title Service Company of the Florida Keys, Inc.*, 457 So.2d 467 (Fla. 1984) (underwriter permitted to recover as intended beneficiary of abstract, even though it was not in privity with the abstractor); *In re Independence Land Title Corp. of Illinois v. U.S. Life Title Ins. Co. of New York*, 18 B.R. 673 (1982) (insurer may collect from agent's bankruptcy trustee for escrow payoff mistake, but only to extent that it can trace funds in escrow account, and then only to pro-rata share of such funds in common with other creditors); *In re Dameron*, 155 F.3d 718 (4th Cir. 1998), *aff'g* 206 Bkcy.Rptr. 394 (Bkcy.E.D.Va. 1997) (recovery of loan funds misappropriated by title agency in its closing and escrow business); *Borne v. Grande*, 1998 WL 27242 (Minn.App.), rev.den. (unpublished) (recovery permitted against agent's girlfriend on her pledge of limited partnership assets, after escrow defalcation of agent); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Bozzuto*, 227 B.R. 466 (E.D.Va. 1998) (breach of contract and conversion claims can be pursued by underwriter against officer of agency; alter ego claim belonged to agency and, by extension, trustee in bankruptcy of debtor agency); *Fidelity Nat'l Title Ins. Co. v. Craven*, 2013 WL 3778388 (E.D.Pa.) (unpublished) (title insurer may sue borrower and complicit title company closer for fraud for losses caused by failure to record mortgages and except them on policies, but RICO claim dismissed).

- Attorneys and their malpractice insurers.[64]

- Banks and other financial institutions, as to account liabilities, including forged or improper check endorsements, [65] permitting diversion of escrow account funds as

[64] See *Douberley v. Angelini*, 240 So.2d 98 (Fla.App. 1970) (malpractice of transaction lawyer); *American Title Ins. Co. v. Seago*, 486 So.2d 938 (La.App. 1986) (error on title opinion; issue decided concerned applicable statute of limitations for suit against attorney); *Gibraltar Savings v. Commonwealth Land Title Ins. Co.*, 907 F.2d 844 (8th Cir. 1990) (recoupment on opinion letter denied because opinion was not proximate cause of loss); *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); *Chicago Title Ins. Co. v. Jackson, Brouillette, Pohl & Kirley, P.C.*, 930 S.W.2d 22 (Mo.App.W.D. 1996) (insurer suing on opinion letter barred by statute of limitation); *Title Ins. Co. of Minn. v. Smith, Debnan, Hibbert and Pahl*, 459 S.E.2d 801 (N.C.App. 1995) (insurer permitted to sue law firm which gave title certification to insured lender, despite lack of privity); *Lawyers Title Ins. Corp. v. Baik*, 55 P.3d 619 (Wash. 2002) (en banc) (law firm liable to insurer on letter assuring that all estate taxes would be paid); *Old Republic Title Ins. Co. v. Santangelo & Cohen*, 299 A.D.2d 189, 750 N.Y.S.2d 16 (N.Y.A.D. 1 Dept. 2002) (letter from law firm promising to obtain a mortgage release was an indemnity to title company); *Chemical Bank of N.J. v. Bailey*, 687 A.2d 316 (N.J.Super.A.D. 1997) (suit against closing attorney who was negligent in paying off revolving credit loan); *Commonwealth Land Title Ins. Co. v. Kurnos*, 340 N.J. Super. 25, 773 A.2d 726 (N.J.Super.A.D. 2001) (insurer barred from suing attorney on revolving credit loan payoff mistake by statute of limitations); *First American Title Ins. Co. v. Lawson*, 177 N.J. 125, 827 A.2d 230 (N.J. 2003) (malpractice policy void as to guilty partners, but not innocent partner, because lawyer lied on application, in suit filed by title insurer for defalcation); *Chicago Title Ins. Co. v. Bologna*, 2006 WL 3491260 (Conn.Super.) (unpublished) (buyers entitled to sue seller's attorney for misrepresentation, based on "Attorney's Undertaking Letter" written to buyers' attorney and title agent, which promised that seller's mortgages would be released despite insufficient sale proceeds to pay them in full); *Continental Cas. Co. v. Kriz*, 2011 WL 1213978 (D.Conn.) (unpublished) (dishonesty exclusion of lawyer malpractice policy excluded coverage for mortgages not paid at closing and improperly not excepted in title policies, although complaint alleged negligence and not dishonest conduct, when fundamental issue was attorney's theft of closing money); *Stewart Title Guar. Co. v. Sterling Savings Bank*, 178 Wash.2d 561, 311 P.3d 1 (Wash. 2013) (title insurer may not sue law firm for malpractice for failing to provide adequate defense to insured, because insurer is not a client of the lawyer; case of first impression); *Old Republic Nat'l Title Ins. Co. v. Shulman, Rogers, Gandal, Pordy & Ecker, P.A.*, ___ F.Supp.3d ___, 2019 WL 6840729 (D.Md. 2019) (not yet released for publication), appeal filed January 16, 2020 (insurer sued retained defense counsel for malpractice; court found that law firm's negligence did not cause loss to insurer).

[65] The insurer was successful in pursuing the bank for paying on a bad endorsement in *Kansas City Title & Trust Co. v. Fourth Nat'l Bank*, 135 Kan. 414, 10 P.2d 896 (Kan. 1932). However, when the insurer sues, courts sometimes are unwilling to find a bank's payment over a forged endorsement to cause the bank to suffer the ultimate loss. Thus, the insurer must be very "clean" to pursue a claim against the payor bank. In *Bank of Fort Mill v. Lawyers Title Insurance Corp.*, 268 F.2d 313 (4th Cir. 1959), the insurer was denied recovery against the bank which accepted a forged endorsement on a fraudulently-obtained loan proceeds check. The court decided that the ultimate loss should remain with the insurer, because the schemer was the insurer's agent, while the bank did not participate in the scheme. Similarly, in *New York Title & Mortgage Co. v. First Nat'l Bank*, 51 F.2d 485, 77 A.L.R. 1052 (8th Cir. (Mo.) 1931), the court denied recovery because it found the schemer to have been the insurer's agent, and the insurer could have detected various forgeries, while the bank was not negligent even though it accepted the forged endorsements. In *Saturn & Mazer Title Services, Inc. v. AmSouth Bank*, 2008 WL 151982 (Tenn.App.) (unpublished), a title agent was found entitled to recover from its bank for paying on forged endorsements of escrow checks, done by an embezzling closer, but its recovery was limited because the major loss was paid by the underwriter, not the agent, and because the money stolen did not belong to the agent but its customers.

However, in *Missouri Abstract & Guaranty Co., State ex rel. v. Globe Indemnity Co.*, 222 Mo.App. 918, 9 S.W.2d 668 (1928), an insurer paid off the loss due to a forged mortgage and then sued the notary. It was denied recovery, because payment on the forged check endorsement was the true cause of the problem. "The Westport Avenue Bank had no right to charge these checks to the account of Gaston. A bank has no right to charge to the account of its depositor money paid on forged indorsements." Further, the court insisted that there was no loss, because the check had not really been paid. Rather, "the money of Gaston is still in the Westport Avenue Bank." *Missouri Abstract* illustrates the importance of naming every alternate source of recovery in one action.

An insurer sued its bank for submitting a loan funding check for payment which had no endorsement. As a result, by the time the insurer's endorsement was added, the lender's account had been depleted by an IRS levy. The insurer argued that its bank should have supplied the missing endorsement or returned the check posthaste. The court found that the loss more properly fell on the insurer, which had failed to endorse in the first place. *Charter Title Corp. v. Crown Mortgage Corp.*, 836 P.2d 846 (Wash.App. Div. 2 1992). See also *Title Ins. Co. v. Comerica Bank--California*, 32 Cal.Rptr.2d 735, 27 Cal.App.4th 800 (1994) (suit against bank for not preventing endorsement by impostor).

In *Simmons v. Lennon*, 139 Md.App. 15, 773 A.2d 1064 (Md.App. 2001), the court distinguished between a forged endorsement and a forged drawer's signature. The court noted that the UCC authorizes suit only for forged indorsements, in which case the loss is passed back from the drawee bank to the bank that first accepted and failed to detect the forgery. Conversely, the drawer bank is stuck with the loss caused by a forged drawer's signature. In *Simmons*, an employee forged an escrow check to buy a car. The time period for suit against the drawer bank had passed, so the account holder sued the person to whom the check was issued, for conversion and negligent failure to detect the forgery. The court found that conversion would be limited to recovery of the check, not the proceeds, and that the payee was not responsible for detecting the forgery and defalcation.

Several decisions denied title insurers recovery against banks for failing to return escrow checks within the time limits set by state "midnight deadline" statutes. In each case, the court found that the title insurer was not a party entitled to seek recovery under the "midnight deadline" statute. *Lawyers Title Ins. Corp. v. United American Bank of Memphis*, 21 F.Supp.2d 785 (W.D.Tenn. 1998); *American Title Ins. Co. v. Burke & Herbert Bank & Trust Co.*, 813 F.Supp. 423 (E.D.Va. 1993). In *Fidelity Nat'l Title Ins. Co. v. Howard Savings Bank*, 436 F.3d 836 (7th Cir. 2006), the court found an action against the bank barred because it was not brought within the statutory one-year period after discovery.

In *Mellon Bank, N.A. v. National Union Ins. Co. of Pittsburgh, PA*, 768 A.2d 865 (Pa.Super. 2001), the contest was between the bank that paid over the bad endorsement and the theft insurer for the company that issued the check. The bank argued that the loss should fall on the insurer because the bank was also a victim, while the insurer had been paid a premium to take this risk. This is the "compensated surety" or "superior equities" doctrine. The appeals court found that the analysis was not that simple, however. The trial court was instructed to examine whether or not the bank's actions caused or contributed to the loss, and then balance the overall equities between the bank and insurer. The court gave numerous useful citations to similar cases in other states.

In *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 993 F.Supp. 1159 (N.D.Ill. 1998), later decision 22 F.Supp.2d 820 (N.D.Ill. 1998), a title insurer sought an order requiring a bank to disgorge about half a million dollars paid by a title agent for what were allegedly phony closing services. The bank claimed that the fee of $200 per closing was valid payment for use of its building for the closings. The court found that the payment was an illegal inducement to steer title work. The payment came to light because Dearborn Title stole money from its escrow account, and the insurer funded the account because it had issued closing protection letters. The insurer then sought recovery from the bank at which the escrow account was located, under the Illinois Fiduciary Obligations Act, 760 I.L.C.S. 65/1, *et seq.* In the decision found at 993 F.Supp. 1159 (N.D.Ill. 1998), the court denied the bank summary judgment and remanded to the trial court. In *Dearborn Title*, the insurer also sued the bank under RESPA. It claimed that the excessive closing fees paid were kickbacks under that Act, and that the insurer was harmed when it funded the shortfall in that escrow account from which the kickback check was written. The court found that the insurer had a cause of action under RESPA, but the claim was barred by the applicable one-year statute of limitations. 22 F.Supp.2d 820 (N.D.Ill. 1998). Finally, the insurer claimed that the kickback check was a fraudulent transfer. Because the check "did not discharge any debt" legally owed, Dearborn received no consideration for it. The check either was written when Dearborn was already insolvent, or made it so, satisfying the second requirement for a fraudulent conveyance action. Therefore, the insurer was allowed to pursue that cause of action against the bank.

The Virginia Supreme Court held that a title agency was barred from suing its bank for paying on counterfeit checks because the title company did not give notice within 60 days, per its contract with the bank. Section 4-406 of the part of a fraud or defalcation,[66] improper handling of money delivered for loan

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UCC provides a one-year notice period. The court held that it was not "manifestly unreasonable" for the bank to shrink the statutory time period by contract. *National Title Ins. Corp. Agency v. First Union Nat'l Bank*, 559 S.E.2d 668 (Va. 2002). However, a New Jersey court said that a bank agreement shrinking the one-year statute of limitations to 60 days was too short, and thus unenforceable, in *In re Clear Advantage Title, Inc.*, 438 B.R. 58 (Bkcy.D.N.J. 2010). That court also found that an account agreement that said that only certain people were authorized check signers created a heightened duty by the bank to detect checks used by a closer to steal money, but the court warned that the title agent had a corresponding duty to promptly review the bank statements and detect unauthorized disbursements.

[66] In *New Jersey Title Ins. Co. v. Caputo*, 163 N.J. 143, 748 A.2d 507 (N.J. 2000), the state supreme court reversed an appellate decision [318 N.J.Super. 311, 723 A.2d 994 (N.J.Super.A.D. 1999)], that had found a bank not liable to an underwriter for allowing a title agent to obtain a series of certified checks payable to himself drawn on his escrow account. The agent gambled the money away, and he repeatedly discussed his gambling with the tellers and branch manager. The Supreme Court found that the underwriter deserved a trial on the merits, because such conduct by the bank might rise to the level of "bad faith." The court said: "We hold that bad faith denotes a reckless disregard or purposeful obliviousness of the known facts suggesting impropriety by the fiduciary. It is not established by negligent or careless conduct or by vague suspicion. Likewise, actual knowledge of and complicity in the fiduciary's misdeeds is not required. However, where facts suggesting fiduciary misconduct are compelling and obvious, it is bad faith to remain passive and not inquire further because such inaction amounts to a deliberate desire to evade knowledge." An Ohio bank, on the other hand, was found not liable for permitting the holder of an escrow account to divert funds for personal reasons, because its knowledge did not rise to the level of bad faith conduct. *Nations Title Ins. of New York, Inc. v. Bertram*, 2000 WL 739262 (Ohio App. 2 Dist.) (unpublished). An appeal to the Supreme Court drew amicus briefs from both the Ohio Land Title Association and the Community Bankers Association. The high court accepted the appeal, then reconsidered and denied refused to accept the appeal, stating only that the appeal was dismissed as "having been improvidently allowed." 91 Ohio St.3d 1246, 745 N.E.2d 432 (2001). In *Go-Best Assets Limited v. Citizens Bank of Massachusetts*, 79 Mass.App.Ct. 473, 947 N.E.2d 581 (Mass.App. 2011), despite the bank's plea that such a ruling would "change the landscape of the banking industry and is plainly unworkable as a matter of public policy," a Massachusetts court held that a bank may be liable to a victim for allowing withdrawals from an attorney trust account that was chronically negative. The court cited a New York case for the principle that "[i]nsufficiency of funds in a trust account is a reliable signal that funds in that account are at risk of misappropriation, 'revealing as it does a telling disparity between entrusted funds and fiduciary expenditures which, in turn, may be, and often is, indicative of trust withdrawals for nontrust purposes.'" *Home Sav. of Am., FSB v. Amoros*, 233 A.D.2d 35, 41, 661 N.Y.S.2d 635 (N.Y. 1997). In *Norwest Mortgage, Inc. v. Dime Savings Bank of New York*, 280 A.D.2d 653, 721 N.Y.S.2d 94, 2001 N.Y. Slip Op. 01673 (N.Y.A.D. 2 Dept. 2001), a suit by a mortgage lender against a bank for allowing a closer to steal from his escrow account was dismissed because the defrauded lender did not allege a pattern indicating foul play. The court said that, in New York, "The general rule is that a depositary bank has no duty to monitor fiduciary accounts maintained at its branches in order to safeguard funds in those accounts from fiduciary misappropriation. ... Liability may be imposed if a depositary bank has actual knowledge or notice that a diversion will occur or is ongoing. Facts sufficient to cause a reasonably prudent person to suspect that trust funds are being misappropriated will trigger a duty of inquiry on the part of a depositary bank, and the bank's failure to conduct a reasonable inquiry when the obligation arises will result in the bank being charged with such knowledge as inquiry would have disclosed. … Such facts include a chronic insufficiency of funds, or payment of the fiduciary's personal obligations to the depositary bank from the escrow account… . Small overdrafts are generally insufficient to trigger a duty of inquiry." In *First American Title Ins. Co. v. Eddings*, 2014 WL 106691 (M.D.Ga. 2014) (unpublished), subsequent decision, 2014 WL 869553 (M.D.Ga. 2014) (unpublished), the court held that a title agent that stole closing money from his lawyer trust account was liable to the insurer for the losses caused by the theft, as was his wife, and that the bank that handled the escrow account might also be liable, because it discovered that the agent was covering his negative balances with false documents. In *Chang v. JPMorgan Chase Bank, N.A.*, 841 F.3d 914 (11th Cir. (Fla.) 2016), the Eleventh Circuit Court of Appeals allowed a lawsuit to proceed against a bank in which the principal to an escrow asserted that a bank officer knowingly allowed the escrowee customer to steal from an account titled as an "escrow account." Although Florida generally says that a bank owes no duty to a non-customer, it has

payoffs,[67] faulty delivery of money by wire transfer and otherwise,[68] or delivery of trust account money to an unauthorized party.[69]

- Brokers of real estate.[70]

- Borrowers and guarantors on notes secured by mortgages and deeds of trust.[71]

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adopted the limited exception to that rule that the bank may be liable when its customer owes a fiduciary duty to the non-customer, the bank knows or ought to know of the fiduciary relationship, and the bank knows that the customer has stolen money belonging to the non-customer. This rule was adopted in *Atlanta & St. A.B. Ry. Co. v. Barnes*, 95 F.2d 273, 276 (5th Cir. 1938). In Florida, an escrowee owes a fiduciary duty to the principals to an escrow. *Watkins v. NCNB Nat'l Bank of Fla*., N.A., 622 So.2d 1063 (Fla.App. 1993).

[67] In *Chicago Title Ins. Co. v. Allfirst Bank*, 394 Md. 270, 905 A.2d 366 (Md. 2006), when a borrower hand-delivered a mortgage loan payoff check to his bank but directed the bank to deposit the money into his personal account rather than to pay off the loan, the bank accepting the check was found liable to the title company's bank. See §13.5.1 regarding loan payoff disputes generally. In *Dillon v. Southern Management Corp. Retirement Trust*, 2014 UT 14, 326 P.3d 656 (Utah 2014), the Utah Supreme Court held, in a case of first impression, that an insured owner that prevailed against a lender for slander of title due to the lender's refusal to honor a partial release agreement was also entitled to be paid its attorneys' fees. The court rejected the lender's claim that the owner should not recover because its title insurer paid the legal bill.

[68] In *Choice Escrow and Land Title, LLC v. BancorpSouth Bank*, 2013 WL 1121339 (W.D.Mo.) (unpublished), a hacker planted a Trojan horse that captured a title company's escrow account and wire transfer password, and used that information to initiate a wire to Cypress. The title company and not the bank bore the loss, because the title agent had declined a safer wire transfer option offered by the bank. In an earlier decision, the court noted that the UCC allows the bank to escape liability if its security procedure is commercially reasonable or the bank authorized the wire according to written procedures, citing Section 202(b) of the UCC. A bank was found liable for failing to promptly notify the title insurer that its customer's wire had arrived, in *Moody Nat'l Bank v. Texas City Devel. Ltd., Co.*, 46 S.W.3d 373 (Tex.App.-Hous. 1 Dist. 2001). The bank did not call the title insurer on the wire's arrival, and failed to locate the wire on numerous inquiries from the title company and its customer. The appellate court found that section 404(b) of the UCC sets a standard for notice of wire transfers ("payment orders"). That section says: "If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds transfer business day following the payment date." The court found that "[m]isinforming the parties was tantamount to failing to send proper notice," making the bank liable to the customer. However, the court threw out a jury award for lost profit. Section 404 says that the exclusive penalty for failure to give notice is payment of interest from the day the notice should have been given to the day the customer learns of its receipt by the bank. In *Belle Meade Title & Escrow Corp. v. Fifth Third Bank*, 282 F.Supp.3d 1033 (M.D.Tenn. 2017), the bank to whom a title agent wired money, based on a phony check, was not liable to the title company for the fraud. The title agent told its own bank not to send the wire out from its account until the deposited check had cleared, which instruction that bank violated. The receiving bank, however, had no duty to the title agent, which was not its customer.

[69] In *National Title Agency LLC v. JPMorgan Chase Bank, NA*, 429 P.3d 758, 2018 UT App 145 (Utah App. 2018), a creditor of a title agency successfully garnished the title agent's escrow account. The court found the bank not liable to either the title agency or its customers for having handed over $600,000 of trust account money to the creditor without approval from the title agency.

[70] In *California Land Title Co. v. Emslie*, 175 Cal.App.3d 1001, 221 Cal.Rptr. 332 (Cal.App. 4 Dist. 1986), a real estate broker fraudulently obtained a loan on her clients' property. The insurer paid, and sued the broker and others. The reported decision involves only the subrogation claim against the property owners.

[71] *Stewart Title Guar. Co. v. WKC Restaurants Venture Co.*, 961 S.W.2d 874 (Mo.App. W.D. 1998), reh.den. Mar. 31,

1998 (loan guarantor liable to insurer that paid off mortgagee); *Lawyers Title Ins. Corp. v. Haire*, 2004 WL 225088 (D.Md. 2004) (unpublished), aff'd, 107 Fed.Appx. 375 (4th Cir. (Md.) 2004) (unpublished) (insurer subrogated to lender and entitled to collect from borrower principal, interest and attorneys' fees); *Transnation Title Ins. Co. v. Livingston*, 2004 WL 203075 (Mich.App.) (unpublished) (insurer that purchased second mortgage debt entitled to collect; defense that title insurer was not a holder in due course rejected); *Chicago Title Ins. Co. v. Prosch*, 2011 WL 250421 (S.D.Ala.) (unpublished) (insurer that bought loan entitled to judgment against sellers for breach of warranty; insurer not guilty of unclean hands in overlooking mortgage); *Fidelity Nat'l Title Ins. Co. v. Craven*, 2013 WL 3778388 (E.D.Pa.) (unpublished) (title insurer may sue borrower and complicit title company closer for fraud for losses caused by failure to record mortgages and except them on policies, but RICO claim dismissed). In *In re Pazdzierz*, 718 F.3d 582 (6th Cir. (Mich.) 2013), a title insurer that took an assignment of a loan to resolve a policy claim was permitted to stand in the lender's shoes to sue the borrower for fraud, and the debt was found nondischargeable in bankruptcy. In *Stewart Title Guar. Co. v. 2485 Calle Del Oro*, LLC, 2018 WL 3222610 (S.D.Cal. 2018) (unpublished), the court granted judgment to the insurer on a note and loan guaranty that were assigned to the insurer by the insured after payment of the claim. In *Uddin v. Cunningham*, 2019 WL 4065273 (Tex.App.-Houston) (unpublished), the title insurer was entitled to recover from a loan guarantor despite numerous defenses raised by the guarantor, including that the insurer had no standing to sue him on the guaranty before it paid the lender's claim. In *Commonwealth Land Title Ins. Co. v. Prado*, 176 A.D.3d 1164, 111 N.Y.S.3d 619, 2019 N.Y. Slip Op. 07766 (N.Y.A.D. 2 Dept. 2019), after the insured mortgage was declared void because the borrower had violated the law by transferring the property from a non-profit organization to himself, the insurer took an assignment of the loan and was entitled to enforce the debt against the borrower.

Courts sometimes mix contractual subrogation with equitable remedies to permit the insurer to collect from the borrower or to impose a lien on real estate. In *Tower City Title Agency, LLC v. Flaisman*, 2001 WL 409528 (Ohio App. 11 Dist.) (unpublished), an Ohio court used equitable subrogation to order borrowers to pay back a title agency for a shortage on a loan payoff. It rejected the borrowers' argument that the agency's mistake barred recovery. The court noted that the twin purposes of equitable subrogation are "the prevention of frauds and relief against mistakes… ." Noting that the borrowers had, "in effect, received a $1,000 interest-free loan from" the title agent, the court found that both equitable subrogation and unjust enrichment applied. The court rejected the Flaismans' argument that Tower City's negligence should keep it from being repaid. "In the instant case, there is no innocent third party, which would be harmed by the application of equitable subrogation. The [lender] has received all the monies it is due. [The Flaismans] have received an extra $1,000 to which they were not contractually entitled, and [Tower City] is $1,000 short." Similarly, in *Fidelity National Title Ins. Co. v. Harlow, Adams & Friedman, P.C.*, 2016 WL 4507356 (Conn.Super.) (unpublished), a title insurer that paid part of a loan debt in order to secure a lien release to protect its lender insured was found entitled to a judgment against the borrower based on unjust enrichment and equitable subrogation. In *Allen v. Union Fed. Mortgage Corp.*, 204 F.Supp.2d 543 (E.D.N.Y. 2002), app.dism. 71 Fed.Appx. 82, 2003 WL 21728999 (2nd Cir.(N.Y.) 2003), a title insurer that bought a loan because the mortgage was not recordable was entitled to enforce an equitable lien against the borrowers, despite their attempt to use the defect to their advantage and their claim that they were "duped" into borrowing the money. Similarly, in *In re Klinger*, 2008 WL 740310 (D.Conn.) (unpublished), when a title insurer bought the mortgage note from its insured lender to resolve a bankruptcy trustee's claim that the lien was void because the mortgage had not been recorded, the borrower had no right to object to the insurer's claim in the estate simply because it had not taken a judgment against him. In *Fidelity Nat'l Title Ins. Co. v. Vontell*, 2019 WL 4513087 (Conn.Super.) (unpublished); companion decision 2019 WL 4514237 (Conn. Super.) (unpublished), when the wrong loan was paid off at a refinance closing, and the title insurer had to pay the right lender for a subordination to protect its insured lender, the court rejected all of the borrowers' equitable defenses to the insurer's claims against them for reimbursement.

The title insurer is permitted to collect from the borrower all sums that the lender could collect under the terms of the note, which may include more than principal and interest. In *Brant v. Hargrove*, 129 Ariz. 475, 632 P.2d 978 (App. 1981), when a title insurer paid for the attorney who conducted the foreclosure and defended against the claimed defect in title, the attorney's fees were found properly added to the amount of the foreclosure judgment. The court rejected the owner's argument that he should not have to pay those fees, since the lender had been reimbursed for them by the insurer. The identical ruling was made in *The Business Bank v. Hanson*, 2011 WL 1546406 (Minn.App.) (unpublished).

- Currency and coin sellers or providers whose coins are bought by fraudsters in order to avoid a paper trail for the use of the stolen proceeds.[72]

- Errors and omissions carriers for title insurance agents.[73]

Borrowers raise various defenses to the insurer's pursuit under the note as subrogee. In *Transnation Title Ins. Co. v. Livingston*, 2004 WL 203075 (Mich.App.) (unpublished), the court rejected the borrower's claim that the insurer that purchased a second mortgage debt to protect its insured lender was not a holder in due course entitled to enforce the debt. An insurer's recovery for breach of mortgage warranties was denied in *American Title Ins. Co. v. M-H Enterprises*, 815 P. 2d 1219 (Okla.App. 1991) because the insurer was found to have violated an Oklahoma statute requiring that "no policy of title insurance shall be issued in the State of Oklahoma except after examination of a duly-certified abstract of title prepared by a bonded and licensed abstractor as defined herein." 36 O.S.1981 § 5001(C). As Professor Palomar points out, however, the *M-H* borrower may have had actual knowledge, since the decision "did not mention whether the mortgagor knew of the prior first mortgage or the foreclosure action." Palomar, *Title Insurance Law*, §8.05, p. 8-39. Thus, the mortgagor was not required to show any reliance on the title commitment or policy, making the error negligence *per se.* A North Carolina decision imposed conditions on the title insurer's pursuit of a borrower on the note after it was purchased by the insurer. In *Investors Title Ins. Co. v. Montague,* 142 N.C.App. 696, 543 S.E.2d 527 (N.C.App. 2001), the borrower sold the property to a buyer who assumed a loan secured by a deed of trust. The insurer missed the deed of trust, bought a loan and sued the original borrower on the note. The court invented the rule that the borrower, Montague, was entitled to buy the loan and enforce the deed of trust rather than merely pay off the debt. The court said "[i]f [Montague] is called on to pay the Note, however, she is entitled to all the rights and privileges contained in the Deed [of trust], including the right to foreclose on the property named in the Deed." The court understood the dilemma that it had thus created for the title insurer, noting that "[i]t does appear, however, it would be unlikely for [Investors] to assign the Deed to [Montague], as this would result in the foreclosure of the property which it insured." In *In re Leone*, 2015 WL 4939868 (Bkcy.M.D.Pa.) (unpublished), recons.den. 2015 WL 6598423 (Oct. 29, 2015) (unpublished), an insurer's bankruptcy claim against borrowers for their equity loan advances the insurer had paid was barred because the insurer did not sue within the limitations period. In *Fidelity Nat'l Title Ins. Co. v. Worthington,* 344 P.3d 156, 779 Utah Adv.Rep. 177, 2015 UT App 19 (Utah App. 2015), the court dismissed a title insurer's claims against a borrower-purchaser for fraud and misrepresentation based on the borrower's failure to inform the insurer that it faced a significant mechanic lien risk on the half-built house, because the owner was not asked to sign an affidavit or make a representation to the insurer at the loan closing. In *First American Title Ins. Co. v. Branyan*, 2016 WL 634103 (Cal.App. 4 Dist. 2016) (unpublished), the court held that a title insurer that bought the insured lender's loan was entitled to recover from the borrower on the note, and rejected the borrower's claim that Arizona's anti-deficiency statute should block recovery. In *Bank of New York Mellon v. Georg*, 175 A.3d 720, 456 Md.App. 616 (Md.App. 2017), the court held that a title insurer that bought the insured lender's loan was not entitled to bring a second action against the borrower to reform the mortgage because the insured had already brought such an action and the first court had denied reformation. The court emphasized that the insurer and insured were in privity with each other, which the court said made the earlier judgment binding on the insurer also.

[72] *Old Republic Nat'l Title Ins. Co. v. JM Bullion, Inc.*, 2019 WL 2004303 (Cal.App. 2 Dist.) (unpublished) (when people borrowed against property they did not own and then bought gold coins with the money, title insurer that paid claim was not entitled to recover its loss from the gold coin dealers, because insurer had not proven that dealer had sufficient knowledge of fraud, despite expert testimony that real estate fraudsters use gold coins to avoid leaving a paper trail).

[73] See §17.10 for a complete discussion of claims under errors and omissions policies. Representative cases include: *Safeco Title Ins. Co. v. Gannon*, 774 P.2d 30 (Wash.App. 1989); *First American Title Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 695 So.2d 475 (Fla.App. 1997). In *National Union Fire*, the carrier denied liability when the claim was presented, but the insurer told the agency to notify it if suit were brought. The agent did not give notice of the suit until it was resolved, which was found to violate the cooperation clause of the E&O policy, voiding coverage.

- Escrow parties.[74]
- Escrowees and closing agents.[75]
- Foreclosure or trustee's sale surplus proceeds or the party who conducted such a sale.[76]

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[74] In *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726 (Mo.App.E.D. 1994), the insurer made a mistake on the closing statement and the buyer paid too little. The court granted judgment by subrogation, on the grounds of unjust enrichment. It cited the Restatement of Restitution § 9 (1937) in its conclusion: "'The right to restitution for unjust enrichment presupposes: (1) that the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; (3) that it would be unjust to allow the defendant to retain the benefit.' ... Here, there is no question the defendant paid $2,000 less than he should have paid for the real estate due to an error Ticor made in the settlement statement. ... He therefore received a $2,000 benefit for which he did not pay. This enrichment came at Ticor's expense. To allow him to retain this benefit without full payment would be unjust." The court rejected the notions that the insurer's payment of the shortage was either a compromise settlement or as a volunteer. It concluded that parties to the escrow have duties to the escrowee to reimburse for their proper expenses: "In this case, Ticor's relationship with the defendant gave Ticor reason to believe it would be reimbursed. Ticor was acting in its capacity as defendant's escrow agent for the real estate purchase, and as such, had reason to believe that defendant would reimburse it for costs associated with the purchase. Therefore, Ticor should be allowed to recover the $2,000 shortage from defendant." In *White Family Companies, Inc. v. Dayton Title Agency, Inc*., 468 B.R. 258 (S.D. Ohio 2012), a title agency's bankruptcy trustee was not permitted to avoid and recapture money paid by a title company from its escrow account, although the $5 million check funding that transaction bounced. Relying on *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838 (6th Cir. 2002) and *Begier v. IRS*, 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990), the court held that escrow money is held in an express trust for other people's benefit and is not property of the estate of the title company escrowee. Therefore, the money was beyond Dayton Title's trustee's avoidance powers.

[75] *Safeco Title ins. Co. v. Gannon*, 54 Wash.App. 330, 774 P.2d 30, *rev.den.* 113 Wash.App.2d 1026, 782 P.2d 1069 (1989); *Title Ins. Co. of Minn. v. Construction Escrow Service*, 675 S.W. 2d 881 (Mo. App. 1981) (construction escrowee); *Chicago Title Ins. Co. v. Landry*, 1999 WL 307220 (Wash.App.Div. 1) (unpublished) (insurer entitled to recover from attorney closer who paid off wrong deed of trust loan and instructed insurer to delete deed of trust based on his faulty payment); *Chicago Title Ins. Co. v. Bologna*, 2006 WL 3491260 (Conn.Super.) (unpublished) (buyers entitled to sue seller's attorney for misrepresentation, based on "Attorney's Undertaking Letter" written to buyers' attorney and title agent, which promised that seller's mortgages would be released despite insufficient sale proceeds to pay them in full); *Stewart Title Guar. Co. v. Inspection and Valuation International, Inc.*, 2013 WL 5587293 (N.D.Ill.) (unpublished) (statute of limitation for suit against independent company hired to review draw requests and inspect construction project began running when lender learned of mechanic's liens, barring suit by title insurer as subrogee of the lender). See Chapter 13 for discussion of escrowee's liability. See §10.2.5 for further discussion of recovery against a construction escrowee.

[76] Recovery is based on the statutory framework for foreclosure, and the insurer must establish that it is a party entitled to protection or receipt of the money. In *Board of Managers of the Coronado Condominium v. Silva*, 54 Misc.3d 775, 42 N.Y.S.3d 742, 2016 N.Y. Slip Op. 26377 (N.Y.Sup.Ct. 2016), a title insurer bought a senior mortgage to protect its insured, who purchased at a condominium lien foreclosure sale and believed he was taking title free of liens. The court ruled that the insurer was not entitled to be reimbursed from the surplus money paid by its insured at the foreclosure auction, because the insurer was not the owner or a creditor holding a junior lien, and the surplus was not a general asset of the owner who had granted the mortgage. In *Diediker v. Peelle Financial Corp.*, 60 Cal.App.4th 288, 70 Cal.Rptr.2d 442, 97 Cal. Daily Op.Serv. 9622 (Cal.App. 2 Dist. 1997), reh.den, an insurer was denied recovery against a trustee who conducted a non-judicial foreclosure sale in California without giving notice of the sale to the IRS as lien

- Forgers and perpetrators of fraud.[77]
- General contractors, on construction lien claims.[78]
- Indemnitors.[79]

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holder. The court found that the insurer, which had insured a grantee from the purchaser at sale, was not a party to whom the trustee owed a statutory duty. The trustee had obtained a trustee's sale guarantee that did not disclose the tax lien, and had no actual knowledge of the lien, which the court found precluded a claim against him for negligent misrepresentation.

[77] *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991) (insurer permitted to recoup from persons who forged IRS lien releases; judgment based on RICO, with "pattern of racketeering activity" element supported by forgery and filing of three lien releases, trebling actual damages); *United States v. Shefton*, 548 F.3d 1360 (11th Cir. (Ga.) 2008) (title insurer that paid off loan fraud victim and got constructive trust on stolen money entitled to funds despite federal government's seizure under forfeiture law); *Stewart Title Guar. Co. v. Revolutionary Marketing, Inc*., 2012 WL 2990769 (D.Md.) (unpublished) (insurer entitled to judgment against loan fraud participants); *Levi v. Commonwealth Land Title Ins. Co*., 2013 WL 5708402 (S.D.N.Y.) (unpublished) (title insurer that paid loan policy limits entitled to judgment against man who gave insured mortgage by pretending to be majority member of owner entity); *Stewart Title Guar. Co. v. Sanford Title Services, LLC*, 2013 WL 5566493 (D.Md.) (unpublished) (when title agent paid large sums from closings to ring leaders of loan fraud scheme for "no legitimate reason," draining the agency's escrow account, insurer that paid off people hurt by account shortage was entitled to judgment against fraudster); *In re Welch*, 494 B.R. 654 (Bkcy.E.D.N.C. 2013) (deed forger); *Stewart Title Guar. Co. v. 2485 Calle Del Oro, LLC,* 2018 WL 3222610 (S.D.Cal. 2018) (unpublished) (title insurer entitled to default judgment against perpetrators for forged reconveyances); *First American Title Ins. Co. v. Chavannes*, 176 A.D.3d 678, 111 N.Y.S.3d 658, 2019 N.Y. Slip Op. 07053, (N.Y.A.D. 2 Dept. 2019) (title insurer that paid claim based on forged power of attorney entitled to enforce judgment against people who forged instrument); *Chicago Title Ins. Co. v. Union Avenue Holding, LLC*, 2019 WL 149534 (N.J.A.D.) (unpublished) (title insurer that paid claim based on forged mortgage discharge received $1.3 million judgment against the seller company and its two members, though neither member admitted having forged the instrument).

[78] *Spring Construction Co. v. Harris*, 614 F.2d 374 (4th Cir. 1980) (recovery permitted against general contractor for subcontractor and supplier claims paid).

[79] *American Sav. & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. 1986) (indemnity of owner against construction liens). Technically, any pursuit of the owner under a construction lien indemnity would not be by subrogation but by the insurer in its own right, since such indemnities run to the insurer. See §5.10 for a complete discussion of indemnities. See also §10.1 regarding construction lien claims. In *Premier Title Co. v. Donahue*, 328 Ill.App.3d 161, 765 N.E.2d 513, 262 Ill.Dec. 376 (Ill.App. 2 Dist. 2002), a seller gave a title insurer a secured indemnity to protect against unpaid taxes. The insurer used some of the money to pay some of the taxes, and mistakenly returned the balance to the seller. The court found that the indemnitor's obligation continued even after the return of the funds, because the indemnity said the indemnitor would "forever" defend against the taxes. In *Lawyers Title Ins. Corp. v. Haire*, 2004 WL 225088 (D.Md. 2004) (unpublished), aff'd, 107 Fed.Appx. 375 (4th Cir. (Md.) 2004) (unpublished), the insurer bought the insured lender's loan and was found entitled to collect against the borrower on an affidavit given to the lender. An insurer was permitted to take a personal judgment against the corporate officer who signed a false judgment affidavit, in *Lawyers Title Ins. Corp. v. P.R.T. Enterprises, Inc.*, 65 Va.Cir. 271, 2004 WL 1714892 (Va.Cir.Ct. 2004). The decision was based in large part on evidence that the officer diverted the sale proceeds to his personal account, and therefore personally benefitted by not paying the corporation's debt. The court refused to award attorneys' fees, however, although the affidavit/indemnity so provided. However, a corporate officer was found not to be personally liable on a mechanic lien indemnity he signed, and further the indemnity was void for fraud in the inducement, on a finding that the

- Insurance companies that have issued homeowner's, casualty or other types of insurance policies.[80]

- Lender recovery funds.[81]

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escrow officer presented only the signature page of the indemnity to the officer, and made the indemnity sound routine. *Fidelity Nat'l Title Ins. Co. v. Marks*, 2004 WL 2386830 (Cal.App. 1 Dist. 2004) (unpublished). In *Stewart Title Guar. Co. v. 2485 Calle Del Oro, LLC,* 2018 WL 3222610 (S.D.Cal. 2018) (unpublished), the court granted judgment to the insurer on a title affidavit containing indemnity language that falsely stated that title was free and clear, when in fact the indemnitor and others had forged reconveyances of deeds of trust.

[80] In *Kazi v. State Farm Fire and Casualty Co.*, 70 Cal.App.4th 1288, 83 Cal.Rptr.2d 364 (Cal.App. 4 Dist. 1999), the court found that, by alleging encroachment and trespass, the complaint against the property owner "alleged property damage to the [insureds' land], giving rise to potential coverage under all of the insurance policies at issue here and requiring the insurers to defend ...." The policies in question were homeowners' policies. In *Borg v. Transamerica Ins. Co.*, 47 Cal.App.4th 448, 54 Cal.Rptr.2d 811 (Cal.App. 1 Dist. 1996), the insurer on a homeowner's policy was found obligated to defend a suit for removal of encroachments by the insured's improvements onto the neighbor's property. As was pointed out in the letter of James N. Laichas, Esq., in the *Guest Quarters* of *The Title Insurance Law Newsletter*, December, 1996, a title insurer should thus consider seeking contribution or recoupment from a homeowner's insurance carrier if a similar action is tendered to the title insurer for defense. In *In re Brookes,* ___ B.R. ___, 2018 WL 5310657 (Bkcy.D.Mass. 2018) (permanent citation not yet available), the court held that the right to collect under a life insurance policy on another's life is an asset of a bankruptcy estate, and a title insurer that was the major unsecured creditor had the right to collect the cash value of the policy.

[81] In *Stewart Title Guaranty Co. v. Park*, 250 F.3d 1249 (9th Cir. (Cal.) 2001), a title insurer was found not to be an 'aggrieved person,' and therefore not entitled to recover from the California mortgage broker recovery account. A mortgage banker stole payoff funds at closing, then convinced Stewart Title to issue policies not excepting the unpaid prior trust deeds. When the defalcation became known, the insurer paid off the prior lenders. Stewart Title got judgment against the mortgage banker. It then filed an application with the California Department of Real Estate for reimbursement from the statutory Mortgage Banker Recovery Act Fund. The central question was whether a title insurer is an "aggrieved party" within the meaning the Recovery Act. Stewart Title made alternate arguments: that it was aggrieved in its own right, and that it was the subrogee of its insureds, who were aggrieved parties. As to its own claim to be an aggrieved party, the court admitted that Stewart Title had satisfied most of the conditions: the broker had committed a fraud, and the insurer had obtained a judgment against it. However, an earlier case, *Middlesteadt v. Karpe*, 52 Cal.App.3d 297, 124 Cal.Rptr. 840 (Cal.App. 1 Dist. 1975), limited the class of parties who may recover: "In light of the state policy underlying the real estate act, the broad provision of section 10471 must be read to the effect that the aggrieved person who is entitled to compensation from the Recovery Fund must be a client or a member of the general public." 52 Cal.App.3d at 302. Applying this judicial gloss to the statute, the Ninth Circuit ruled that a title insurer also is not part of the public intended to receive the protection of the fund. The court then considered the argument that Stewart Title stood in the shoes of its insureds by subrogation. It acknowledged that claims against the fund may be assigned. However, it turned to another decision, *Wallace v. Onate*, 2 Cal.App.4th 549, 3 Cal.Rptr.2d 3 (Cal.App. 2 Dist. 1991), for the proposition that the fund is meant to be a last resort only. The application form requires the claimant to certify that he or she has "diligently pursued collection efforts against other judgment debtors and all other persons liable to the claimant in the transaction." The court found that this put Stewart Title in a catch-22: "As this 'last resort' analysis indicates, aggrieved persons have no right to recovery from the fund until they have exhausted all other avenues of relief. Under the contractual liability created by the title insurance contract involved here, Stewart Title was obligated to compensate the lenders for their loss of lien priority. Thus, in light of the § 10471(c)(7)(E) provision, the insured would not have been eligible for recovery from the fund prior to seeking compensation from the title insurance company. However, once they did seek that compensation, both they and the borrowers were made whole by Stewart Title. Viewed

- Mortgage lenders.[82]

- Mortgagors.[83]

- Notaries public and their sureties.[84]

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in this light, because title insurance was purchased to cover the relevant transactions, the borrowers and insured lenders are not themselves eligible for relief. Thus, there can be no subrogation right for Stewart Title."

[82] *Commonwealth Land Title Ins. Co. v. R&S Rose Creditor Group*, 2017 WL 4683968 (D.Nev.) (unpublished) (title insurer that agreed to insure refinancing lender's priority over existing junior lien had misrepresentation claim against junior lender that promised to subordinate to new deed of trust); *WFG Nat'l Title Ins. Co. v. Kavac Holding Company, LLC*, 2019 WL 636722 (S.D.Tex. (Houston) 2019) (unpublished), recommendations adopted 2019 WL 632754 (S.D.Tex. (Houston) 2019) (permanent citation not yet available) (title insurer entitled to sue holder of blanket deed of trust based on oral promise to subordinate lien to subsequent construction deeds of trust on individual lots, and for other claims based on lender's actions seeking to wipe out lot buyer and lender). In *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374 (4th Cir. 1980), an insurer that had paid off lien claimants and taken their construction lien claims by subrogation was entitled to pursue the HUD loan funds remaining for the project under equitable subrogation. The court found: "It would be unjust to allow Spring [the general contractor] to recover under a theory of unjust enrichment and deny similar relief to those who actually performed the services and supplied materials." Id. at 378. In *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 939 F.Supp. 611 (N.D.Ill. 1996); aff'd 118 F.3d 1157 (1997); later opinion 22 F.Supp.2d 820 (N.D.Ill. 1998), an insurer that funded the shortfall in an underwritten title company's escrow account was entitled to recover from a mortgage lender for money not disbursed to the agent to fund loans. The court said the underwriter would also have been entitled to recover money paid to the lender by the agent that constituted an illegal kickback under RESPA, if the claim had not been barred by the one-year statute of limitations in the Truth in Lending Act. In *In re Dayton Title Agency, Inc.*, 262 B.R. 719, 37 Bkcy.Ct.Dec. 265 (S.D. Ohio 2001), a title agency's bankruptcy trustee was permitted to seek return of funds paid by the title company in an escrow. The paid-off lenders argued that Dayton Title did not have a property interest in the escrowed funds, and therefore had no right to seek return of the money. The court agreed that, ordinarily, a title company does not own the funds in its escrow account, and is a mere conduit. It said this case was distinguished, however, "by the unfortunate fact that [the funding] check was a forgery." The money given to the lenders was partly other people's money that happened to be in the escrow account at the time, and mostly a loan from the bank to the title agent. Also, Dayton Title established that it had control over the money because "Dayton Title made the critical decision to write checks to WFC and Wenrick from the trust account, without waiting for Chari's $5,000,000 deposit to clear." Further, the transfers to the lenders became liabilities of the title agency, "diminishing the amount of assets available to other creditors" of the agency. Therefore, the court concluded that Dayton Title had established that it had an interest in the money. In *Rubie's LLC v. Wells Fargo Bank, N.A.*, ___ F.Supp.3d ___, 2018 WL 6419674 (E.D.Cal. 2018) (permanent citation not yet available), the court held that the United States Small Business Administration was not entitled, under the doctrine of sovereign immunity, to the dismissal of all claims brought by a title insurer for the agency's failure to reconvey a deed of trust after its receipt of a full payoff of the loan, which caused a substantial loss. See §13.13 for a discussion of claims precipitated by the failure of the lender to honor its loan funding check, and other issues related to delivery of good funds at closing.

[83] *Ticor Title Ins. Co. v. Nissell*, 871 P.2d 652 (Wash.App. 2 Div. 1994) (discussed further at §5.2); *Stewart Title Guar. Co. v. Delcid*, 2017 WL 3498328 (La.App. 1 Cir.) (unpublished) (title insurer that paid lender policy limits because its mortgage was recorded late was entitled to recover half of property's value from half owner who signed mortgage but not note); *Independent Settlement Services, LLC v. Lewis*, 296 F.Supp.3d 194 (D.D.C. 2018) (title agent forced to buy loan it had closed because it failed to get insured deed of trust recorded received judgment against borrower under note; borrower's assertion that he paid for title insurance policy found to be irrelevant).

- Property owners who permit or participate in a fraud concerning title or an insured mortgage.[85]

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[84] *Willow Highlands Co., Commonwealth ex rel. v. Maryland Casualty Co.*, 373 Pa. 602, 97 A.2d 46 (1953). Often, the notary's defense is that the improper notarial act is not the proximate cause of the loss. For example, in *Common Wealth Ins. Systems Ins. v. Kersten*, 40 Cal.App.3d 1014, 115 Cal.Rptr. 653 (1974), the court held that there was a fact question as to whether the false notarization of a forged instrument could be found to be the proximate cause of a loss. If it was, an escrow party was entitled to indemnification from the notary and his surety. However, in another case, the notary was found not liable because his act did not cause a loss. In *Missouri Abstract & Guaranty Co., State ex rel. v. Globe Indemnity Co.*, a party forged both a deed of trust and an endorsement of the loan proceeds check. The notary certificate on the deed of trust was false. The insurer paid the insured because of the forged deed of trust and then sued the notary and his surety. The court denied recovery, on the theory that the insured had not suffered a loss. The court found that the bank which accepted the forged check endorsement was liable instead. "The Westport Avenue Bank had no right to charge these checks to the account of Gaston. A bank has no right to charge to the account of its depositor money paid on forged indorsements." Thus, the insured's money "is still in the Westport Avenue Bank." 222 Mo.App. 918, 9 S.W.2d 668 (1928). Presumably, what the court meant was that the insurer's money paid on the claim resided in the Westport Avenue Bank, merely waiting to be withdrawn. In *Kirk Corp. v. First American Title Co.*, 270 Cal. Rptr. 24 (App. 1990), the notary changed a jurat and failed to record the notarial act in her notary journal. The court found that the failure to post to the notary journal did not cause damage, since "[c]ivil liability for neglect of notarial duties can only be predicated on the existence of damages proximately caused by the conduct of the notary." The notary's act was found the proximate cause of loss, permitting recovery, in *Garton v. Title Insurance & Trust Co.*, 106 Cal.App.3d 365, 165 Cal.Rptr. 449 (Cal.App. 3 Dist. 1980). In that case, a deed was altered materially after it was signed. Still later, the notary gave his acknowledgment. The notary argued that no harm was done, because the signatures themselves were valid and not forged. The court disagreed. "By taking the false acknowledgment and recording the altered deed of trust defendants deprived plaintiffs of the opportunity to learn the true facts of the transaction. As the result plaintiffs received less than that for which they had bargained. Such allegations are sufficient to avoid a demurrer." 165 Cal.Rptr. at 455. In *Chicago Title Ins. Co. v. LaPierre*, 104 A.D.3d 720, 961 N.Y.S.2d 237 (N.Y.A.D. 2 Dept. 2013), construing New York's Executive Law § 135 regarding notary misconduct, the title insurer was not required to prove that it relied on the notary's actions in order to recover from him for losses caused by the fact that the deed he acknowledged was a forgery. However, in a later decision in the same case, the court held that the attorney's fees that the insurer paid to defend the insured against the claim of forgery were not damages that the title insurer could recover from the notary. *Chicago Title Ins. Co. v. LaPierre*, 140 A.D.3d 821, 33 N.Y.S.3d 397, 2016 N.Y. Slip Op. 04379 (N.Y.A.D. 2 Dept. 2016). In *U.S. Bank, N.A. v. Commonwealth Land Title Ins. Co*., 2015 WL 1291151 (S.D.N.Y. 2015) (unpublished), the court held that a title insurer that paid a claim caused by the impersonation of the borrower could not sue the notary who falsely witnessed the impersonator's signature, based on the doctrine of *in par* delicto, under which a party who participated in wrongdoing cannot sue its conspirator for indemnification. The court appeared to miss the fact that the insurer did not participate in the wrongdoing, but merely insured the title, whereas the notary was charged with verifying the identity of the person who showed up at the closing table. In *Stewart Title Guar. Co. v. 2485 Calle Del Oro, LLC*, 2018 WL 3222610 (S.D.Cal. 2018) (unpublished), a title insurer was not permitted to collect against the person who notarized forged reconveyances because the court did not find that a notary owes an insurer a duty of care under Arizona law. In *Fidelity Nat'l Title Ins. Co. v. Western Surety Co.*, 277 So.3d 40 (Ala.Civ.App. 2018), the court dismissed an action against a surety under a notary bond because the action was not filed within two years after the notarial act was committed, which the court found to be the applicable limitations period in Alabama.

[85] *California Land Title Co. v. Emslie*, 175 Cal.App.3d 1001, 221 Cal.Rptr. 332 (Cal.App. 4 Dist. 1986) involved a loan fraudulently obtained by a real estate broker on her clients' property. The insurer paid off the lender and sued the property owners for negligence, money had and received, and imposition of an equitable lien on the property. The court reversed a demurrer to all three counts. It found that the property owners had a duty to inquire when asked to endorse over the loan proceeds check to the broker. It also allowed an equitable lien on the property in the amount of a deed of

- Purchasers.[86]

- Recorders or registers of deeds, or clerks of court, for dereliction of duties in the filing, recording and indexing of documents and liens, or for theft of recording fees.[87]

- Sellers.[88]

- Sureties, including providers of bonds to title agents.[89]

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trust paid off by the insured deed of trust.

[86] In *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726 (Mo.App.E.D. 1994), the insurer made a mistake on the closing statement and the buyer paid too little. The court granted judgment by subrogation, on the grounds of unjust enrichment. It cited the Restatement of Restitution § 9 (1937) in its conclusion: "'The right to restitution for unjust enrichment presupposes: '(1) that the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; (3) that it would be unjust to allow the defendant to retain the benefit.' ... Here, there is no question the defendant paid $2,000 less than he should have paid for the real estate due to an error Ticor made in the settlement statement. ... He therefore received a $2,000 benefit for which he did not pay. This enrichment came at Ticor's expense. To allow him to retain this benefit without full payment would be unjust." The court went on to reject the notions that the insurer's payment of the shortage was either a compromise settlement or as a volunteer.

[87] See Miller & Starr, *Current Law of California Real Estate*, 2nd Ed., § 8:18 and *Liability of officer charged with duty of keeping record of instrument affecting title to or interest in property for mistakes or defects in respect to records*, 94 ALR 1303. There has been increased concern about recording delays, and some recorders have been sued for negligent supervision and dereliction of duties. See Condell Private Letter, March 13, 1997, p. 17 and July 10, 1997, p. 18, concerning a suit by the Pennsylvania Land Title Association against the Philadelphia Department of Records for alleged recording delays of up to one year. See also *South Milwaukee Savings Bank v. Barczak*, 229 Wis.2d 521, 600 N.W.2d 205 (Wis.App. 1999) (clerk of court personally liable to judgment creditor for negligent supervision of staff resulting in tardy docketing of judgment lien, thus allowing debtor to convey property before docketing occurred); *New Jersey Land Title Association v. State Records Committee*, 315 N.J.Super. 17, 716 A.2d 541 (N.J.Super.A.D. 1998) (decision to allow destruction of microfilm and other real estate records was arbitrary and capricious, and title association had standing to challenge the decision); *Brakke v. Kensrud*, 489 N.W.2d 594 (N.D.App. 1992), reh. den. 514 N.W.2d 691 (1994) (register of deeds not liable on claim that he should have denied documents for recording); *LaPierre v. Maltais*, 406 A.2d 123 (N.H. 1979) (plaintiff's own negligence in investigating title greater than register of deeds' negligence in misposting mortgage, thus precluding recovery). Note, too, that a New Jersey statute precludes subrogation claims by insurers or their insureds against governmental entities. See *Pinkowski v. Township of Montclair*, 299 N.J.Super. 557, 691 A.2d 837 (N.J.Super.A.D. 1997). Regarding recovery of money stolen by the recorder or one of the office employees, see *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288 (Mo. 2007), in which the court affirmed a jury verdict of almost $650,000 against St. Louis County and its recorder of deeds for money stolen by an employee of the recorder's office. The crime was made possible by the recorder's policy of requiring title companies to leave blank checks for daily recording fees.

[88] Subrogation claims against sellers, and the defenses thereto, are discussed separately at §5.9.

[89] *First American Title Ins. Co. v. Western Surety Co.*, 283 Va. 389, 722 S.E.2d 637 (Va. 2012) (title insurer that paid claim caused by agent theft of closing funds entitled to make claim under Virginia statutory Consumer Real Estate Settlement Practice Act title agent bond); *First American Title Ins. Co. v. First Alliance Title, Inc.*, 718 F.Supp.2d 669 (E.D.Va. 2010) (Virginia title agent Consumer Real Estate Settlement Practice Act (CRESPA) surety required to pay

back underwriter for stolen loan payoff money; closing protection letter did not create agency precluding recovery on CRESPA bond); *Bennison v. Western Surety Co.*, 405 Fed.Appx. 763, 2010 WL 5394856 (4th Cir. (Va.)) (unpublished) (Virginia statutory title agent bond not triggered when agent obeyed instruction to get title insurance on property); *First American Title Ins. Co. v. Travelers Cas. & Surety Co. of America*, 2010 WL 5395055 (E.D.Va.) (unpublished) (leaving open question of whether or not a title insurer is an "aggrieved party" who may make claim under Virginia title agent bond because *Western Surety* case cited above was then on appeal); *Chicago Title Ins. Co. v. Main Street Title & Escrow LLC*, 78 Va. Cir. 68, 2008 WL 8203224 (Va.Cir.Ct. 2008) (finding that there is no private cause of action under Virginia CRESPA title agent bond law, in opinion issued before *Western Surety* decision); *First American Title Ins. Co. v. Star City Title & Settlement Agency, Inc*., 2015 WL 2092814 (W.D.Va. 2015) (unpublished) (statute of limitations had run on suit over Virginia title agent CRESPA bond, pursued by insurer as subrogee of lender, because the breach occurred at closing, when the agent failed to close the revolving credit loan account, "and not when the resulting damage [was] discovered" when the lender foreclosed). Also see *St. Paul Title Ins. & Trust Co. v. Johnson*, 64 Minn. 492, 67 N.W. 543 (1896) and *First American Title Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 951 F.2d 1134 (9th Cir. 1991). The latter case discusses recovery under blanket bond "standard form No. 25" for an escrow employee's misconduct. Also, in *Anchor Equities, Ltd. v. Pacific Coast American*, 737 P.2d 532, 105 N.M. 751 (1987), the owner and sole employee of the title agency/escrow company allegedly absconded with the funds in the escrow account. The court sanctioned direct action against the agency's fidelity bond surety by a lender whose money was stolen. See, for example, *Commonwealth Land Title Ins. Co. v. Gulf Underwriters Ins. Co.*, 1998 WL 283510 (Wash.App. Div. 1) (unpublished), in which the sole shareholder and director of an escrow company (not a title agency) named Creekside that failed to pay off mortgages. Creekside folded, leaving unsatisfied mortgage liens to be paid off by two title insurers. The insurers attempted to collect on the escrow company's fidelity bond, which covered acts of employees and officers, but not owners. The court found that the insurers were not entitled to compensation, because they were "sophisticated business entities" which "do not stand in the shoes of the trust beneficiaries [the parties to the escrows], but in the shoes of the escrow agent, Creekside, whose assignment [footnote omitted] underlies their cause of action. Simply put, the title companies are not within the class of persons protected by the [escrow] Act or by the bond." Id. at 3. In so holding, the court distinguished an earlier case, *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wash.2d 490, 844 P.2d 403 (1993), which had permitted escrow parties to recover when a vice president of an escrow company had stolen escrowed money.

The *Gulf Underwriters* court's analysis elevates form over substance. The insurers were victims of the escrow company, not its legal assignees. They pursued recovery on the bond as subrogees of their insureds, the escrow parties. The assignment of the escrow company's rights against its own bond was belt-and-suspenders lawyering. Moreover, the surety itself argued that assignment of the bond was prohibited by the terms of the bond, and thus the assignment was void. The court merely rejected this argument/admission by the surety. Id. at fn. 1. A document of such a dubious nature did not establish or change the legal relationships between the parties. Had the insurers denied the policy claims and directed their insureds to pursue claims on the bond instead, *Estate of Jordan* would have controlled and permitted recovery.

In *Chicago Title Ins. Co. v. Lumbermen's Mutual Cas. Co.*, 120 Md.App. 538, 707 A.2d 913 (1998), an insurer made parties whole after the title agent shorted its escrow account. The insurer then pursued the agent, its errors and omissions carrier and its fidelity bond surety. The insurer settled with and released all but the surety. The court applied the rule that a release of the principal without a reservation of the right to pursue the surety discharges the surety's obligations. Therefore, the insurer was prohibited from recovering under the bond.

An assessment by the State of California against an underwriter to cover its share of the escrow shortage of a defunct agency was not a loss directly caused by the title agent's dishonesty, and therefore the insurer was denied recovery under the agent's fidelity bond, in *United General Title Ins. Co. v. American Int'l Group, Inc.*, 2002 WL 31554048 (9th Cir. (Cal.)) (unpublished). A title agent's theft of loan funds was not covered by the mortgage banker's financial institution bond, because the title company closer was not an employee of the lender. *Utica Mutual Ins. Co. v. Precedent Companies, LLC*, 782 N.E.2d 470 (Ind.App. 2003). In *New Jersey Title Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh*, 2011 WL 6887130 (D.N.J.) (unpublished), the court held that a title insurer could not collect on a financial institution bond that it purchased, that had an Agents Fidelity rider that listed the agent whose employee later stole money and caused the insurer's loss, despite the fact that the insurer had bought the bond for the exact type of loss for which the surety denied liability.

- Surveyors.[90]
- Taxpayers, as to tax liens against themselves.[91]
- Taxpayers, as to real estate taxes paid.[92]

Many employee theft bonds do not protect against the acts of the agency owner. In *Conestoga Title Ins. Co. v. Premier Title Agency, Inc.*, 328 N.J.Super. 460, 746 A.2d 462 (N.J.Super.A.D. 2000), *aff'd* 166 N.J.2, 763 A.2d 746 (2000), a New Jersey court held that an employee theft bond does not protect against the acts of the title agency's owners. The perpetrator at Premier was the sole director, president, and shareholder. The court ruled that "numerous cases have held that this common definition of employee in corporate fidelity bonds—persons whom you have the right to direct and control while performing services for youBis unambiguous and means that thefts by corporate alter egos are not covered." In *Hartford Fire Ins. Co. v. Conestoga Title Ins. Co.*, 328 N.J.Super. 456, 746 A.2d 460 (N.J.Super.A.D. 2000), issued the same day and involving the same underwriter but a different agency, the court reached the same result although the stock of the agency was owned not by the president and perpetrator but his wife.

In *KMC Management Corp. v. Certain Underwriters at Lloyd's London*, 2000 WL 1742096 (Minn.App.) (unpublished), a claim under an employee theft bond was denied as to money stolen by a mortgage banker. The purchaser of mortgage loans wired the loan amounts to the mortgage banker rather than his warehouse lenders, contrary to the terms of a written agreement. The owner of the mortgage banking company stole the money. The court ruled that the money belonged to the mortgage banker at the time it was stolen, and not "in transit," a pre-requisite for bond coverage. *Fidelity Coverage for E-Commerce Fraud*, by Mark E. Wilson, The Brief (Fall 2001), p. 40, analyzes the types of fraud that e-commerce invites, and how they fit with the coverage of the traditional employee theft bond. There is an excellent discussion of recovery on blanket bonds in the letter of James N. Laichas, Esq., in the *Guest Quarters* of *The Title Insurance Law Newsletter*, December, 1996.

[90] See *Commonwealth Land Title Ins. Co. v. Close, Jensen & Miller, PC*, 2008 WL 4926953 (Conn.Super.) (unpublished) (insurer may sue surveyor directly when survey certified to title insurer); *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987); *Commonwealth Land Title Ins. Co. v. Conklin Associates*, 152 N.J.Super. 1, 377 A.2d 740 (1977); *Lawyers Title Ins. Co. v. Carey Hodges & Assoc.*, 358 So.2d 964 (La.App. 1978) (insured permitted to recover cost of removing encroaching improvements set according to inaccurate survey); *Commonwealth Land Title Ins. Co. v. Hart*, 2002 WL 171280 (Wash.App.Div. 1) (unpublished) (Washington surveyor who ignored existing monuments and measured from wrong line performed below professional standard of care; no expert testimony needed to establish negligence and right to recover by insurer that gave coverage based on survey); later decision, *Commonwealth Land Title Ins. Co. v. Hart*, 2004 WL 1559773 (Wash.App.Div. 1) (unpublished) (finding surveyor responsible for interest since date of claim payment by insurer and its attorneys' fees in collecting against the surveyor); *Commonwealth Land Title Ins. Co. v. KCI Technologies, Inc.*, 922 F.3d 459 (D.C.App. 2019) (in lawsuit against surveyors based on D.C. Code's statute of limitations, D.C. Code Ann. § 12–301, which sets three-year limitations period beginning "from the time the right to maintain the action accrues," title insurer was entitled to extended limitations period because errors on surveys were not patent). A title insurer that removed the survey exception based on a survey done at time of policy issuance was found not entitled to sue a surveyor who prepared a later and equally inaccurate survey, because the coverage was not given based on the later survey, in *Chicago Title Ins. Co. v. MacDonald*, 2006 WL 3741047 (N.J.Super.A.D.) (unpublished). *Land Surveyor Liability to Third Parties in Illinois*, by Richard F. Bales, appears in 95 Illinois Bar Journal No. 3 (March 2007), p. 136, and gives a thorough analysis of the case law, the questions not yet answered by the courts, and the interplay between the survey and title insurance coverage given in reliance thereon.

[91] See §3.4.7.1.5 regarding recovery against taxpayers on federal tax liens.

[92] Insurers have been permitted to recover from owner-borrowers and sellers for real estate taxes paid. *Chicago Title Ins. Co. v. Heskestad*, 86 App.Div.2d 854, 447 N.Y.S.2d 329 (1982); 57 N.Y.2d 632, 454 N.Y.S.2d 60, 439 N.E.2d 869

- Title insurers liable to other insureds for the same obligation.[93]

- Victims of a fraud perpetrator whose claims against the property are inferior to that of the insurer.[94]

Prompt notice to the potential recoupment parties will estop them from raising defenses later if they do not raise those defenses at the time the matter is being resolved. Also, prompt notice prompts the Recoupment party to disclose facts or legal theories that might aid in defending an insured. If the insurer does not elicit the facts until after payment is made, the other party may assert that it was a volunteer in making payment. See §5.8.3 regarding the defense that the insurer paid as a volunteer.

Finally, prompt notice to other parties puts them under the same time constraints as the insurer faces in resolving the title claim and related issues, blunting or negating the possible argument that the insurer paid too much by making a panic settlement (see §5.8 for further discussion of this defense).

5.8 Defenses Raised As To Insurer's Right Of Subrogation

An insurer seeking to recoup by subrogation is subject to defenses against its own right to collect, and defenses which the third party has against the insured. In addition, defenses against the insurer's agent may be imputed against the underwriter.

This section will discuss four defenses commonly raised against insurers attempting to recoup by subrogation:

1. That the insurer's error precludes recovery;

2. That the insurer paid too much to solve the problem;

(1982), later app., 97 A.D.2d 784, 468 N.Y.S.2d 523 (1983) (insurer subrogated to lender which paid taxes for borrower).

[93] In *TRW Title Ins. Co. v. Stewart Title Guar. Co.*, 832 S.W.2d 344 (Tenn.App. 1991), two title insurers had insured different lots affected by one mortgage which was not shown on either policy. Stewart Title purchased the loan and then foreclosed the mortgage. TRW Title asserted, among other defense, that it was entitled to pay only one-half of the amount owed, as its contributive share of the "common" loss. The court rejected this argument, since the two insurers did not have a common obligation but rather had insured different parties and property. The court thus permitted Stewart Title to collect the full sum of the debt. This case did not hinge on subrogation. The court found that Stewart was not a "subrogator" but rather a holder of the indebtedness by assignment.

[94] In *United States v. Gettel*, 2017 WL 3966635 (S.D.Cal.) (unpublished), the federal government seized several parcels in a forfeiture action against fraudsters who lured investors into a fake property rehabilitation scheme. One such parcel was sold by the government. The sale proceeds went to the title insurer that had established a constructive trust on the sold parcel because it had paid off liens secured by that property. The title insurer's claim was given priority over the claims of creditors whose losses could not be traced to that real estate.

3. That the insurer paid as a volunteer; and

4. Defenses available to the third party against the insured.

There are various defenses particular to sellers who are sued for breach of warranty, as discussed at §5.9. State law may also prohibit subrogation in certain situations as a matter of public policy.[95]

5.8.1 Insurer Error

To recover against a third party by subrogation, the insurer must establish that the third party justly deserves to bear the ultimate loss.[96] The insurer's mistake may be a factor, but ordinary negligence on the insurer's part should not be determinative. In *Castleman Construction Co. v. Pennington*,[97] the court stated:

> ...the better rule is that regardless of the source of the right of subrogation, the right will only be enforced in favor of a meritorious claim and after a balancing of the equities.[98]

It quoted 83 C.J.S. Subrogation § 6, which says:

> Negligence of the subrogee must be more than ordinary negligence, however, in order to bar application of the principle of subrogation, and relief may be allowed notwithstanding the suitor's mistakes and ignorance... .[99]

The court concluded that the insurer's negligence in not detecting the title defects did not prevent it from recovering from the seller on warranties:

> We do not say that ordinary negligence of the subrogee may not be taken into consideration in ascertaining whether he be entitled to the equitable relief of subrogation. What we do say is that ordinary negligence alone will not be held to be a complete bar to subrogation where in spite of such negligence the equities are still

[95] A New Jersey statute precludes subrogation claims by insurers or their insureds against governmental entities. See *Pinkowski v. Township of Montclair*, 299 N.J.Super. 557, 691 A.2d 837 (N.J.Super.A.D. 1997).

[96] See the "ultimate loss" rule and *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24 (Cal.App. 2 Dist. 1975).

[97] 432 S.W.2d 669 (Tenn. 1968).

[98] 432 S.W.2d at 676.

[99] Id.

in favor of the subrogee.[100]

The insurer must show that its own negligence is not so great that it could be considered the precipitating factor in the loss.[101] The insurer must be guilty of more than ordinary negligence in order for it to be denied the right to recover on the basis of its mistake.[102] The actions of the title agent that issued the policy are not imputed to the insurer to support the defense of comparative fault.[103]

Various cases have permitted the insurer to recover when its error was one of omission rather than commission.[104] For example, when the insurer gave survey coverage based on a survey which

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[100] 432 S.W.2d at 677.

[101] When the insurer vested title incorrectly, and later paid a large sum to get a corrective deed, the court denied its attempt to recoup on the warranty deed prepared in reliance on the title commitment. "[R]ecovery is not a matter of absolute right but is granted or withheld as the equities of a particular case may require. See Thompson v. Miller, 195 Va. 513, 79 S.E.2d 643, 647 (1954), Federal Land Bank of Baltimore, 18 S.E.2d at 920. Thus, the negligence of the party seeking subrogation is a factor that can be considered by the court in determining whether or not subrogation should be allowed. ... In this case, U.S. Titles made a critical error in transferring information learned in its title search. U.S. Titles was clearly negligent and Meridian, as principal, is responsible for that negligence. But for the error, no claim by Meridian or Cahill would exist against the defendants. In light of these circumstances, it would be contrary to principles of equity to allow Meridian to escape its obligation on the insurance policy it issued. The court will not allow a party to recover for a debt they themselves are fully responsible for merely because they can point to wrongful conduct on the part of another that was a separate and additional, but ultimately not contributing cause of the mistake creating the debt." *Meridian Title Ins. Co. v. Lilly Homes Inc.*, 735 F.Supp. 182, 186 (E.D. Va 1990).

[102] "Culpable negligence may prevent one from being afforded the equitable relief of subrogation, but negligence of the subrogee must be more than ordinary negligence ... and relief may be allowed notwithstanding the suitor's mistakes and ignorance ... where in spite of such negligence the equities are still in favor of subrogee." *Castleman Construction Co. v. Pennington*, 222 Tenn. 82, 432 S.W.2d 669, 677 (1968). In *In re Estate of Barnes v. Stewart Title Guar. Co.*, 2000 WL 688540 (Tenn.App.) (unpublished), the seller asserted the insurer's error in not detecting a title defect should bar recoupment against it. After quoting the above passage from *Castleman*, the court concluded: "We do not say that ordinary negligence of the subrogee may not be taken into consideration in ascertaining whether he be entitled to the equitable relief of subrogation. What we do say is that ordinary negligence alone will not be held as a complete bar to subrogation where in spite of such negligence the equities are still in favor of the subrogee. Applying the teaching of Castleman on the question of negligence to the facts of this case, we are of the opinion the negligence of the title examiner was not sufficiently egregious to preclude the claim, nor the equities of the Estate superior to those of Stewart Title." In *Weiss v. Old Republic Nat'l Title Ins. Co.*, 262 Ga.App. 120, 584 S.E.2d 710 (Ga.App. 2003), the insurer was permitted to recover from the sellers because it was found not to have been negligent in searching title. The policy erroneously included an extra parcel, because the deed and policy used a newly-created legal description aggregating several parcels. The appeals court found that "there is no evidence that a title search on the subject property alone would have revealed the incorrect property description." See also *Chicago Title Ins. Co. v. Prosch*, 2011 WL 250421 (S.D.Ala.) (unpublished) (insurer not barred by supposed unclean hands from suing seller for breach of warranty for mortgage not detected in title search).

[103] *Commonwealth Land Title Ins. Co. v. Howard*, 2016 WL 1255719 (E.D.Ky.) (unpublished) (title agent's supposed actions that aided borrowers' loan fraud were not imputed to insurer to block it from suing borrowers on notes, especially because insurer did not know agent was aiding the fraud and its actions were not within the scope of its agency).

[104] When the insured's title was found defective because the deed to the insured's seller was adjudged a mere

located an easement in the wrong place, it was permitted to recover its full loss against the surveyor. The court rejected the surveyor's claim that the insurer was equally responsible for locating the easement.[105] Courts have divided on whether or not a party to litigation may introduce evidence that another party has the benefit of title insurance. Most courts have adopted what is commonly called the collateral source rule, which allows a plaintiff in a negligence action to recover from a tortfeasor even when the plaintiff has been compensated by a liability insurer. Some courts have said that the collateral source rule should also apply to exclude evidence of the existence of title insurance coverage, because the availability of insurance coverage can influence the trier of fact to find against the insured on the assumption that he or she will be made whole by the insurer.[106] However, not all courts have applied the collateral source rule to title insurance coverage.[107]

When the insurer buys a mortgage in order to release it from the insured property to protect its insured purchaser, it may enforce the lien against the seller as to other land that is security for the mortgage.[108] When the insurer takes an assignment of the mortgage note from the insured lender, it becomes a true creditor of the borrower. One right of a creditor is to file an involuntary bankruptcy petition against the borrower. The borrower's claim under its own title insurance policy may act as an offset against the borrower's liability under the note. However, the fact of insurance coverage does not render the insurer's claim disputed; thus, the filing of the petition is not precluded

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mortgage, the debt having been paid, the insurer was permitted to recover against the seller. The seller argued that the insurer had missed a *lis pendens* filed in connection with the action to set aside the deed. The court found that the insurer's sin "was one of omission, while the sin of the defendants was one of commission and one which was the genesis of the problem." *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24, 27 (Cal.App. 2 Dist. 1975).

[105] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987). Also, an insurer was not estopped from foreclosing a lien it had purchased because it had earlier failed to show the lien on a policy issued to another party, in *Ticor Title Ins. Co. v. Nissell*, 871 P.2d 652 (Wash.App.Div. 2 1994).

[106] *KeyBank Nat'l Ass'n v. Southwest Greens of Ohio, L.L.C.*, 988 N.E.2d 32, 2013-Ohio-1243 (Ohio App. 10 Dist. 2013) (barring evidence of title insurance at trial, by analogy to liability insurance).

[107] *Keever v. Dellinger*, 291 Ga. 860, 734 S.E.2d 874, 12 FCDR 3430 (2012) (permitting introduction of evidence of title insurance at trial). In *Chanda v. Federal Home Loans Corp*., 215 Cal.App.4th 746, 155 Cal.Rptr.3d 693, 13 Cal. Daily Op. Serv. 3938 (Cal.App. 1 Dist. 2013), a mortgage broker was sued for negligence and breach of fiduciary duty. The broker sought to defend those claims by showing that he had ordered title insurance to protect against fraud and forgery. The trial court excluded the evidence. The appeals court reversed, holding that the collateral source rule did not apply to title insurance, and that the probative value of title insurance evidence outweighed its prejudicial effect. The court concluded that the trial court's decision to exclude evidence of title insurance was prejudicial. In *Scurich Brothers, Inc. v. Frederickson*, 2016 WL 3960170 (Cal.App. 6 Dist.) (unpublished), the court agreed with *Chanda* and held that the collateral source rule does not apply to title insurance. In that decision, a buyer sued the seller for breach of warranty. The court allowed evidence that the owner had title insurance and had not incurred a loss due to the seller's breach of warranty.

[108] In *Petrol Properties, Inc. v. Stewart Title Guar. Co*., 225 S.W.3d 448 (Mo.App. S.D. 2007), the court held that a title insurer that bought a loan to protect its insured owner, and asserted the deed of trust against the remaining property owned by the seller to the insured, was entitled to foreclose despite the seller's defense that the title company had been negligent in searching title.

thereby.[109]

The insured's status as a bona fide purchaser for value is not forfeited as to third parties simply because the title insurer is performing its obligations to pay for the cure of the insured's title.[110] See §5.9 for further cases concerning the defense of the insurer's mistake as raised by sellers.

5.8.2 Excessive Settlement Amount Paid By Insurer

The subrogation target may admit liability but claim that the insurer paid too much to solve the title defect. Most courts will presume a settlement to be reasonable and set that amount as the recovery against the third party. The insurer should show that it did not act carelessly or collusively.[111] The burden of proof is on the third party to show that the settlement was not reasonable, or that the third party's liability does not equal the settlement amount.[112]

However, in certain circumstances, the amount which the insurer may recover against a third party will be different than the amount the insurer was obligated to pay the insured as its policy loss.[113] The insurer should thus be careful to prove that the party it is suing is obligated for all of the elements of damage for which the insurer has compensated the insured. Otherwise, the insurer could be effectively penalized for stepping forward and solving the problem. The insurer should remind the court that full compensation is necessary for the insurer/insured to be indemnified for its loss. In *Commonwealth Land Title Ins. Co. v. Conklin Associates*,[114] the court refused to limit recovery

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[109] *In re Seko Investment, Inc.*, 156 F.3d 1005 (9th Cir. 1998).

[110] See *Cooper v. Cano*, 72 Cal.App.4th 672, 84 Cal.Rptr.2d 922 (Cal.App. 4 Dist. 1999), discussed in full at §5.6.

[111] Careless settlement could include the release of parties who might be liable to the party against whom subrogation is sought. See *Chemical Bank of N.J. v. Bailey*, 687 A.2d 316 (N.J.Super.A.D. 1997), in which a closing attorney paid off a revolving credit loan but did not get a release of the lien because he negligently failed to instruct the lender to close the account. The insurer paid the later advances to obtain a release of the lien. It was not permitted to recover against the attorney because it had released the borrowers when it removed the lien, destroying the attorney's right of subrogation.

[112] "We have concluded, therefore, that we cannot affirm the summary judgment for the reason that American's declaration does not lay to rest the factual issue of whether their settlement with the Binns, under the principles we have set forth, was reasonable and within the limits of the potential liability. When indemnification is sought on the basis of a settlement effected with the creditor the question of liability and the limit thereof are still open factual questions. (Lamb v. Belt Casualty Co., 3 Cal.App.2d 624, 631, 40 P.2d 311.) The settlement is only presumptive evidence of the liability and the amount, subject to being overcome by proof. (Fidelity & Deposit Co. v. Whitson, 187 Cal.App.2d 751, 10 Cal.Rptr. 6.)" *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24, 27 (Cal.App. 2 Dist. 1975). In *Ratchford v. Miller*, 2004 WL 36263 (Cal.App. 4 Dist. 2004) (unpublished), the title insurer was entitled to full recovery against a seller who conveyed on behalf of an estate while the will was being challenged. The insurer's settlement with the contesting heirs was not voluntary, and the amount paid was "a reasonable approximation of the value" of their claim.

[113] "The amount of the judgment to which American would be entitled on subrogation would be limited to the amount which the Binns could have recovered had they proceeded directly against the defendants. In settling with the Binns for any greater amount, American would be a volunteer." *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24, 27 (Cal.App. 2 Dist. 1975).

[114] 152 N.J.Super. 1, 377 A.2d 740 (1977).

against a negligent surveyor to the fair market value of the overlap property purchased by the insurer. The court gave the insurer full indemnity instead.[115]

However, in *Safeco Title Ins. Co. v. Citizens & Southern National Bank*, the court found that the insurer acted in undue haste in acquiring disputed land, largely because of its own error. It ruled that the seller was responsible only for the true fair market value of the land, not the panic price paid by the insurer.[116]

5.8.3 Insurer As Volunteer

A third party may argue that the insurer was a mere volunteer in making payment because it was not obligated under its policy to make the payment. For a discussion of this subject in the context of claims by underwriters against title agents, see §17.8. The doctrine of "conventional," or contractual, subrogation is based on the idea that an insurer's payment is not voluntary, but compelled by the insurance contract:

> [W]here the courts have distinguished between legal and conventional subrogation, they have done so for the purpose of showing that one who makes a payment under a contract calling for subrogation is not a mere volunteer, thereby relieving them from the rule that a volunteer is not entitled to subrogation.[117]

For example, when an escrowee paid the seller the full purchase price, it was permitted to recoup

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[115] "Defendants urge that ... the purchase price was unreasonably high and not diligently negotiated by Commonwealth. They further suggest that the proper measure of damages is the market value that the land would bring in an arm's-length negotiation, and that no evidence of this was introduced at trial. This overlooks the positions of the parties to the negotiations. The title companies were obligated to their insureds to protect them against any loss or claim and to expeditiously settle the matter. The New Jersey homeowners were faced with a loss of sections of their developed properties and Wulster's time and contractual obligations hung heavy on him. Unless the matter was expeditiously concluded, greater expense might well have been incurred. Under the circumstances, this court finds that the negotiated settlement was reached in good faith and is not an unfair or unreasonable measure of damages." *Commonwealth Land Title Ins. Co. v. Conklin Associates*, 377 A.2d 740, 745 (1977).

[116] *Safeco Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 190 Ga.App. 809, 380 S.E.2d 477 (1989). The court was swayed by the fact the insurer rather hastily decided that the interest of the neighbor was not an easement, as reported on the policy, but fee title. Further, the claim arose when the insured built a swimming pool and foundation on the easement/fee, without giving notice. "In view of the fact that it was the improper act by appellant's insured which precipitated the claim, we find no merit in appellant's arguments that when it settled [the neighbor's] claim, it was acting under compulsion or in response to an emergency and that in some way legally entitled appellant to recover the $100,000 it paid for the disputed property from appellee [the seller]." Id. at 480. Similarly, the court in *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24 (Cal.App. 2 Dist. 1975), found that the amount and elements of damage compensable were not necessarily identical to the loss paid by the insurer, but were dependent on the cause of action brought against the third party. The court sent the case back for determinations of fact.

[117] *Castleman Construction Co. v. Pennington*, 432 S.W.2d 669 (Tenn. 1968) (citing *United States Fidelity & Guar. Co. v. Elam*, 198 Tenn. 194, 278 S.W.2d 693 (1955)). See also *Hornstein v. Guarantee Ins. Co.*, 471 So.2d 108, 110 (Fla.App. 3 Dist. 1985): "In honoring the contractual obligation to indemnify their insured, insurers are not, as to the payment of the lien obligation, mere volunteers. Their interest is real, pecuniary and obligatory."

from the buyer who had paid too little. The insurer/escrowee was not a volunteer because its "payment was made in performance of its duty as defendant's escrow agent, and as such, was not voluntary."[118]

When the insurer settles a claim despite a valid policy coverage defense, a party against whom the insurer seeks subrogation will sometimes assert as a defense the insurer's lack of legal obligation to indemnify. This is a variant of the volunteer doctrine. However, when the coverage question is debatable, or the insurer asserts the coverage defense but it fails or is stymied, the insurer is not a volunteer in making payment on the policy. In *Realty Alliance of Texas, Ltd. v. Stewart Title Guar. Co.*,[119] the insurer sought an injunction against the sale of property by the IRS, based on facts which also formed the basis for a coverage defense, but the injunction was denied. At that point, "Stewart Title's alternative was to allow the IRS to sell the property and face a bad faith action which could have resulted in a much greater loss."[120] In addition, there was testimony that it was "a close call" as to whether or not the policy terminated on the insured's post-policy conveyance of the property to a corporation it controlled. The insurer thus was not a volunteer in paying off the lien rather than allow the property to be auctioned.

However, an insurer may be subject to attack as a volunteer if it was not required by the contract to pay the claim.[121] Thus, when a matter was later deemed by the court to be excluded from coverage, the insurer was held to have volunteered both defense and settlement funds, with no right to recover from the abstractor who erred.[122] An insurer was held to be a volunteer when it paid a lender's claim after the lender had obtained a deed in lieu of foreclosure. The court adopted the erroneous position that "the payment or satisfaction of the note releases the obligations under the title policy."[123] An agent or approved attorney against whom recoupment is sought may raise policy

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[118] *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726, 728 (Mo.App.E.D. 1994).

[119] 1997 WL 13651 (Tex.App.-Houston) (unpublished).

[120] Id. at 3.

[121] See *Safeco Title Ins. Co. v. Citizens & Southern National Bank*, 380 S.E.2d 477, 190 Ga.App. 809 (1989) (subrogation may not be had when insurer made a "panic" settlement of an "emergency" which the court found the insured had precipitated by its construction work). *Citizens & Southern* is a good example of how an insurer may lose its right to be reimbursed by stepping into and solving an urgent problem for the insured.

[122] *Fidelity National Title Ins. Co. of Tennessee v. Kidd*, 394 S.E.2d 225 (N.C.App. 1990). The court admitted there were "novel factual aspects" to the case, in that the insured's sole interest in the property was "a promissory note for $650,000.00 'or such proportionate amount as her ultimate interest in property may bear to 100% with such payment to occur upon final clearing of title.' This note was secured by a deed of trust to the property having no warranties of title." The insured paid no consideration for the property. Based on these facts, which the insurer knew, the court held that the insurer could not have had a duty to indemnify the insured no matter how the lawsuit had been concluded. The *Kidd* ruling is overly broad. The court apparently missed the fact that the duty to defend is broader than the duty to indemnify, and the settlement was apparently made to cut off the defense costs.

[123] *Title Guaranty & Trust Co. v. Johnson*, 485 S.W.2d 764 (Tenn.App. 1972). The court failed to understand that a loan policy continues in effect as long as the lender has an interest in the real estate. The decision might be justified, however, on the implicit finding that the lender obtained both a claim payment and a deed clearing title to the land. Thus, it may have been that the lender suffered no compensable loss, which could be considered to make the insurer's payment

defenses that it believes should have been applied to avoid payment of the claim.[124] A Texas court rejected the volunteer defense altogether, however, because the insurer established contractual or conventional subrogation rights.[125]

When the insurer reimburses an insured that paid off a lien, the third party may argue that the insured paid the lien as a volunteer. In such cases, it is not sufficient to show that the payment by the insurer to the insured was required under the policy. The insurer must also establish that the payment of the debt by the insured was based on an obligation or to preserve an interest in the property. This was shown, for example, when the insured lender paid the real estate taxes to protect the lien of its mortgage.[126]

The volunteer defense may also be raised when the insurer has paid off a federal tax lien against a former owner. See §3.4.7.1.5 for a complete discussion of recoupment of federal tax liens.

5.8.4 Defenses Applicable To Insured

The insurer has no greater rights against third parties than would the insured itself. Thus, when the insurer paid off construction lien claimants and then attempted to pursue the borrowers individually, they successfully defended based on the fact that the loan was non-recourse.[127] Also, an insurer was not permitted to pursue a claim as the insured's subrogee for misrepresentation by the seller when the insured had failed to make a diligent inquiry regarding facts at time of purchase.[128] Finally, in *Lawyers Title Ins. Corp. v. Feldsher*,[129] when the insured lender was aware that a prior trust deed existed but mistakenly thought he would have priority over that interest, the insurer was bound by the insured's knowledge. The insurer was denied application of the doctrine of equitable subrogation.

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a gift or volunteer payment.

[124] See, for example, *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976).

[125] In *Dawson v. Chicago Title Ins. Co.*, 2002 WL 80162 (Tex.App.-Dallas) (unpublished), the insurer paid off taxes for the insured buyer that were assessed after the seller's tax exemption was revoked. The insurer pursued the seller on covenants of warranty, and the seller's principal defense was that the insurer did not have to pay the tax claim because the reassessment was a post-policy matter. The court rejected the argument, holding that "when a claim is asserted under a policy through a contractual subrogation provision, whether a payment is more than required by the policy or made voluntarily is immaterial."

[126] *Chicago Title Ins. Co. v. Heskestad*, 454 N.Y.S.2d 60, 439 N.E.2d 869 (1982).

[127] *Berks Title Ins. Co. v. Haendiges*, 772 F.2d 278 (6th Cir. 1985), aff'g in part, rev'g in part, 591 F.Supp. 879 (N.D. Ohio 1984).

[128] *Meridian Title Ins. Co. v. Lilly Homes Inc.*, 735 F.Supp. 182 (E.D.Va. 1990).

[129] 42 Cal.App. 4th 41, 49 Cal.Rptr.2d 542 (Cal.App. 2 Dist. 1996), reh.den. February 29, 1996.

5.9 Subrogation Rights Against Sellers

FORM 67, Appendix A
Recoupment against seller who created defect

An insurer may pursue the seller of property under a claim of subrogation. Such a demand often requires a balancing of equities between seller and insurer. There are several defenses to recovery that apply only to property sellers, as discussed below.

5.9.1 Theories Of Recovery Against Sellers

For the insurer to pursue the seller in the insured's shoes, the insured must have a basis for claiming liability against the seller. The most common cause of action is based on warranties of title.[130] Recovery for breach of warranties allows the insurer to be made whole after it has made the insured whole.[131]

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[130] See *Kenny v. Safeco Title Ins. Co.*, 113 Cal. App. 3d 557, 169 Cal. Rptr. 808 (Cal.App. 4 Dist. 1980); *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409 693 P.2d 697 (1985); *Fairmont-Tillett Ltd. v. First Memphis Realty Trust*, 691 F.2d 991 (11th Cir. 1982); *American Title Ins. Co. v. Coakley*, 419 So.2d 816 (Fla.App.1982); *Harvey v. J & H Holdings, Inc.*, 310 So.2d 371 (Fla.App.1975); *Douberley v. Angelini*, 240 So.2d 98 (Fla.App.1970); and *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex.App.1961); *Patel v. Kahn*, 970 P.2d 836 (Wyo. 1998) (buyer entitled to recover from seller cost of settling with a foreclosing mortgagee, despite seller's claim that mortgage was invalid); *Vestal v. Lawler*, 2001 WL 912818 (Tenn.App.) (unpublished), app.den. (title searcher entitled to recover from seller on warranties for cost of removing deed of trust paid on buyer's behalf); *Theraube v. Rodriguez*, 2006 WL 1980342 (Cal.App. 2 Dist.) (unpublished) (title insurer entitled to sue seller under warranties for having given prior deed to another, although seller proved that other grantee obtained deed by fraud); *Wilkinson Homes, Inc. v. Stewart Title Guar. Co.*, 271 Ga.App. 577, 610 S.E.2d 187 (Ga.App. 2005) (boundary dispute or overlap); *Midland Title Security, Inc. v. Carlson*, 171 Ohio App.3d 678, 872 N.E.2d 968, 2007-Ohio-1980 (Ohio App. 8 Dist. 2007) (recovery for missed mortgage); *Kelly v. National Attorneys Title Assurance Fund*, 955 N.E.2d 224 (Ind.App. 2011) (seller liable to title insurer for his own federal tax liens not excepted in warranty deed); *Commonwealth Land Title Ins. Co. v. Rabeh*, 2016 WL 3997260 (E.D.Pa. 2016) (unpublished) (title insurer that paid off federal tax liens to protect insured owner entitled to judgment against grantors for breach of warranty). In *Fidelity Nat'l Title Ins. Co. v. Wooden*, 2017 WL 2243032 (N.D.Ala.) (unpublished), the court said that the insurer would have a claim for breach of warranty against the seller once it had paid the insured and had become vested in the claim under the made-whole doctrine. The court rejected a number of defenses by the seller to its warranty liability. In *In re Brown*, 570 B.R. 98 (W.D.Okla. 2017), sellers who warranted that title was free of liens, but who failed to pay off a judgment lien at closing, were found not absolved of their warranty liability just because the title insurer had paid the judgment debt. In *Cochran Investments, Inc. v. Chicago Title Ins. Co.*, 550 S.W.3d 196 (Tex.App.-Houston 2018), the court ruled that a Texas special warranty deed does not covenant that the seller has good title, and therefore the title insurer could not recover from the seller when title failed.

[131] *American Title Insurance Co. v. Coakley*, 419 So.2d 816 (Fla. App. 1982) (IRS lien against seller); *Harvey v. J & H Holdings, Inc.*, 310 So.2d 371 (Fla.App.1975) (easement granted by sellers); *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex.App. 1961) (forged release of deed of trust); *Lawyers Title Ins. Corp. v. Cosby*, 1996 WL 682462 (Tex.App.-Dallas) (unpublished) (paving assessment levied before conveyance). However, in *Reiterer v. Monteil*, 98 So.3d 586, 37 Fla. L. Weekly D549 (Fla.App. 2 Dist. 2012), the court held that recovery against the seller for breach of warranty applies only to fees incurred to defend title, and not fees incurred in the suit for breach of warranty. In *Chicago Title Ins. Co. v. Aurora Loan Services, LLC*, 2013 IL App (1st) 123510, 996 N.E.2d 44 (Ill.App. 1 Dist. 2013), a seller that gave a special warranty deed was found not liable to the insurer, as subrogee of the purchaser-insured, because the real estate taxes that caused the policy claim were a lien before the seller took title.

Recoupment

The insurer is not limited to claims for breach of warranties, however. When no warranties of title have been given, the court may reform the deed to create warranties, in order to avoid unjust enrichment of the seller.[132] When the deed to the insured is declared void, the title insurer which has indemnified the insured has a right to repayment of the purchase price.[133] A seller who is mistakenly paid too much money at closing must return the overpayment as unjust enrichment.[134] If the contract between seller and buyer provides that errors will be corrected after closing, the insurer may pursue the seller under this contract term after making the insured whole.[135] Absent a showing of unjust enrichment, however, a lack of warranties may defeat recovery.[136] The insurer stands in the insured's shoes, and should consider what other causes of action the insured has against its seller. This may include a misrepresentation claim. However, in making such claims, the insurer is subject to any defense the seller may have as to the insured.[137]

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[132] A judgment couched in the doctrine of unjust enrichment was granted to the title insurer in *Title Ins. Co. of Minnesota v. Costain, Inc.*, 164 Ariz. 203, 791 P. 2d 1086 (Ariz.App. 1990). In *Commonwealth Land Title Ins. Co. v. Rabeh*, 2016 WL 3997260 (E.D.Pa. 2016) (unpublished), the court granted judgment in favor of the insurer against the sellers based on breach of warranty, but also on common law indemnity and unjust enrichment. In *Glassick v. Wells Federal Bank*, 2016 WL 7337087 (Minn.App.) (unpublished), the court entered judgment in favor of the insurer against the seller based on common law indemnification.

[133] *Rose Development Corp. v. Einhorn*, 65 A.D.3d 1115, 886 N.Y.S.2d 59, 2009 N.Y. Slip Op. 06526 (N.Y.A.D. 2 Dept. 2009) (when property sold twice, then deeds rescinded, insurer entitled to recover from original seller but recovery limited to original sale price, not higher price paid on second purchase); *First American Title Ins. Co. v. Township of Rockaway*, 322 N.J.Super. 583, 731 A.2d 572 (1999). In this case, a township had a deed declared void because the property was sold without state approval as required by law. The insurer paid the insured, then sued the township to get back the purchase price. The township urged that "as between a public entity and a commercial title insurance company paid to search the public record, the public entity's position must be preferred as a matter of public record." The court was unmoved, saying "[t]he Township ignores its own failure to adhere to the law concerning a document to which it was party. This is more than mere inadvertence and more akin to a reckless disregard of facts within its actual knowledge. 'Disgorgement' is a necessary result of declaring the conveyance void. This is, essentially, an equitable action to quiet title and to make whole the parties who bore costs in connection with a void conveyance that would not have occurred but for the Township's ultra vires act. The proper goal is to restore every player to the position he would be in now but for that void transaction, as if it never occurred, which, in effect, it did not. ... To do any less in this case would unjustly enrich the Township, which has, in essence, always owned the property and had the use of Zibaee's initial purchase money for more than thirteen years."

[134] In *Lawyers Title Ins. Corp. v. Wetzel*, Ill.App. 5 Dist. No. 5-98-0429 (May 28, 1999) (unpublished), the sellers, the Wetzels, received $30,000 too much as proceeds at closing. The title insurer sued for unjust enrichment. The Wetzels argued that the insurer was precluded from recovering because of negligence. The court said: "[w]e will give this case all the analysis it deserves. The Wetzels are attempting to perpetrate a fraud. They have been unjustly enriched. The Wetzels' arguments to the contrary represent legal nit-picking and double-talk. Lawyers Title is subrogated to Magna Bank's claim and was properly awarded summary judgment. See *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill.2d 314, 597 N.E.2d 622 (1992). We will not aid the Wetzels in this chicanery."

[135] *National Granite Title Ins. Agency, Inc. v. Cadlerock Properties Joint Venture, L.P.*, 5 A.D.3d 361, 773 N.Y.S.2d 86 (N.Y.A.D. 2 Dept. 2004), app.dism. 3 N.Y.3d 702, 818 N.E.2d 671, 785 N.Y.S.2d 29 (N.Y. Sep 14, 2004).

[136] *Chicago Title Ins. Co. v. Eynard*, 84 Misc.2d 605, 377 N.Y.S. 2d 895 (1975).

[137] For example, in *Great American Mortgage Investors v. Louisville Title Ins. Co.*, the seller had created deed

Also, when sellers were paid $65,000 too much at a closing, the insurer was permitted to have the debt declared non-dischargeable in the sellers' bankruptcy. The court found that the sellers' failure to inform the insurer of the existence of a mortgage to be paid off was a false pretense under § 523(a)(2)(A) of the Code. Technically, recovery was found not to be by subrogation, however, because the court recognized a direct cause of action by the insurer-escrowee against the seller for fraudulent concealment.[138]

The insurer has a right to be indemnified by the seller only if the seller's negligence is causal but the insurer's is not. As stated in *Enright v. Lubow*, the right of indemnity:

> ... enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.[139]

The following sections discuss the factors considered in determining whether the seller or the insurer should bear the ultimate loss. In California, an insurer was denied recovery against a trustee who conducted a non-judicial foreclosure sale without giving notice of the sale to the IRS as lien holder. The court found that the insurer, which had insured a grantee from the purchaser at sale, was not a party to whom the trustee owed a statutory duty. The trustee had obtained a trustee's sale guarantee, which did not show the lien. He also had no actual knowledge of the lien, which the court found precluded a claim against him for negligent misrepresentation.[140]

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restrictions that the court found to create a joint venture with the insured. When the insured sued for misrepresentation, the seller defeated the claim by having the seller's knowledge of the restrictions imputed to the insured. 597 S.W. 2d 425 (Tex.App. 1980), writ ref. n.r.e. (July 23, 1980) and reh'g of writ of error overruled Sept. 12, 1980 (Tex.App.-Forth Worth 1980). In *212 Marin Boulevard, LLC v. Chicago Title Ins. Co.*, 2019 WL 287215 (N.J.A.D.) (unpublished), the seller, Consolidated Rail Corporation, represented to the title insurer that no Surface Transportation Board approval was required for the abandonment of the rail line being sold to a private party, because it was not a main line. The court found that Conrail believed the statement to be true, so it was not made with the intent to deceive. Therefore, Conrail was not required to give back any of the purchase price, despite the fact that the insurer had paid the buyer the full $5,000,000 purchase price as a claim payment.

[138] *In re Demarest*, 176 B.R. 917 (Bkcy.W.D.Wash. 1995). Similarly, a seller's debt to a title insurer was nondischargeable when it resulted from a deed of trust that the seller intentionally failed to list on a lien affidavit presented to the insurer at closing. The insurer bought the debt from the lender and sued the seller on the note. The court found evidence of misrepresentation in the seller's admission that he knew that the title agent had made a "mistake" by not showing the deed of trust. The court found that the seller filed bankruptcy "so that the loss would ultimately fall on someone else." The intent to deceive and profit from it made the debt nondischargeable. *In re Lett*, 238 B.R. 167 (Bkcy.W.D.Mo. 1999), aff'd *In re Lett*, 2001 WL 43614 (8th Cir. (Mo.)) (Table) (unpublished).

[139] 202 N.J.Super. 58, 493 A.2d 1288, 1303 (1985).

[140] *Diediker v. Peelle Financial Corp.*, 60 Cal.App.4th 288, 70 Cal.Rptr.2d 442, 97 Cal. Daily Op.Serv. 9622 (Cal.App. 2 Dist. 1997), reh.den.

5.9.1.1 Seller Created Or Knew Of Defect

When the seller created the title defect, the seller ordinarily will be required to indemnify the insurer.[141] If the other factors listed above are neutral or do not exist, the seller may also be required to reimburse the insurer for encumbrances not created by the seller but known to it.[142] In some other jurisdictions, the seller's knowledge must be such that a reasonably prudent person might not have conveyed title in the same fashion.[143]

5.9.1.2 Seller Would Reap Windfall

The seller also must indemnify the insurer when the seller would otherwise reap a windfall. This includes cases in which the title defect is a lien against the seller. In such situations, when the insurer pays off the lien, it is paying off a personal debt of the seller, leaving the seller with a windfall.[144] The insurer is not a mere volunteer in paying the lien, because the insurer's payment is a contractual obligation.[145]

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[141] *Harvey v. J & H Holdings, Inc.*, 310 So.2d 371 (Fla.App. 1975) (easement granted by sellers); *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex.App. 1961) (forged release of deed of trust); *Title Ins. Co. of Minn. v. Costain Arizona Inc.*, 791 P.2d 1086 (Ariz.App. 1990) (seller paid for land he had previously deeded to another); *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24 (Cal.App. 2 Dist. 1975) (deed to sellers was recharacterized as a mortgage; the court held that "The sin of American ... was one of omission, while the sin of the defendants was one of commission and one which was the genesis of the problem."); *First American Title Ins. Co. v. Commerce Associates, LLC*, 2015 WL 7188387 (D.Nev.) (unpublished) (title insurer that paid a lien for its insured purchaser was entitled to stand in the insured's shoes to sue the seller for misrepresentation and concealment of the risk).

[142] *Fairmont-Tillett Ltd. v. First Memphis Realty Trust*, 691 F.2d 991 (11th Cir. 1982) (restriction shown in policy issued to seller).

[143] "Barring circumstances amounting to fraud on Malinak's part, or his possible comparative negligence in conveying the title when a reasonably prudent person might not do so, Malinak's knowledge of the status of his title is irrelevant with respect to the liability of the title insurer." *Malinak v. Safeco Title Ins. Co. of Idaho*, 661 P.2d 12 (Mont. 1983).

[144] *American Title Insurance Co. v. Coakley*, 419 So.2d 816 (Fla.App. 1982) (IRS lien against seller); *Kenny v. Safeco Title Ins. Co.*, 113 Cal.App.3d 557, 169 Cal.Rptr. 808 (Cal.App. 4 Dist. 1980) (IRS lien against seller); *American Title Co. v. Anderson*, 52 Cal.App.3d 255, 125 Cal.Rptr. 24 (Cal.App. 2 Dist. 1975) (seller's deed really a mere mortgage, securing a debt already repaid, meaning seller had no right to sell the insured property; therefore, "defendants' retention of any consideration they received would amount to unjust enrichment. This latter consideration clearly weights the balance of the equities in favor of American's right to subrogation."); *Oliver v. Midland Title Security, Inc.*, 1996 WL 753172 (Ohio App. 5 Dist.) (unpublished) (sellers were overpaid on a claim because they owned less of an interest in the property than as shown on the policy were required to give up extra payment); *Stewart Title Guar. Co. v. Borkowski*, 2017 WL 4769081 (Cal.App. 3 Dist.) (unpublished) (insurer entitled to collect from seller's estate after insurer paid off estate's loan debt to protect buyer-insured; estate would be unjustly enriched if not required to reimburse insurer).

[145] See *Zurich General Accident & Liability Ins. Co. v. Klein*, 181 Pa.Super. 48, 121 A.2d 893 (1956) (abstractor-attorney malpractice carrier which paid off federal tax liens of seller "was not officious since [it] was under a contractual duty to the attorney who searched the title"); *Hornstein v. Guarantee Ins. Co.*, 471 So.2d 108 (Fla.App. 1985); *Lawyers' Title Guarantee Fund v. Sanders*, 571 P.2d 454 (Okla. 1977).

5.9.2 Sellers' Defenses To Recovery

The seller may also assert one or more acts of the insurer to justify a position that the insurer should be the ultimate bearer of the loss. The seller must generally establish acts of commission by the insurer, on which the seller relied, and that the seller was damaged.

5.9.2.1 Insurer Error In Reporting Status Of Title

In almost every case, an insurer suing the seller on warranties has failed to report the title defect in question. The rare case is when the defect was not a plain miss but a "true" title risk such as forgery.[146] However, in states that embrace the idea of abstractor negligence on a title commitment, such abstractor negligence has been held to bar the insurer's equitable right of subrogation. This closely related issue is discussed at §5.9.2.4 below.

The insurer is not precluded from recovery simply because it failed to report the title defect or lien.[147] The insurer's subrogation right is not thwarted when the seller is unable to establish that the insurer could have discovered the issue by a search of the public records.[148] However, when the

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[146] *Wolff v. Commercial Standard Ins. Co.,* 345 S.W.2d 565 (Tex.Civ.App. 1961) (forged release of deed of trust).

[147] *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex.Civ.App. 1961); *Title Ins. Co. of Minn. v. Costain Arizona Inc.*, 791 P.2d 1086 (Ariz.App. 1990): "We conclude that if Talley had the right to maintain a claim for breach of warranty against Costain, TICOM was subrogated to that right. We note that courts have found title insurers subrogated to the rights their insured may have had against the seller despite the fact that the title insurer was negligent in its examination of title. See, e.g., *Transamerica Title Insurance Company v. Johnson*, 103 Wash.2d 409, 693 P.2d 697 (1985); *American Title Ins. Co. v. Coakley*, 419 So.2d 816 (Fla.App. 1982); *Harvey v. J & H Holdings, Inc*., 310 So.2d 371 (Fla.App.1975); *Douberley v. Angelini*, 240 So.2d 98 (Fla.App. 1970); *Wolff v. Commercial Standard Ins. Co*., 345 S.W.2d 565 (Tex.App. 1961)." See also *In re Hagle*, in which the insurer was permitted to collect real estate taxes from the seller although insurer did not report the taxes on commitment or policy. The court found no duty to the seller, and therefore no defense to reimbursement: "While it is true that the title insurance company, the Claimant, was negligent in not finding and disclosing the defects in this title to the buyers, the same cannot be said vis-à-vis the sellers. Put another way, the title insurance company does not owe any duty to the seller/Debtor and, therefore, it may make a claim for reimbursement of the money paid to the buyers." 89 B.R. 952 (M.D.Fla. 1988). See also *In re Estate of Barnes v. Stewart Title Guar. Co.*, 2000 WL 688540 (Tenn.App.) (unpublished) (*Ratchford v. Miller*, 2004 WL 36263 (Cal.App. 4 Dist. 2004) (unpublished) (insurer's sin was of omission, while seller's conveyance during will contest was sin of commission; therefore, insurer was not precluded from subrogation); *Awad v. Duke*, 1998 WL 1991731 (Mich.App.) (unpublished) (seller not insured; insurer owed no duty to seller to report state of title); *Martin v. Fidelity Nat'l Title Ins. Co.*, 2011 WL 4478431 (E.D.La.) (unpublished) (insurer not precluded from subrogation against former owners on theory that it should have detected deficiencies in chain of title beginning with a quiet title judgment against estate heirs not served); *Glesner v. Baer*, 2015 WL 7162010 (Md.App.) (unpublished) (insurer that paid to defend its insured in quiet title suit not barred from recovering those fees from seller, for breach of warranty, based on seller's assertion that insurer had been negligent in searching title); *Puente v. Beneficial Mortgage Co. of Indiana*, 9 N.E.3d 208 (Ind.App. 2014) (insurer not denied subrogation based on the assertion that it was negligent in agreeing to insure title); *Glassick v. Wells Federal Bank*, 2016 WL 7337087 (Minn.App.) (unpublished) (insurer granted judgment against seller despite his claim that the insurer's agent had "negligently" failure to issue a policy free of an exception for the mortgage that was the subject of the loss; also, seller had waived direct claim of insurer search negligence); *In re Brown*, 570 B.R. 98 (W.D.Okla. 2017) (sellers who warranted title free of liens not absolved of warranty liability because title insurer missed judgment and paid judgment debt).

[148] *Wilkinson Homes, Inc. v. Stewart Title Guar. Co.*, 271 Ga.App. 577, 610 S.E.2d 187 (Ga.App. 2005) (court rejected claim that insurer could have detected boundary dispute or overlap in the public records).

insurer's error created the title defect, the insurer's error may be deemed one of commission rather than omission, which can cause the insurer to bear the ultimate loss and preclude subrogation.[149]

Also, an insurer is sometimes estopped from collecting against a seller which obtained its title insurance from the insurer. When the sellers had also obtained a title commitment from the insurer at the time they purchased, which commitment contained the same error, the insurer was estopped to pursue the seller. The court found that the sellers had purchased the property in reliance on the title commitment.[150] However, a seller who took back a purchase-money mortgage was not permitted to block the insurer's recovery by asserting that the seller's loan policy also omitted the easement in dispute. The seller had himself granted the easement, and thus the primary obligation for the loss fell to him.[151]

[149] In *Meridian Title Ins. Co. v. Lilly Homes Inc.*, 735 F.Supp. 182 (E.D.Va. 1990), the court denied the insurer subrogation because the defect in the conveyance was due to the fact that the title insurance commitment inaccurately stated which party was vested in title.

[150] *Vining v. Chase*, 410 So.2d 1 (Ala. 1981). "The only logical conclusion to be drawn from the Vinings' purchase of the initial title binder is that they wanted the assurance of a title expert that they had marketable title. The Court notes that Mississippi Valley, like any other title insurance company, holds itself out as an expert in the examination of real estate titles. In reliance on this expertise the Vinings retained Mississippi Valley to insure their title. Mississippi Valley certified to the Vinings that they had good title by the binder of July 2, 1975, which bore number J-20878." Similarly, when the purchaser-insured incorporated the commitment legal into the purchase agreement, and the title defect was discoverable with an accurate title search, one court reasoned that the insured may be estopped to sue for misrepresentation. The jury refused to find the seller liable, and the court would not overturn the verdict. *Combs and Transamerica Title Ins. Co. v. Loebner*, 814 P.2d 531 (Or.App. 1991).

[151] *Harvey v. J & H Holdings Inc.*, 310 So.2d 371 (Fla.App. 1975). The court reasoned: "There is no question that the sellers should have had knowledge of the easement. The record shows it was the sellers who granted the easement… . The sellers also contend that the easement in issue was duly recorded among the public records and, therefore, the title insurer had constructive knowledge of its existence. It is apparent that the title insurer was put on constructive notice of the easement. As a consequence, it was negligent in not disclosing the existence of the said encumbrance to the buyer after it had examined the title. In cannot be said, however, that the title insurer owed the same duty to the sellers that it did to the buyer. Put another way, the sellers do not stand in the shoes of the buyer. We can find absolutely nothing in the record to indicate that the encumbrance, i.e., easement, supra, should be excluded from the operation of the covenant of the sellers to convey title by general warranty deed free and clear of all encumbrances. The sellers simply did not convey title to the property as they had agreed to do."

5.9.2.2 Reliance On Commitment In Warranting Title

Some courts have accepted as a defense to subrogation the argument that the seller relied on the insurer's title evidence in warranting title free of the defect that caused the policy loss.[152] Other courts have not accepted this defense.[153] To prevail in this defense, the seller must show actual reliance on the title commitment, and/or that the insurer consciously granted affirmative coverage.[154] The mere fact that the seller paid for the policy, as is customary in many jurisdictions, does not make the seller a third party beneficiary.[155] When a state follows the rule that a grantee may not pursue the grantor for breach of warranty unless the grantee has relied on the warranty to induce it to purchase the property, the insurer as subrogee must establish that the insured-grantee did so rely.[156]

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[152] See *Malinak v. Safeco Title Ins. Co. of Idaho*, 661 P.2d 12 (Mont. 1983).

[153] *First American Title Ins. Co. v. Ramsundar*, 2007 WL 2660072 (Cal.App. 4 Dist.) (unpublished) (seller's claim that he relied on title insurance policy as representation that his own deed of trust was extinguished did not prevent insurer from suing on title warranties after paying off debt); *Campbell v. Summit Plaza Associates*, 192 P.3d 465 (Colo.App. 2008) (seller did not rely on policy access coverage in warranting title); *JV Properties, LLC v. SMR7, LLC*, 2014 WL 7277393 (Nev.) (unpublished) (seller's covenant against encumbrances in a grant, bargain and sale deed not rendered unenforceable because buyer bought title insurance policy).

[154] In *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409 693 P.2d 697, 700-1 (1985), the court said: "There is no showing, on this record, of reliance, damage or an expectation of a search and disclosure. This defendant knew of the assessments long before the plaintiff ever issued a preliminary commitment. When the defendant's agent ordered title insurance, the defendant had already listed the property subject to the buyer assuming the sewer assessment. The defendant's awareness and knowledge are evidenced by the deletion of the assumption requirement from the listing. Again, long before asking the plaintiff to insure title, the defendant had contractually agreed with its purchasers (the only insureds) to convey title free of the assessments. There is no showing that this defendant expected an 'abstract' of title or that even if it had, that it relied thereon in any manner. In fact, had the assessments been disclosed, the defendant would have had to pay them from the closing proceeds. The defendant is merely paying, through subrogation, that which it had knowledge of and had agreed to pay long before the plaintiff became involved." Similarly, in *Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 17 S.W.3d 467 (Ark. 2000), the court upheld the insurer's right of conventional subrogation against a seller, saying that the seller had shown no reliance on the commitment and was not an intended beneficiary anyway: "Here, where the insurer is exercising express contractual rights of subrogation in a claim against one other than its insured and against one to which it owed no legal duty, or who demonstrated no reliance, equitable defenses are unavailing. Welch acknowledges that it was not a named insured on the title policy but argues that Chicago Title owed it a legal duty and breached that duty. … Clearly, our cases, and those of other jurisdictions, establish a duty on the part of title companies to make a reasonable search of the relevant records to detect clouds or defects in title. However, neither our courts, nor those of other jurisdictions, have held that that duty extends beyond those to which the company is contractually obligated, or to those shown to have reasonably relied upon the search. Welch also relies upon *Lawyers Title Ins. Corp. v. Capp*, 174 Ind.App. 633, 369 N.E.2d 672 (Ind.App. 1 Dist. 1977), but it, too, is quite different from the case at bar. In particular, the *Capp* court noted that the title insurance policy itself involved a tripartite agreement involving the vendor, vendee, and insurer. Moreover, Capp (the vendor) demonstrated reliance upon lawyers. In the instant case, Welch failed to show either contractual obligation or reliance."

[155] See §7.6 for a complete discussion of third party beneficiary claims. As to sellers specifically, see *Wolff v. Commercial Standard Ins. Co.*, 345 S.W.2d 565 (Tex.Civ.App. 1961); *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409, 693 P.2d 697 (1985). In *Kenny v. Safeco Title Ins. Co.*, 113 Cal.App.3d 557, 169 Cal.Rptr. 808, 810 (Cal.App. 4 Dist. 1980), the court stated: "There is a contention by appellants that because they agreed to pay the premium on the policy of title insurance in the escrow as consideration for the sale that this would bootstrap their position and create a 'duty of care' on the part of the title insurer or render the agreement between the buyer and the title

In *Boatright v. Texas American Title Co.*,[157] the seller's payment of the premium was considered a factor in denying the insurer the right to recoupment against the seller. However, in *Boatright*, the insurer's agent breached a "fiduciary" duty to the seller as escrowee, and the agent had a special knowledge of the omitted lien because of its role as escrowee. This breach of duty and knowledge were imputed to the underwriter to cancel its right to pursue the seller.

5.9.2.3 Insurer's Drafting Of Deed

When the insurer drafted the deed creating the title defect, that negligence may be considered sufficiently "active" to deny the insurer indemnity against the seller. An insurer which drafts a deed assumes a duty to the seller separate from the title policy.

However, the deed drafting must itself have been a strong contributing factor in the loss for the insurer's recovery to be denied. When the seller had created the easement at issue, the mere fact that the insurer later drafted the seller's deed did not erase the seller's duty to indemnify.[158]

5.9.2.4 Abstractor Negligence Of Insurer

A seller may also assert a retaliatory cause of action against the insurer for abstractor negligence, if the commitment was inaccurate.[159] Some courts take the view that an insurer is not

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insurer a third party beneficiary contract for benefit of appellant. Appellant would still be an incidental beneficiary and, as such, have no cause of action against respondents." *Independent Settlement Services, LLC v. Lewis*, 296 F.Supp.3d 194 (D.D.C. 2018) (title agent forced to buy loan it had closed because it failed to get insured deed of trust recorded received judgment against borrower under note; borrower's assertion that he paid for title insurance policy found to be irrelevant).

[156] Illinois has adopted this rule. In *Chicago Title Ins. Co. v. Bass*, 31 N.E.3d 444, 391 Ill.Dec. 768, 2015 IL App (1st) 140948 (Ill.App. 1 Dist. 2015), the insurer paid a loss and sued the grantor to the insured for breach of warranty. The court held that, because the insureds were not induced to purchase the property by the seller's warranty deed, the breach of warranty claim failed. The facts in *Bass* were highly unusual, and involved a tax sale. A Texas court rejected the identical argument, that a "reliance" element should be made a condition to recovery for breach of warranty, in *Romero v. Stewart Title Guar. Co*., 2015 WL 348870 (Tex.App.-Amarillo 2015) (unpublished). In that decision, a Texas appeals court enforced the title insurer's right to sue the seller for breach of warranty, as subrogee of its insured.

[157] 790 S.W.2d 722 (Tex. 1990).

[158] *Harvey v. J & H Holdings, Inc.*, 310 So.2d 371 (Fla.App. 1975).

[159] For example, in *Lawyers Title Ins. Corp. v. Capp*, 174 Ind.App. 633, 369 N.E.2d 672 (Ind.App. 1 Dist. 1977), the court upheld a judgment denying an insurer recovery against a seller, saying that the trial court may have construed the settlement paid by the insurer as settlement of a claim against it for abstractor negligence. The court apparently assumed that a seller in Indiana has a valid cause of action as a third party beneficiary for abstractor negligence in the issuance of a title commitment. *Capp* was effectively overturned by *Puente v. Beneficial Mortgage Co. of Indiana*, 9 N.E.3d 208 (Ind.App. 2014), which held that a title insurer could not be denied the right of subrogation based on the assertion that it had been negligent in the way in which it insured title. In *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409 693 P.2d 697 (1985), the court refused to the seller to assert such a defense. The court prudently recognized that there are far-reaching consequences in recognizing abstractor negligence on a title commitment, and then extending such a cause of action to a seller as a third party beneficiary. It stated "the record is devoid of any evidence, factual or empirical, of the practices, intentions, expectations or consequences of adopting or rejecting the various theories of liability or nonliability. In absence of a full adversary review of such evidence, caution is warranted when considering a departure

entitled to the equitable remedy of subrogation when it has been negligent.[160] In *First American Title Ins. Co. v. Haggins*,[161] the court resorted to abstractor cases to deny an insurer its contractual subrogation rights:

> Where an imperfect title search has been performed and relied upon by a lender, equity will not reward such negligence by applying the doctrine of subrogation in favor of the negligent party. [citing *State v. Jones*, 61 Ohio St.2d 99 (1980) and *Ft. Dodge Bldg. & Loan Ass'n v. Scott*, 86 Iowa 431 (1892), both abstract cases] To do so would encourage carelessness. ... [W]here one's own negligence precipitates a loss, a court may apply the precepts of equity to deny subrogation.[162]

Such a rule would ordinarily result in unjust enrichment of the seller. In acknowledgment of this, the *Haggins* court emphasized that the seller had introduced evidence that it had paid off the mortgage which was the subject of the warranty claim. If so, the court found, it was the lender which was unjustly enriched, by being paid a second time by the title insurer.

A closely related issue is whether or not the insurer's abstractor negligence precludes the insured from asserting equitable subrogation to step into the shoes of a paid-off lienholder. Those cases are discussed at §15.2.

5.9.2.5 Insurer's Escrow Negligence Or Defalcation

The insurer's recovery against a seller may be prohibited by the insurer's escrow or closing negligence or malfeasance. For example, when the seller's deeds of trust were not paid off because the closer took the money, and the closer was approved by the insurer "to act as its special counsel in the matter,"[163] the insurer was precluded from suing on the seller's warranties.[164]

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from long established precedent." 693 P.2d at 700. The identical conclusion was reached in *Calamari v. Grace*, 98 App. Div.2d 74, 469 N.Y.S.2d 942 (1983).

[160] In *Lawyers Title Ins. Corp. v. MHD Corp.*, 2010 WL 4157301 (Ohio App. 6 Dist.), 2010-Ohio-5174 (unpublished), an Ohio court denied an insurer's right to sue the seller for breach of warranty, saying "[i]n order to entitle one to subrogation, his equity must be strong and his case clear. …Where an imperfect title search has been performed and relied upon by a lender, equity will not reward such negligence by applying the doctrine of subrogation in favor of the negligent party."

[161] 1998 WL 32776 (Ohio App. 8 Dist.), rev.den. 82 Ohio St.3d 1434, 694 N.E.2d 982 (1998) (unpublished).

[162] Id. at 3.

[163] *Jacobs v. Chicago Title Ins. Co.*, 709 F.2d 3 (4th Cir. 1983). The insurer had apparently issued a closing protection letter to the lender, although the opinion does not so state. See Chapter 14 regarding the interpretation of the assurances under the closing protection letter.

[164] The *Jacobs* court found that the closer, an attorney, was counsel for both buyer and seller (and perhaps lender). In addition, however, it found the closer to be the insurer's "special" counsel. The court felt that the insurer and lender were in a better position to "monitor" the closer, and thus became equitably estopped from shifting the liability back to the seller.

5.9.2.6 California Deed Of Trust Defenses

In California, an insurer seeking to pursue a seller for personal liability on a note after buying out an insured deed of trust may be barred by the statutory requirement that the insurer first pursue security rather than persons in recouping a loss.[165] Also, the insurer may be prohibited from suing the seller if the insured deed of trust is considered "purchase money."[166]

5.10 Indemnities--Recoupment On

Insurers sometimes commit to protect an insured against a risk based on an indemnity[167] given to the insurer by a party other than the insured. In most situations, the indemnitor is the seller or borrower. Construction lien indemnities are sometimes given by the general contractor. Recoupment on an indemnity is not by subrogation, since the indemnity is given directly to the insurer to induce it to issue an insurance coverage. Construction lien indemnities are further discussed at §5.10.2.

5.10.1 Asserting Rights Under Indemnities

The claim administrator will typically investigate whether or not an indemnity was provided to the insurer to assume a known risk. If one has been signed, it is a common custom to have the original indemnity delivered to the claim administrator for safekeeping.

The claim administrator will want to read the indemnity to see if it is secured by cash or other collateral. If so, the collateral should be located, and the indemnity reviewed as to the conditions

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[165] Code of Civil Procedure § 726. In *Lawyers Title Ins. Corp. v. Dedmore*, 2014 WL 4354663 (Cal.App. 1 Dist.) (unpublished), California's one-action or anti-deficiency law was applied to preclude a *title insurer* from collecting from the owners on the note after the insurer bought the loan and reconveyed the property in order to resolve the claim under the loan policy. In *Dedmore*, the insurer did not make a credit bid and did not assert in the reconveyance that the debt had been paid or discharged, resulting in a distortion of the law.

[166] This defense is based on Code of Civil Procedure § 580(b), which prohibits deficiency judgments on purchase money deed of trust loans.

[167] The term indemnity is used consistently in this text because it is the most common and descriptive term. An indemnity may also be termed a hold harmless agreement, undertaking or indemnity bond. An example of fairly standard indemnity language is found in the instrument at issue in *Bell v. Commonwealth Land Title Ins. Co.*, 494 N.E.2d 997, 998-9 (Ind.App. 1991), which read:

"This agreement by and between [parties], witnesseth that:

"Whereas Second Party has been requested to issue a policy or policies of title insurance covering the title to the following described real estate, to wit:

[Legal description], and,

"Whereas said title is subject to the following defects, objections and/or encumbrances, to-wit:

[Title matter], and,

"Whereas said insurer has been requested to issue its said policy or policies of title insurance without exception to or specifically insuring against the foregoing defects, objections and/or encumbrances, First Party hereby agrees to fully protect and save harmless the said company from any and every expense, loss or damage which it may suffer, expend or incur under, by reason of or arising out of the policy or policies of title insurance referred to above by reason of the foregoing defects, objections and/or encumbrances."

under which the collateral may be used by the insurer. The collateral should be kept in an account or place beyond the indemnitor's control. This avoids the possibility that the indemnitor will find a way to convince the bank to release the funds or other collateral to the indemnitor.[168] See §5.10.3 below regarding indemnity collateral.

The insurer should give the indemnitor notice that the risk for which the indemnity was taken has ripened into a claim. If the indemnity obligates the indemnitor to defend an action and one is pending, the insurer may wish to tender defense to the indemnitor. Two issues normally come up regarding defense: choice of counsel, and control of the litigation. If by state law the insured has its choice of counsel, but the indemnity allows the indemnitor to choose counsel, the indemnity will be of little use. Therefore, most indemnities drafted by insurers take control away from the indemnitor. If the indemnity has been favorably drafted, the insurer's notice will merely identify the counsel chosen for the insured, and advise that the attorney's statements will be sent for payment on receipt.

The insurer typically advises the indemnitor of the status of the claim. The insurer may elect to encourage the indemnitor to settle the matter. If the insurer gets into settlement negotiations, it will normally keep the indemnitor informed as well as time permits. Notice avoids the argument that the insurer settled as a volunteer.

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[168] *Ransom Distributing Co. v. Lazy B., Ltd.*, 39 Colo.App. 137, 561 P.2d 1276 (Colo.App. 1977), provides a sobering example of an indemnitor who got back his collateral to the insurer's harm. A developer gave an indemnity against a judgment secured by money. The money was deposited at the indemnitor's bank. When the developer appealed its judgment, the insurer was induced to write the court agreeing to be surety on appeal. When the developer lost the appeal, the creditor asked for the money. The bank refused to release it, because it had taken the escrowed funds as collateral for a new loan to the developer. The insurer was required to pay out the entire judgment, plus costs and interest. The court did allow that the insurer "may have" an action against the developer or the bank.

5.10.2 Enforcement Of Indemnities And Affidavits

FORM 68, Appendix A
Demand on indemnitor

Title insurers frequently provide assurances to their insureds based on protections from others. The two most common such inducements are indemnities and affidavits. An indemnity is a contract, and all rules regarding construction of contracts apply.[169] The insurer must bring an action on an indemnity within the applicable limitations period.[170] Insurers take various types of affidavits from sellers, borrowers and others. The insurer is entitled to sue the maker of a false affidavit that was given to induce the insurer to assume an unknown risk.[171]

The indemnitor may raise a number of defenses when the insurer seeks to enforce it.[172] The

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[169] *Bell v. Commonwealth Land Title Ins. Co.*, 494 N.E.2d 997 (Ind.App. 1991); *Liberty Steel Co. of Houston, Inc. v. Guardian Title Co.*, 713 S.W.2d 358 (Tex.App. 1986).

[170] In *Chicago Title Ins. Co. v. Plitt Theaters, Inc.*, 1995 WL 716641, 1995 U.S.Dist. LEXIS 18009 (N.D.Ill.) (unpublished), the court found that the applicable limitations period began to run only when the insurer paid a claim of loss, but that a companion agreement to pay the tax lien was breached as soon as the taxes were not paid.

[171] *Windsor Village, Ltd. v. Stewart Title Ins. Co.*, 2011 WL 61848 (Tex.App.-Houston (14 Dist.)) (unpublished) (seller who concealed filed mechanic's lien on sworn affidavit liable to insurer; court rejected defense that insurer should have discovered lien in title search); *Fidelity Nat'l Title Ins. Co. v. 1st Trust Title, Inc.*, 2011 WL 5025221 (M.D.Tenn.) (unpublished) (insurer entitled to judgment against borrower who was also a title agent and who lied about an existing mortgage on his property on lien affidavit submitted to induce insurer to insure title free of mortgage); *Wasserberg v. Flooring Services of Texas, LLC*, 376 S.W.3d 202 (Tex.App.-Houston (14 Dist.) 2012) (builder seller liable to insurer for false affidavits at new-home sale closings stating there were no unpaid subcontractors); *First American Title Ins. Co. v. Howell*, 2017 WL 3763997 (La.App. 1 Cir. 2017) (unpublished) (sellers liable to insurer for losses paid based on false statements about property ownership in owner's affidavit); *Stewart Title Guar. Co. v. 2485 Calle Del Oro,* LLC, 2018 WL 3222610 (S.D.Cal. 2018) (unpublished) (court granted judgment to insurer on title affidavit containing indemnity language that falsely stated that title was free and clear, when in fact indemnitor and others had forged reconveyances of deeds of trust). See §5.11 for cases concerning the affiant's right to a discharge in bankruptcy of the debt owed to a title insurer for having provided a false affidavit.

[172] *First American Title Ins. Co. v. Lyons*, 2012 WL 1307086 (Cal.App. 5 Dist.) (unpublished) held that an indemnitor's false statement in the escrow instructions that title was free of liens was not an exercise of free speech, and action by insurer-escrowee for damages caused by the false statement was not barred by California Civil Code § 425.16, the anti-SLAPP action statute. In a later decision in the same suit, the court held that the insurer's recovery against the indemnitor was not barred by its alleged failure to conduct an adequate title search. *First American Title Ins. Co. v. Lyons*, 2014 WL 3697248 (Cal.App. 5 Dist. 2014) (unpublished). In *Chicago Title Ins. Co. v. NWJ Investment Fund, IV, LLC*, 2013 WL 1500446 (S.D.Ind.) (unpublished), the court enforced an indemnity against the individual who signed it despite his protest that he had intended to sign it as an officer of the entity that owned the property, and rejected his argument that the indemnity was not enforceable because it was not signed by the insurer, although there was a signature block for the insurer on the instrument. In *Old Republic Nat'l Title Ins. Co. v. Warner*, 2011 WL 2708708 (N.D.W.Va.) (unpublished), later decision at 2013 WL 2403597 (N.D.W.Va.) (unpublished), a mechanic lien indemnity signed at closing was held to cover liens that were filed after closing, despite the indemnitors' protest that they intended only to protect against lien rights that existed on the closing date. In *First American Title Ins. Co. v. Howell*, 2017 WL 3763997 (La.App. 1 Cir. 2017) (unpublished), the court found the sellers liable to the insurer for losses it paid based on their false claim of ownership of 520 acres in an owner's affidavit, and rejected the sellers' claim that the insurer had a duty to

indemnitor may assert that no consideration was given for the indemnity, but the consideration is the inducement to insure. For example, when the seller gives an indemnity, the insurer's protection of the insured buyer allows the seller to close the transaction when otherwise the buyer would refuse to close due to the title issue. In one unusual case, however, the insurer premised its protection against a quiet title suit on the payment of an additional premium equal to the likely cost of litigation. It apparently obtained the indemnity from the seller without explanation of its effect (and possibly by subterfuge). The insurer was found to have received the bargained-for consideration when it collected the premium; the indemnity was held void for lack of consideration.[173] Similarly, when the insurer also received additional premium for the risk, and the indemnitor was not aware of the legal effect of the indemnity, the agreement was void for lack of consideration to the indemnitor.[174] Also, when subcontractors and suppliers signed indemnities in favor of the insurer, the indemnities were held void when the indemnitors' checks which induced the indemnitors to sign did not clear.[175] An indemnity is not a waiver or release, and an insured who gave an indemnity to the insurer is not barred from making a claim against the insurer.[176]

An indemnitor may also claim that an indemnity given to the title insurer is void as having been obtained by duress. Given the insurer's role of third party stakeholder in a competitive free market, it is difficult to imagine the circumstances under which a title insurer would have the leverage to obtain an indemnity by duress or coercion. Rather, it is the other parties to the transaction that may have the right to obligate the seller or borrower to give an indemnity to induce the insurer to provide coverage to its insured. The duress defense was rejected when the only pressure applied to the seller was the buyer's insistence on closing the transaction under their contract. The court observed mildly that it "is never duress to threaten to do that which a party has a legal right to do."[177]

As with other contracts, the indemnity is construed against the drafter.[178] Most indemnities at

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discover the issue in its title search.

[173] *Jeter v. Title Ins. Co. of Minn.*, 424 S.W.2d 329 (Mo. 1967).

[174] *City Bank & Trust Co. v. Kwaske Bros. Constr. Co.*, 69 Mich.App. 271, 244 N.W.2d 443 (1976).

[175] *Metropolitan Life Ins. Co. v. First Security Bank*, 94 Idaho 489, 491 P.2d 1261 (1971), reh.den., 94 Idaho 489, 492 P.2d 1400 (1971).

[176] *Halprin v. Federal Deposit Ins. Corp*., 2018 WL 4088795 (W.D.Tex. 2018) (unpublished) (buyers who gave indemnities to title insurer not precluded from suing insurer based on same subject as indemnities, because in Texas an indemnity protects the indemnitee against third party claims but is not a release of claims by indemnitor against indemnitee).

[177] *Daniels v. Botts Abstracting Co.*, 2000 WL 1862124 (Tex.App.-Austin) (unpublished). In *Daniels*, the indemnity was not given to induce the insurer to protect against a title defect. Rather, the seller had engaged in so much litigation and delaying tactics to avoid selling the property that the insurer and title agent refused to close the transaction unless the seller indemnified them in advance. The court found that the indemnity was merely to facilitate the buyer's lawful insistence on closing, and the insurer did not overreach in its request.

[178] *Bell v. Commonwealth Land Title Ins. Co.*, 494 N.E.2d 997 (Ind.App. 1991).

least start out as standard forms prepared by the insurer which will be construed against the insurer. When the indemnitor drafted the entire agreement or the provision at issue, however, an ambiguity is construed against the indemnitor.[179]

The indemnity controls as to the conditions under which the indemnitor must pay. An indemnity usually describes the title defect for which it is given. This description is typically the same as the title exception in the commitment. Most indemnities require the indemnitor to reimburse the indemnitee for attorneys' fees and litigation expenses that it incurs, in addition to the cost of removing the lien or other matter that is the subject of the indemnity.[180]

Some decisions have held that an indemnity given as part of a comprehensive agreement is rendered unenforceable if the insurer breaches its concomitant duties and thereby increases the risk to the indemnitor.[181] However, other decisions have held that a construction lien indemnitor may not assert as a defense the claimed negligence of the insurer in disbursing the construction loan money, because such a defense would negate the primary assurance on which the insurer relied in giving policy coverage.[182] An indemnitor also may not escape liability for construction liens paid by the insurer on the theory that the insurer erred in determining that the policy provided coverage against the liens.[183]

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[179] See *Overmyer v. Lawyers Title Ins. Corp.*, 32 Md.App. 177, 359 A.2d 260 (1976) and *Fifth Third Bank v. Attorneys' Title Guaranty Fund, Inc.*, Case No. 03 C 4926, USDC N.D. Ill. (June 28, 2007). In the latter case, a handwritten addition to an indemnity prepared by the indemnitor's attorney was construed against the indemnitor.

[180] In *Overmyer v. Lawyers Title Ins. Corp*., 32 Md.App. 177, 359 A.2d 260 (1976), the title defect was a judgment. The indemnity recited the judgment's amount and terms in the same manner as an exception on Schedule B. The indemnitor argued that the stated sums capped his liability. The court rejected the argument, holding that he had indemnified against the judgment, which necessarily included all sums needed to fully satisfy it. In *First American Title Ins. Co. v. Spanish Inn, Inc*., 239 Cal.App.4th 598, 191 Cal.Rptr.3d 22 (Cal.App. 4 Dist. 2015), the court held that the indemnitor was required to pay litigation expenses as well as the cost of removing the liens which were the subject of the indemnity.

[181] For example, in *U.S. Life Title Co. of Ariz. v. Bliss*, 150 Ariz. 188, 722 P.2d 356 (Ariz.App. 1986), escrow instructions required the insurer to break escrow only when it had received word that the buyer's check had cleared. The insurer broke escrow on receipt of a certified check, which turned out to have a forged certification. A general indemnification in the escrow from the seller was negated by the insurer's breach of instruction. The *Bliss* decision rested in part on *Royal Properties Inc. v. Arizona Title Ins. & Trust Co.*, 13 Ariz.App. 376, 476 P.2d 897 (Ariz.App. 1970), which held that "the indemnitee is not entitled to be compensated for losses occasioned by its own wrong unless the indemnity agreement expresses such intention in clear and unequivocal terms."

[182] In *Commonwealth Land Title Ins. Co. v. Historic Ivy Tower, LLC,* 2014 WL 3799607 (Minn.App.) (unpublished), the court rejected the argument made by construction lien indemnitors that the indemnity was void because the insurer increased their exposure when it negligently "advance[d] funds without performing its duties and obligations under the Disbursing Agreements," such as collecting appropriate waivers of lien. It relied on cases holding that an allegation of negligence by the indemnified party is not a defense to enforcement of an indemnity contract.

[183] In *Chicago Title Ins. Co. v. Ali Properties 1, LLC*, 2015 WL 1612097, 2015 Il App (1st) 123301-U (Ill.App. 1 Dist. 2015) (unpublished), the court rejected the indemnitor's argument that it should not be liable under the indemnity to reimburse the insurer because the company had misinterpreted the policy coverage and paid liens that it was not obligated to pay. Similarly, in *First American Title Ins. Co. v. Spanish Inn, Inc.*, 239 Cal.App.4th 598, 191 Cal.Rptr.3d 22 (Cal.App. 4 Dist. 2015), the court upheld judgment in favor of a title insurer against mechanic's lien indemnitors for

The indemnitor may also claim that the insurer wrongly settled the subject of the indemnity without the indemnitor's consent.[184] The indemnitor may not enforce a consent provision if the indemnitor would have had no basis to refuse consent, if asked.[185] See §5.8.3 for the related subject of the volunteer defense as asserted when the insurer is pursuing subrogation rights.

Insurers often take indemnities as security for the granting of construction lien coverage, either before the project is started or before any lien has been filed. The indemnity typically will specify what action the owner or contractor indemnitor must take if a construction lien is filed. Such indemnities and affidavits are enforceable in contract. When a developer indemnity required that the indemnitor post a bond or obtain a release of any construction lien, and the developer failed to do so, the court ordered specific performance on the indemnity.[186] One defense that the construction lien indemnitor may raise is that its indemnity was not intended to protect against the particular lien that was filed.[187]

Also, insurers commonly accept owner and/or contractor affidavits stating that no work has been done within the lien period, or that all subcontractors and suppliers have been paid for any lienable work. When construction projects are ongoing and are being disbursed by the insurer or its agent, the insurer receives contractor affidavits with each draw request stating that the identified parties are the only ones who have provided labor or materials and, thus, hold lien rights. Such affidavits typically contain indemnity provisions in favor of the insurer. An insurer may sue an affiant that provided a false affidavit and to enforce any attendant indemnity.[188] A false affidavit also

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the money it paid to remove the liens and the attorneys' fees it incurred in defending the insured, finding that the indemnitors had not proven that the insurer should have denied the claim on the ground that the liens fell under Exclusion 3(a).

[184] In *Bell v. Commonwealth Land Title Ins. Co*., 494 N.E.2d 997 (Ind.App. 1991), the indemnity protected against "[a]ny judgment or decree entered in a suit for specific performance." The insurer settled the claim without notice to the indemnitor, which the court held to bar the insurer's right to recover from the indemnitor. The court said that the insurer deprived the indemnitor of the ability to obtain a dismissal of the action against herself at the same time, causing her substantive harm. Also, the court construed the indemnity against the insurer as drafter.

[185] In *Liberty Steel Co. v. Guardian Title Co. of Houston Inc.*, 713 S.W.2d 358 (Tex.App. 1986), and *Bell v. Commonwealth Land Title Ins. Co.*, 494 N.E.2d 997 (Ind.App. 1991), the courts found that the insurers voided the indemnities by failing to get the indemnitors' consent to settlements, because that consent was required.

[186] *Ticor Title Ins. Co. v. Middle Street Office Tower & Associates, Inc.*, 768 F.Supp. 390 (D.C. Maine 1991).

[187] In *Chicago Title Ins. Co. v. Ali Properties 1, LLC*, 2015 WL 1612097, 2015 Il App (1st) 123301-U (Ill.App. 1 Dist. 2015) (unpublished), the court found that the title insurer had the right to use money deposited under a title indemnity to pay mechanic lien claims, despite the owner-indemnitors' argument that the indemnity was not supposed to cover the liens because they were for work done for a tenant. In *Commonwealth Land Title Ins. Co. v. Norton*, 2005 WL 3540833 (Cal.App. 4 Dist.) (unpublished), the court found the indemnitor liable under the indemnity for protecting against the construction lien filed, including the cost of defending the foreclosure action, even though the indemnitor was both a member of the owner entity and the general contractor that filed the lien.

[188] See *Commonwealth Land Title Ins. Co. v. Norton*, 2005 WL 3540833 (Cal.App. 4 Dist.) (unpublished) (indemnitor liable under indemnity protecting against construction liens, including cost of defense of insured, even though indemnitor was both member of owner entity and owner of general contractor that filed lien; signing of indemnity found not to be an unconstitutional waiver of the indemnitor's lien rights). A contractor's lien indemnity may or may not be

supports a fraud claim.[189] If the affidavit violates a deceptive trade practice act, the insurer may collect interest and attorneys' fees.[190] However, an officer of a corporation was found not to be personally liable for fraud based on a lien waiver that contained the false representation that all subcontractors had been paid, when the officer did not personally sign the waiver.[191]

When a construction lien has been filed before the policy is issued, a title insurer will sometimes provide coverage to a party (typically a lender) based on a construction lien indemnity. Such indemnities are typically secured by money deposited with the insurer, but also provide that the indemnitor must reimburse the insurer for any amount it must pay in excess of the deposited sum to obtain the release of the lien.[192] See §5.10.3 for a further discussion of disputes over the money deposited to secure an indemnity.

5.10.3 Indemnity Collateral Disputes

When an indemnity is secured by collateral, typically the insurer is given the right to use the collateral to satisfy the title defect in its sole discretion. This is an important provision of the indemnity, because the insurer has obligations to its insured(s). The insurer's course of action should not be dictated by the desires of the party who put up the collateral. If the indemnity states that the insurer may use the collateral without notice to the depositor, no notice is required.[193] If the deposit of funds is governed by any other agreement in addition to the indemnity, the documents should be entirely consistent in their terms and stated purposes.[194]

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deemed a waiver of the contractor's right to file a lien when not paid. *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (Idaho 2009).

[189] *In re Dallam*, 850 F.2d 446, 449 (8th Cir. 1988); *In re Barber*, 95 B.R. 684 (Bkcy.W.D.Mo. 1988).

[190] *Lawyers Title Ins. Corp. v. Simonetti*, 1993 WL 408062 (Conn.Super. 1993) (unpublished). The title insurer was ruled to be entitled to collect the attorney fees expended in pursuing the indemnitor, due to his dilatory tactics, in *Collard & Roe, P.C. v. Klein*, 2003 WL 22132868 (Conn.Super.) (unpublished). The court rejected the indemnitor's claims that the indemnity was obtained by duress and coercion.

[191] *Chicago Title Ins. Co. v. Fisher*, 2007 WL 2413068 (4th Cir. (N.C.)) (unpublished).

[192] In *First American Title Ins. Co. v. Dundee Reger, LLC*, 2016 WL 1359374 (N.D.Ill. 2016) (unpublished), a title insurer insured over a construction lien based on a secured indemnity and the deposit of a certain amount of money. The indemnity provided that the indemnitor was required to reimburse the insurer for any amount it would have to pay for a release of the lien in addition to the deposit amount. The insurer obtained a release of the lien, which cost more than the deposit amount. The court held that the indemnitor was required to pay the balance to the insurer.

[193] *Commonwealth Land Title Ins. Co. v. Leidner*, 169 A.D.2d 699, 564 N.Y.S.2d 187 (N.Y.A.D. 2 Dept. 1991); *First American Title Ins. Co. v. Dundee Reger, LLC*, 2016 WL 1359374 (N.D.Ill. 2016) (unpublished). However, in *Bell v. Commonwealth Land Title Ins. Co.*, 494 N.E.2d 997 (Ind.App. 1991), the insurer settled the claim without notice to the indemnitor, which the court held to bar the insurer's right to recover from the indemnitor. The court said that the insurer's settlement without notice deprived the indemnitor of the ability to obtain a dismissal of the action against herself at the same time, causing her substantive harm.

[194] In *1616 Reminc Limited Partnership v. Commonwealth Land Title Ins. Co.*, 778 F.2d 183 (4th Cir. 1985), for example, an indemnity was taken for construction liens on a troubled project. Three separate documents were executed:

An indemnity typically provides that the money held as collateral may be used to defend the insured against the defect or lien for which the insurer provides an assurance in exchange for the taking of the indemnity. The insurer may use the money for all expenses it incurs in defending the insured against the indemnified matter, as well as its own expenses in a dispute with the indemnitor.[195] However, if the funds may not be sufficient to satisfy all claims and expenses, the insurer may elect in prudence not to seek reimbursement from the funds until the indemnified matter is resolved.[196]

If an indemnitor is failing financially, other parties may come after money or other collateral being held to secure the indemnity, just when the insurer most needs the collateral. These attacks may take several forms. First, the indemnitor may take the money or pledge it to another creditor contrary to the terms of the indemnity.[197] Second, the indemnitor's bankruptcy trustee may assert a claim to the money. Finally, other creditors of the indemnitor may seek to garnish or otherwise seize the collateral. This section will deal with the latter two issues.

An issue sometimes arises as to whether or not money that secures an indemnity is the property of the indemnitor's bankruptcy estate. The bankruptcy trustee is charged with laying claim to all legal or equitable interests of the debtor in property, wherever located, as of the date the case is commenced.[198] Funds given to an insurer as its protection in giving insurance coverage should not be considered property of the debtor unless the risk for which the indemnity was given has expired. State law dictates in determining ownership of property in bankruptcy cases.[199] In the typical secured

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an agreement, an escrow agreement, and an indemnity. The indemnity was given by the owner to allow the insurer to give lien coverage to the lender. The insurer at least implicitly acknowledged its willingness to at least share in the expense of removing the liens. Later, the owner and insurer fought about who was entitled to the money. Although according to the escrow agreement the insurer was entitled to the money, the court found that the agreement superseded the escrow. The insurer was allowed to deduct its litigation expenses, but the owner got the balance of the funds.

[195] In *Fifth Third Bank v. Attorneys' Title Guaranty Fund, Inc.*, Case No. 03 C 4926, USDC N.D. Ill. (June 28, 2007), the court held that the insurer had the right to use the money which secured the indemnity to remove the liens at issue, and was not fettered by the indemnitor's claimed right to dispute the liens first. The court also approved a substantial award of attorneys' fees to be paid by the indemnitor. In *Hopper v. Lawyers Title Ins. Corp*., 2014 WL 1989689 (Cal.App. 2 Dist.) (unpublished), the court affirmed the insurer's right to deduct about $30,000 from the indemnity fund to pay its fees in defending an action brought by the indemnitor to demand the return of the money.

[196] In *West Suburban Bank v. Attorneys' Title Ins. Fund, Inc.*, 326 Ill.App.3d 502, 761 N.E.2d 346, 260 Ill.Dec. 502 (Ill.App. 2 Dist. 2001), the indemnity provided, "In case of litigation involving the fund or the rights of any person or corporation hereunder, the cost, expense and attorney's fees of the company may be paid or retained by the company out of the fund." This provision would appear to allow the insurer to deduct its fees. When there was litigation about the indemnity, the court put the request to deduct funds in abeyance until the entire matter was resolved.

[197] See *Ransom Distributing Co. v. Lazy B., Ltd.*, 39 Colo.App. 137, 561 P.2d 1276 (1977).

[198] 11 U.S.C. § 541(a)(l).

[199] "Our inquiry must begin with state law for the Bankruptcy Code does not provide rules for deciding whether a debtor has an interest in any particular property. 4 Collier on Bankruptcy, ss. 541.-02[l] (L. King 15 ed. 1985). The nature and extent of the debtor's interest in property are determined by state law. Id. Property rights under section 541 are defined by state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). However, once

indemnity, the only money that may later be returned to the indemnitor is the excess after payment of the lien, and any accrued interest. One court thus determined that an equitable trust existed on behalf of the indemnitor as to any money in excess of that needed to pay off the mortgages for which the indemnity was taken. The court held that, "while we agree with the district court that the entire fund is technically property of the estate, we cannot agree that the debtors' interests in the main fund are unlimited."[200] The court ordered that any excess after payment of the mortgages, and any accrued interest, be paid to the estate.

Creditors sometimes attempt to levy on or garnish money being held in escrow[201] or held as collateral for an indemnity to the insurer-escrowee. As with the cases cited above involving bankruptcy, the question is quite simply "Whose money is it?" Generally, money held in escrow is considered unavailable for garnishment or levy. One court reasoned:

> Although we are cited no Michigan authority as to whether money in escrow can be reached by garnishment, several other states have taken the position that it cannot. … In that case, the plaintiff creditor attempted to attach $1,000 which the judgment debtor had placed with his attorney. The debtor-client had instructed the attorney to pay over the $1,000 to a swimming pool contractor in settlement of previous unrelated litigation, if and when the contractor corrected allegedly faulty workmanship in the debtor's swimming pool. The court noted that the condition under which the money was to be turned over to the swimming pool contractor had not been met at the time of the garnishment. The court held that the test of the right to garnishment is whether the client could bring suit for return of the money, and that since there had been no showing negating the continued validity of the escrow, the client could not have demanded a refund, and therefore the fund was not subject to attachment at the hands of the clients' creditor.
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> The same rationale applies in the case at bar. Honey Brook [the escrow party] could not have reached the escrowed funds,[FN2] except for the limited purpose of paying the holders of mechanics' liens upon receipt of a discharge or settlement with them. Therefore we hold that the funds held in escrow could not be attached by the plaintiff... .
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> [FN2] Had the terms of the escrow been completed or aborted, a different result would be very likely.[202]

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that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate." *In Re Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. (Ark.) 1985).

[200] *In Re Garrott & Sons*, 772 F.2d 462, 467 (8th Cir. (Ark.) 1985).

[201] In *National Title Agency LLC v. JPMorgan Chase Bank, NA*, 429 P.3d 758, 2018 UT App 145 (Utah App. 2018), a creditor of a title agency successfully garnished the title agent's escrow account. The court found the bank not liable to either the title agency or its customers for having handed over $600,000 of trust account money to the creditor without approval from the title agency.

[202] *City Bank & Trust Co. v. Kwaske Bros. Constr. Co.*, 69 Mich.App. 271, 244 N.W.2d 443 (1976).

Any such question should be avoided if the escrow agreement or indemnity states that the money is the property of the insurer while held for the stated purpose, or that the insurer is the sole or primary beneficiary. Funds held by a title insurer to secure an indemnity and delivered from loan proceeds are not the property of the lender, and the insurer is not obligated to turn over the money to the lender while still at risk for the lien for which the indemnity was taken.[203]

Collateral held by an insurer as security for an indemnity is not held in escrow. Rather, the collateral is either the property of the insurer while held by it, or is held under a security agreement.[204] However, once the purpose of the indemnity is completed, the money securing the indemnity is the property of the indemnitor.[205] A standard-form Chicago Title Insurance Company Agreement With Deposit to Protect Against Defects in Title (secured indemnity) was at issue in *In re LDM Development Corp.*[206] After depositing cash with the insurer under the indemnity, LDM gave the Larsons a security interest in the money to secure a loan. In its bankruptcy, LDM disputed the Larsons' claim to the money, arguing that the funds were held in escrow, rendering their pledge invalid. The court rejected the argument, characterizing the secured indemnity as a security agreement, not an escrow. Further, the court relied on case law to the effect that money held under a

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[203] *West Suburban Bank v. Attorneys' Title Ins. Fund, Inc.*, 326 Ill.App.3d 502, 761 N.E.2d 346, 260 Ill.Dec. 502 (Ill.App. 2 Dist. 2001). In this case, a title insurer held money to protect against a broker lien. The lender sued the broker to release the lien, then demanded the money securing the indemnity. The order releasing the broker lien was overturned, and the court held that the insurer was entitled to keep the money because the bank's security was in the assurance received from the title company, and it needed the money to make good on that assurance: "...Attorneys' Title issued a title insurance policy to West Suburban Bank insuring West Suburban Bank first priority on its loans to the new buyer/Hotko. Clearly, Attorneys' Title would not have issued title insurance and would not have established the indemnity fund containing only $52,500 if it knew that West Suburban Bank would claim rights to the fund for liens that it had already released. Accordingly, West Suburban Bank is estopped from asserting any rights to the indemnity fund."

[204] Confusion on this issue is common, and sometimes is augmented by the insurer's wording of the form indemnity. In *Mehlman v. Dollinger*, 674 N.Y.S.2d 37 (N.Y.A.D. 1 Dept. 1998), the court held that, under an escrow created to allow an insurer to protect against a title defect, the insurer was permitted to pay attorney fees incurred in defending only the insured against the title defect, and was not permitted to use the funds to defend any other party. What the court characterized as an escrow was really a title indemnity secured by funds. Most title insurers' indemnity forms explicitly permit the insurer to draw on the deposited funds for defense of all insureds, present and future.

[205] In *Hopper v. Lawyers Title Ins. Corp.*, 2014 WL 1989689 (Cal.App. 2 Dist.) (unpublished), the court held that a borrower who gave a secured indemnity to protect against an unreleased deed of trust was required to do something to remove the instrument in order to get his money back, not merely offer legal argument as to why the lien was probably not enforceable. Because the indemnitor sued the insurer for refusing to give back the money, the insurer was also entitled to deduct its defense costs from the money deposit. In *In re Heartland Steel, Inc.*, 2003 WL 21766588 (S.D.Ind. 2003) (unpublished), the court said: "the language of the Escrow Agreement … support[s] the conclusion that Heartland Steel maintained a legal and equitable interest in the Escrow Funds. Heartland Steel had an interest in the income the Escrow Funds generated and … in any unused portion of the Escrow Funds. Moreover, if Heartland Steel had decided it no longer needed title insurance relative to the Mechanic's Liens, the Title Company would have returned the Escrow Funds to Heartland Steel's possession. Bascon and Lewis were not parties to the Escrow Agreement, and under no scenario did they have an interest in the Escrow Funds."

[206] 211 B.R. 348 (Bkcy.D.Minn. 1997).

security agreement may not also be held in escrow. Thus, the Larsons were found to have a junior pledge of the cash.

A construction lien claimant not named in an indemnity agreement was not a third party beneficiary entitled to pursue a claim against the indemnitor in lieu of collecting on its lien or judgment.[207]

5.11 Recoupment Against Bankruptcy Debtors

An insurer may assert a subrogation claim against a bankruptcy debtor. Contractual or conventional subrogation rights are codified in Section 509 of the Bankruptcy Code. One court noted that Section 509 of the Code sanctions conventional, not equitable subrogation:

> The concept of equitable subrogation is a well recognized principle of equity jurisprudence. ... Equitable subrogation is a creation of equity, not statute and should not be confused with the subrogation rights specifically set forth in section 509.[208]

That court permitted the insurer to pursue the mortgagor by subrogation, under the terms of the note and mortgage, for the attorney fees the insurer had incurred in defending the insured mortgage. Still, the right to subrogation does not depend on the Bankruptcy Code, but is an equitable principle enforceable in the context of bankruptcy proceedings.[209] An insurer may pursue an equitable subrogation claim against a bankruptcy debtor although Section 509 does not specifically sanction that remedy.

The Code generally offers the debtor a discharge of debts, in furtherance of the purpose of the Code in giving the debtor a fresh start. However, the discharge privilege under Section 727 is not available when the debtor obtained money by false statements, fraud, theft or similar conduct. Thus, for example, 11 U.S.C. § 523(a) provides that the obligation is non-dischargeable if the debt is:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> > (A) false pretenses, a false representation, or actual fraud;
> >
> > (B) use of a statement in writing—(i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive ...
> >
> > *   *   *   *
>
> (4) for fraud or defalcation while acting in a fiduciary capacity,

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[207] *Goldberg v. R.J. Longo Construction Co.*, 54 F.3d 243 (5th Cir. 1995).

[208] *In re Spirtos*, 103 Bkcy.Rptr. 240, 245 (C.D.Cal. 1989).

[209] *In re Spirtos*, 103 B.R. 240, (Bkcy.C.D.Cal. 1989), citing *In re New England Fish Co.*, 749 F.2d 1277 (9th Cir. 1984) and *In re Glade Springs, Inc.*, 826 F.2d 440 (6th Cir. 1987).

embezzlement, or larceny ... .

The Code creates a fairly high burden of proof for establishing conduct that renders a debt nondischargeable.[210]

Thus, the bankruptcy Code offers several bases on which to have debts declared to be non-dischargeable when the debtor provided a false affidavit or indemnity, stole closing money, or otherwise obtained money by fraud in connection with a real estate closing or secured loan. Insurers take various types of affidavits from sellers, borrowers and others.[211] The maker of a false title-related affidavit is liable to an insurer that was induced to give coverage in reliance on its false statements, and such liability is ordinarily not dischargeable in bankruptcy.[212] The reliance

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[210] In *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013), the United States Supreme Court held that, to establish defalcation under 11 U.S.C. § 523(a)(4), a creditor must show that the debtor was a fiduciary and that he or she consciously disregarded or was willfully blind to "a substantial and unjustifiable risk" that his or her conduct would violate that fiduciary duty. *Bullock* was applied in *In re Colson*, 2013 WL 5352638 (Bkcy.S.D.Miss.) (unpublished), which found that the title insurer had met the threshold, and declared a debt owed by an agent to a title insurer to be nondischargeable. In *In re Moses*, 547 B.R. 21 (Bkcy.E.D.N.Y. 2016), the court said that a title insurer did not establish an exemption from discharge as to a lawyer who arranged improper transfers of property that caused title losses, although a state court judge had held that the lawyer had perpetrated a fraud and had committed fraud on the court.

[211] *In re Welch*, 494 B.R. 654 (Bkcy.E.D.N.C. 2013) (deed forger received no discharge); *In re Speisman*, 495 B.R. 398 (Bkcy.N.D.Ill. 2013) (title insurer prevailed in adversary to declare debt of borrower nondischargeable under Section 523(a)(2)(A), for loan money obtained by "false pretenses, a false representation, or actual fraud," although debtor did not obtain his loan from the insurer, because title insurer provided insurance that induced lender to make the loan to the debtor); *In re Presley*, 490 B.R. 633 (Bkcy.N.D.Ga. 2013) (title insurer survived motions to dismiss and for summary judgment brought by title agent's owners in bankruptcy, in action by insurer to have money stolen from escrow account declared nondischargeable debt).

[212] See *In re Demarest*, 176 B.R. 917 (Bkcy.W.D.Wash. 1995). In *In re Dallam*, 850 F.2d 446 (8th Cir. 1988), the court said "[w]e conclude that Lawyers Title produced evidence establishing fraud and a nondischargeable debt under 11 U.S.C. § 523(a)(2): Dallam obtained payment of her business' debt by knowingly making a false statement in order to induce Lawyers Title to rely on it, and Lawyers Title's reliance on the statement caused it to lose money. The lower courts erred in holding the complaint should be dismissed." Similarly, a seller's debt to a title insurer was nondischargeable when it resulted from a deed of trust which the seller intentionally failed to list on a lien affidavit presented to the insurer at closing. The insurer bought the debt from the lender and sued the seller on the note. The court found evidence of misrepresentation in the seller's admission that he knew that the title agent had made a "mistake" by not showing the deed of trust. The court found that the seller filed bankruptcy "so that the loss would ultimately fall on someone else." The intent to deceive and profit from it made the debt non-dischargeable. *In re Lett*, 238 B.R. 167 (Bkcy.W.D.Mo. 1999), aff'd *In re Lett*, 2001 WL 43614 (8th Cir. (Mo.)) (Table) (unpublished). *In re Looney*, 453 B.R. 252 (6th Cir. BAP (Tenn.) 2011) held that an owner who lied on an affidavit delivered to the title insurer at closing, swearing that all subs and suppliers had been paid on a newly-constructed home, was not entitled to be discharged on the debt he owes for the mechanic liens later filed and paid by the title insurer. In *Davidson v. Investors Title Ins. Co.*, 2008 WL 4426142 (W.D.N.C.) (unpublished), an attorney's false statements about title were sufficient to prevent the discharge in bankruptcy of his debt to the title insurer that relied on those statements. Also, in *Sousa v. Old Republic Nat'l Title Ins. Co.*, 2008 WL 302391 (Bkcy.D.N.J.) (unpublished), when the borrower lied on a lien affidavit by failing to disclose a judgment against herself, and then lied again on her bankruptcy schedules by failing to list the title insurers who had since taken an assignment of the judgment to protect their insureds, the combined falsehoods thwarted the debtor's discharge of the debt. The court quoted a decision which said that "a debtor cannot, merely by playing ostrich and

requirement of Section 523(a)(2)(B) may be met by proof that the insured lender relied on the borrower-debtor's false statements.[213] Section 523(a)(6) of the Code applies when the debtor deliberately and intentionally injures the creditor by a willful and malicious act.[214] Section 727(a)(3) of the Code also states that the debtor is not entitled to a discharge of a debt discharge when he or she has:

> ... concealed, destroyed, mutilated, falsified, or failed to keep or preserve any

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burying his [or her] head deeply enough in the sand, disclaim all responsibility for statements which he has made under oath." *Scimeca v. Umanoff*, 169 B.R. 536, 542 (D.N.J.1993). In *In re Livingston*, 368 B.R. 610 (Bkcy.E.D.Mich. 2007), affirmed in 2010 WL 1404530 372 Fed.Appx. 613 (6th Cir. (Mich.) 2010) (unpublished), a title insurer bought two mortgage loans that the sellers failed to disclose at closing and got a judgment against them based partly on fraud. The sellers were found not to be entitled to a discharge of the judgment debt in bankruptcy, even though the judgment was premised only partly on fraud. In *In re Baxter*, 2010 WL 3447625 (Bkcy.E.D.Mo.) (unpublished), borrowers who drew on a line of credit after closing although they knew that the loan was to have been paid off and the mortgage satisfied at their refinance closing, were guilty of intentional conduct that prevented the discharge of the loan debt in bankruptcy, after the title insurer bought the loan. The insurer carefully proved how the borrowers used fraud to parlay the closing mistake rather than correcting the error. In *Stewart Title Guar. Co. v. Vasquez*, 2010 WL 1487997 (Bkcy.D.Conn.) (unpublished), a title company employee who deceived her employer into insuring title on the sale of her house without paying off the second mortgage was found not entitled to a discharge of the debt in bankruptcy. In *In re Chesson*, 2012 WL 4794148 (Bkcy.M.D.N.C.) (unpublished), the court held that the insurer had established under § 523(a)(2)(B) of the Code that a developer was not entitled to a discharge after having given the insurer a false mechanic lien affidavit. In *In re Vermilio*, 457 B.R. 863 (Bkcy.M.D.Fla. 2011), a borrower who gave the wrong loan number to the escrowee, so that a loan on a different parcel was paid off, and who quickly closed on a home equity loan on the released parcel before the insurer and lender discovered the problem, was found not to be entitled to a discharge for the loan debt. In *In re Levasseur*, 482 B.R. 15 (Bkcy.D.Mass. 2012), a borrower who sold her house and paid off her home equity loan at closing, but later drew the full amount of the loan when she realized that the bank had mistakenly not closed the account, was not entitled to a discharge of the debt in bankruptcy. In *In re Pazdzierz*, 718 F.3d 582 (6th Cir. (Mich.) 2013), a title insurer that took an assignment of a loan to resolve a policy claim was permitted to stand in the lender's shoes to sue the borrower for fraud, and the debt was found nondischargeable in bankruptcy. In *In re Speisman*, 495 B.R. 398 (Bkcy.N.D.Ill. 2013), the title insurer prevailed in an adversary proceeding to declare the debt of the borrower nondischargeable under Section 523(a)(2)(A), for loan money obtained by "false pretenses, a false representation, or actual fraud," when the debtor gave a false lien affidavit that induced the title insurer to provide insurance that, in turn, induced the lender to make the loan to the debtor. In *In re Fakhuri*, 583 B.R. 915, 65 Bankr.Ct.Dec. 168 (Bkcy.N.D.Ill. 2018), the court held that a seller's failure to disclose a judgment lien on a gap affidavit, when that judgment was recorded in the title search gap, was a false representation making the debt to the insurer non-dischargeable in bankruptcy under Code section 523(a)(2)(A).

[213] *In re Pazdzierz*, 459 B.R. 254 (E.D.Mich. 2011); *Boyajian v. New Falls Corp.* (*In re Boyajian*), 564 F3d 1088 (9th Cir. 2009).

[214] *In re Homer*, 168 B.R. 790 (Bkcy.N.D.Ga. 1994) (loan debt non-dischargeable because debtor failed to disclose lis pendens in her loan application and made other misrepresentations to lender); *In re Garcia*, 442 B.R. 848 (Bkcy.M.D.Fla. 2011) (borrower who sold property before mortgage was recorded, then borrowed against the line of credit for seven more years, not entitled to discharge of debt because his conduct was deliberate, willful and malicious; objection to discharge was brought by title insurer after it paid claim to lender); *In re Crawford*, 2016 WL 502014 (D.C.Bkcy. 2016) (unpublished) (debtor who steadfastly refused to honor settlement of title insurer's recoupment claim, and served jail time for refusal to pay sanctions awarded to insurer, was guilty of intentional and wanton behavior barring discharge of debt under this section of the Code).

> recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case... .[215]

However, when an element for nondischargeability is lacking, the debtor will receive a discharge of the debt.[216] The creditor must bring an adversary proceeding to have the debt declared non-dischargeable within the time permitted by the court order or rule, and its failure to do so within the permitted time causes the debt to be discharged and allows the debtor to avoid the lien under Section 522(f) of the Code.[217]

Insurers often take indemnities as security for the granting of construction lien and other coverages. The indemnity may specify what action the owner or contractor must take when a construction lien claim is made. In addition, insurers rely on owner and/or contractor affidavits. Owner's affidavits are used to assure the insurer that all workmen have been paid. Contractor affidavits are supplied with each draw and state that the named parties are the only ones who have

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[215] In *In re Brandenfels*, 2015 WL 5883317 (9th Cir. B.A.P. 2015) (unpublished), aff'd 692 Fed.Appx. 461, 2017 WL 2547301, a title insurer took a money judgment against a borrower after buying a junior lender's loan to solve a title claim. When the borrower filed a bankruptcy petition, the court held that the debt was not dischargeable in bankruptcy because the debtor had violated Section 727(a)(3) by hiding money from the insurer to avoid garnishment and by intentionally keeping incomplete financial records to disguise the money trail.

[216] See *In re Wassef*, 2006 WL 2417271 (Bkcy.D.N.J.) (unpublished), in which a woman who gave a false affidavit of no judgments was found entitled to a discharge of the debts because the people who accepted the affidavit should have known better. Also, when the seller concealed a mortgage debt but did not make a written misrepresentation on an affidavit, she was entitled to a discharge (and to keep the money). *In re Davis*, 376 B.R. 66, 2007 WL 2815990 (Bkcy.D.Mass. 2007). Further, in *United General Title Ins. Co. v. Jordan*, 2008 WL 1746737 (Bkcy.M.D.Ala.) (unpublished), sellers who deliberately did not pay off their mortgage loan when they sold their home, because the title insurer missed the lien, and then filed bankruptcy, were willful and malicious, two of the elements for non-dischargeability of the debt. However, the title insurer, as assignee of the loan, was not able to prove the third element, injury to the lender, precisely because the insurer paid off the loan. In *In re Koosyial*, 2016 WL 106507 (Bkcy.E.D.Tex. 2016) (unpublished); companion decision, 2016 WL 107199 (unpublished), the court held that a seller-borrower's loan debt was dischargeable despite the fact that the borrower signed a no-lien affidavit at closing. The court said the title insurer could not establish that it had relied on the affidavit because it had failed to discover in its title search the recorded mortgage that caused the title policy loss. Also, the debtor testified that he did not knowingly make a false statement, because he believed the debt was not secured by the real estate. In *In re Casali*, 547 B.R. 263 (Bkcy.N.D.Ill. 2016), the court ruled that the debtor was entitled to a discharge of his debt to his refinancing first lender caused by the debtor's failure to close his junior lien equity loan account as promised. Construing Code Section 523(a)(2)(A), for money obtained by "false pretenses, a false representation, or actual fraud," the court said that the refinancing bank "did not justifiably rely" on the debtor's promise to close the loan account but, rather, the lender was "unbelievably careless in not protecting its interest in obtaining a first lien." In *In re Moses*, 547 B.R. 21 (Bkcy.E.D.N.Y. 2016), the court said that a title insurer did not establish an exemption from discharge, when the debtor lawyer had arranged improper transfers of property that caused title losses. The court allowed the debt to be discharged although a state court judge had held that the lawyer had perpetrated a fraud and had committed fraud on the court.

[217] *In re Savino*, 558 B.R. 1 (Bkcy.Mass. 2016) (when title insurer did not seek to have debt declared non-dischargeable within time set by court, it had no right to object to debtor's request to reopen case to avoid the attachment lien for that debt under Section 522(f)).

done work. The giving of an affidavit containing false statements about liens or other title matters will preclude discharge of the debt.[218] However, under certain circumstances, such debts have been found to be dischargeable.[219]

A title insurer may also seek to have a debt declared non-dischargeable under a variety of other circumstances in which the debtor caused the insurer to incur a loss due to the debtor's theft of money, fraud, hiding of assets, false representations or embezzlement.[220]

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[218] See *In re Dallam*, 850 F.2d 446, 449 (8th Cir. 1988), quoted and relied on in *In re Barber*, 95 B.R. 684 (Bkcy.W.D.Mo. 1988), which also found that a false construction lien affidavit rendered the debt non-dischargeable. "Misappropriation of funds held in trust denies discharge for the debt, when the creditor shows (1) that the trust relationship and its legal source exist; and (2) that the creditor can identify the trust funds, if they are commingled." *In re Goldberg*, 932 F.2d 273 (3rd Cir. 1991). A corporate officer responsible for disbursing funds to laborers and materialmen was found to have defalcated when he failed to pay funds held in trust, and the debt was found non-dischargeable in his personal bankruptcy, in *In re Baird*, 22 C.B.C.2d 1598 (9th Cir. B.A.P. 1990). A contractor who falsified figures on sworn statements and lien waivers was not entitled to a discharge in bankruptcy for the debt, with the court finding that the only possible explanation was that he intended to defraud the lender, in *In re Christensen*, 2005 WL 1941231 (Bkcy.N.D.Ill.) (unpublished). The *Christensen* court used plain language in denying the discharge: "[T]he schoolyard excuses he offers--"nobody said I couldn't," "everyone else does it"—will not wash. This is a fraud case, not a contract matter in which the loan documents are relevant. … Christensen offers no evidence of such a practice, and the contention itself—that it is generally accepted for contractors to submit false statements and lien waivers and for lenders to accept them—is ludicrous." In *Stewart Title Guar. Co. v. Roberts-Dude*, 497 B.R. 143 (S.D.Fla. 2013), a borrower who failed to list a deed of trust on a lien affidavit for the sale of the house was found not to be entitled to a discharge of the debt to the title insurer that paid off the loan, despite her argument that the insurer did not justifiably rely on the affidavit because it could have located the lien in the public records. See also the companion decision of *Stewart Title Guar. Co. v. Dude*, 708 F.3d 1191 (10th Cir. (Colo.) 2013), which found the same affiants liable for misrepresentation by concealment of fact in the affidavit. The two courts differed in their rulings about justifiable reliance.

[219] In *In re Pitt*, 121 B.R. 493, 21 Bankr.Ct.Dec. 116 (Bkcy.E.D.Va. 1990), the court permitted the discharge of the debt on the regrettable theory that the insurer-escrowee knew enough facts that it should have anticipated the fraud. It held that, because the insurer-escrowee was aware that the contractor signed affidavits in blank at the beginning of the project, and that "the company was having difficulty paying the jobs," the insurer should have expected the affidavits to be false. The court did not explain why the insurer's "knowledge" should benefit the contractor by allowing it to have the debt discharged. In a second case, a contractor who admitted that he lied when signing an affidavit claiming that all subcontractors and suppliers had been paid was still entitled to a discharge in bankruptcy, because there was "no evidence" that he made the statement with the intent to deceive. *In re Oxley*, 2007 WL 2407266 (Bkcy.D.Kan. 2007) (unpublished).

[220] In *United General Title Ins. Co. v. Karanasos*, 561 B.R. 316 (E.D.N.Y. 2016), the court held that a title agency owner's large debt to the insurer, caused by a policy claim, was not dischargeable in bankruptcy because the debtor fraudulently transferred his residence to his wife within a year of the bankruptcy filing and falsely failed to list in his schedules a lawsuit brought by the insurer to overturn the conveyance. In *Stewart Title Guar. Co. v. Santa Cruz (In re Santa Cruz)*, 2014 WL 2615344 (W.D.Ky.) (unpublished), the debtor orchestrated a loan fraud scheme but only his wife signed the note. The insurer solved the title claim by taking an assignment of the loan. The debtor listed the loan debt in his petition. The insurer succeeded in having the loan debt declared nondischargeable based on the covenant to pay the debt given by the debtor in the mortgage. In *Attorneys' Title Guaranty Fund, Inc. v. Wolf (In re Wolf)*, 519 B.R. 228 (N.D.Ill. 2014), the court held that an insured was not entitled to a discharge in bankruptcy for his debt to a title insurer that had to pay off his mortgage loan after a state court determined that the insured owner had obtained title by fraud and forgery. In *Conestoga Title Ins. Co. v. Patchell (In re Patchell)*, 569 B.R. 635 (Bkcy.Md. 2017), the court said that the owner of a title agent was entitled to have her debt to her underwriter discharged in bankruptcy, even though it emanated from a lien on her personal residence, because the title agent believed her lender had agreed to release its lien. In

5.12 Taking Property Rights As Salvage

An insurer may be entitled to a conveyance from the insured of the insured property, or an assignment of the insured mortgage and note, after the insurer has paid a claim of loss. This is known as the right of salvage.

Salvage is distinct from subrogation. Subrogation permits the insurer to stand in the insured's shoes to make a claim against a third party. For example, subrogation may permit the insurer to sue the seller based on deed warranties. To permit subrogation, however, the insured does not have to deed the land to the insurer. See §5.4 regarding the use of the insured's name in a suit by subrogation. One decision found that the subrogation provisions of the policy do not apply to salvage rights.[221]

In most cases, the insurer has a right of salvage only if the insurer and insured agree to resolve the claim by "cashing out" the insured. For an owner, the insurer will typically pay the insured the fair market value of the property unencumbered by the title defect. As to a lender, salvage is normally based on the fair market value of the debt. Thus, salvage value often is not the same as the actual loss due under the policy. One treatise states: "It has been held that the insurer may either pay the actual loss suffered or pay the full loss suffered, that is, the price of the property and receive the property as salvage."[222] For example, in *Rancher's Life Ins. Co. v. Banker's Fire & Marine Ins. Co.*,[223] the court recognized the insurer's right to purchase a mortgage loan as salvage if it wished. The insurer was thus permitted either to pay actual loss based on a "with and without encumbrance" analysis ($2,800), or buy the insured mortgage and debt as salvage for the amount due on the note ($3,467.80 plus interest).

Insurers must be careful to distinguish subrogation rights, salvage rights, and the right to clear title. In *Summonte v. First American Title Ins. Co.*,[224] a judgment lien encumbered all of a new subdivision. The insured had contracted to improve the subdivision, then sell it back to his sellers.

Southern Title Ins. Corp. v. Syed Rizwan Mohiuddin (In re Mohiuddin), ___ B.R. ___, 2017 WL 2123870 (Bkcy.S.D.Tex.-Houston 2017) (permanent citation not yet available), the treasurer of a title agency who knew of and participated in transactions in which liens were not paid off at closing was found not to be entitled to have the $8 million debt to the title insurer discharged in his bankruptcy.

[221] "The subject policy expressly provides that American shall be subrogated to the rights and remedies of the plaintiffs in the event it removes the title defect. That right has been recognized in many cases. *E.g.*, *Sandler*, *supra*. American would expand the subrogation rule to require the plaintiffs to surrender their lots in return for clearing title; it claims that this is necessary to permit its pursuit of all rights and remedies of the plaintiffs against the Radostis and Franklin Stephen Construction Company. The position is unacceptable. It is not supported by any known theory of subrogation." *Summonte v. First American Title Ins. Co.*, 436 A. 2d 110, 118 (N.J.Super.Ch. 1981). See further discussion of *Summonte* at §5.11.

[222] 9 Appleman, *Insurance Law & Practice*, §5217, n.57.25, quoted with approval in *Summonte v. First American Title Ins. Co.*, 436 A. 2d 110 (N.J.Super.Ch. 1981).

[223] 190 So.2d 897 (Miss. 1966).

[224] 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981).

The contract also provided that the insured would help sell the lots, and share in commissions. When notified of the claim, the insurer bought the judgment, then demanded that the insured sell the land to the insurer and assign the resale contract to it. The court held that this was a misapplication of the notion of salvage, so overreaching that it breached the insurer's obligation of good faith dealings with its insured.[225]

On the other hand, salvage is a right, not a duty. The insured may not require the insurer to purchase the land or mortgage debt to resolve the claim. See the cases cited under §3.4, regarding the right to clear title, and in §3.4.5 as to final determination of loss, in which insureds have attempted to insist that the insurer purchase the property or the insured mortgage loan rather than exercise the right to clear title.

The insurer that buys a debt for its salvage value becomes the holder of the debt with all or most of the ramifications of being a creditor. The insurer assumes a creditor-debtor relationship with the borrower. The asset administrator may even be subject to the Fair Debt Collection Practices Act, even though his or her employer is a title insurer and not an independent debt collection company.[226] When the insurer takes an assignment of the insured mortgage loan, however, it is not uncommon for the borrower to assert that some error by the insurer estops it from collecting the debt. In *Chicago Title Ins. Co. v. Mertens*,[227] for example, the insurer missed a senior federal tax lien against the owner. When the insurer bought the loan, the owner claimed that the insurer:

> ... should be barred since it obtained the assignment of the note from HRC as a result of paying a claim on the title policy due to its negligence in failing to discover the tax lien. Appellant [owner] claims that had respondent [insurer] performed the title search properly, appellant would not have received the loan from HRC, and subsequently, would not owe on the note. Respondent contends that it is not seeking indemnity for its own negligence, but rather is attempting to recover as an assignee of a promissory note.[228]

The owner even claimed that he lost his "equity" in his home because his own undisclosed tax lien prevented him from selling the property. The trial court in *Mertens* was apparently beguiled by this

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[225] "The proposition advanced by American to its insureds is backward and absurd. It would use its obligation to remove the judgment lien as a club permitting it to acquire title and capture profits resulting from its insured's efforts in improving and selling the lots. This is entirely beyond the expectations of the insured. It is not permitted by any provision in the policy and is a significant breach of American's obligation to deal with its insureds in good faith." *Summonte v. First American Title Ins. Co.*, 436 A. 2d 110, 117 (N.J.Super.Ch. 1981).

[226] *Gulcynski v. Fidelity Nat'l Title Group*, 2007 WL 1231635 (S.D.Cal.) (unpublished). However, in *Fisher v. Congress Title*, 247 Fed.Appx. 372, 2007 WL 1862683 (3rd Cir. (N.J.)) (unpublished), a title agent that allegedly paid off judgments that were not the seller's debts, but which were against people with names similar to his, was found not to be liable under the debt-validation provisions of the Fair Debt Collection Practices Act.

[227] 878 S.W.2d 899 (Mo.App.E.D. 1994).

[228] 878 S.W.2d at 901.

reasoning, because it instructed the jury to consider the insurer's "comparative fault." The appeals court was not so confused, however, and struck down that part of the verdict. It stated:

> Appellant waited until he reaped the full benefit of the loan and now attempts to argue that the loan should never have been approved in the first place. To allow appellant to reap the benefit of the loan without repaying it would be unjust.[229]

The insurer should consider the possibility of taking salvage rather than paying a claim of loss when there is a realistic chance that it can recover more than the full amount it pays, including the additional money the insurer spends to purchase the asset. The most common such case is when the insurer is already liable for policy limits, and the value of the asset is a small fraction more than that sum.

Before taking real estate as salvage, the insurer must consider the same matters that any other purchaser of property must review. The following checklist is intended as a guide to the investigation the insurer will typically make. There may be additional actions warranted, depending on the circumstances.

1. Review the property for the risk of environmental clean-up costs and/or premises liability (unfinished construction projects, for example).

2. Obtain an accurate title search or commitment to insure, to check for liens and encumbrances.

3. Determine what permits, zoning changes or other regulatory hurdles have to be overcome in order to purchase and resell the property.

4. Get a realistic quick-sale (not fair market) valuation of the property.

5. Decide how the company would sell it. For example, choose a broker and have the broker tour the property to evaluate exposure time and price.

6. Analyze the carrying costs for the estimated holding time (taxes, insurance, any mortgage debt payments, repairs, fix-up expenses) and the closing costs (broker's commission, transfer tax, other costs of sale).

7. Calculate the estimated net proceeds from a quick sale, after deducting the costs listed at 1 and 6 above. If this net is more than the increase of the salvage cost over the actual loss, it is worth it to salvage the asset. If the net will be less than the extra sum required to buy the asset rather than pay the loss, it will not normally be worth it to pursue salvage.

[229] 878 S.W.2d at 902.

Once the insurer takes title, it must manage the property. The insurer must take numerous steps, which the claim administrator or recoupment specialist should plan in some detail before title is transferred. These actions typically include the following:

1. Have premises liability insurance in place as of the date of transfer.

2. Change the locks immediately.

3. Secure the property if vacant. Shut off all unneeded water and utility service and winterize if necessary.

4. Arrange for basic services, such as grass mowing, snow removal and security.

5. If there are tenants on the property, hire a property manager. Have a notice sent to each tenant as to the change in management and ownership.

6. Pay off liens to stop the interest clock and/or prevent foreclosure.

7. Take steps to sell the property. Sign a listing contract if you will use a broker.

8. Inspect the property to determine if repairs are needed before showing the property.

9. Take whatever action is required by company policy to have the property listed as a company asset for record-keeping and accounting purposes.

10. Solve the title defect. If it is insoluble or not yet solved when a listing contract is signed with a broker, make sure it is adequately disclosed on the listing contract and will be properly represented to prospective purchasers.

11. If the title defect still exists, determine how the matter will be treated in the listing contract, purchase agreement, and title commitment to be issued.

5.13 Reinsurance, Coinsurance, Excess Insurance And Letters Of Indemnity

Title insurers or insureds may sometimes recover policy losses from third parties in ways that are not discussed in the preceding sections of this chapter or in Chapter 17. The four main avenues of recovery are a reinsurance treaty or contract, a coinsurance contract, a liability policy issued to a title insurer and a letter of indemnity issued by one insurer to another.

Some title insurers have granted reinsurance treaties in favor of other title insurers. Such treaties often come into being to allow an insurer with smaller capital and claim reserves to write insurance policies having higher policy limits. There is no standard reinsurance treaty. All provisions are a matter of contract between the parties. Under such a treaty, the reinsurer agrees to accept liability for losses incurred on policies issued by the ceding insurer above a certain dollar amount.

Typically, the threshold is set either based on the amount of the loss or the policy. A typical reinsurance treaty automatically covers all policies issued by the ceding company that meet the reinsurance threshold. The premium paid by the ceder to the reinsurer may be based on policy volume, aggregate insurance coverage or similar measures, and is typically paid monthly or at other regular intervals. The treaty describes the risks that may not be ceded without the reinsurer's consent or independent title examination and underwriting, the ceding company's duty to give notice to the reinsurer of a potential loss, the method by which any claims are administered and paid, and the respective duties of both insurers in adjusting losses. A treaty may permit the insured to have direct access to the reinsurer to submit a claim, although such a provision is not typical.

A title insurer will also sometimes enter into a reinsurance contract with another insurer. A reinsurance contract, as opposed to a general reinsurance treaty, concerns a single policy. A reinsurance contract is typically used when the amount of the policy to be issued exceeds the insurer's self-imposed maximum policy liability amount, the insurer's statutory retention limit as set by its state of domicile or the state in which the risk is written, or the liability limit imposed by the customer. Life insurers and other large institutional lenders have traditionally imposed conservative limits on the per-policy risk amount they will accept from any one title insurer. The title insurer is required by that customer to obtain one or more reinsurance contracts from other title insurers to cover the amount of the policy above the self-imposed, statutory or customer-imposed risk retention limit.

Since 1961, American Land Title Association has promulgated ALTA Facultative Reinsurance Agreements, in order to foster uniformity in such reinsurance contracts. The current ALTA agreements were adopted on October 16, 2008. The previous versions were adopted on June 17, 2006. The term "facultative" means simply that the agreement applies to a specified transaction, as opposed to being a general treaty.

There are two versions of the standard ALTA reinsurance agreement, which are denominated as being with and without direct access. The direct access provision refers to the right of the insured to make a claim directly to the reinsurer.[230] Under a reinsurance contract that does not contain a direct access provision, the insured may only submit its claim to the ceding company; the ceder is the only party having a direct contractual right against the reinsurer(s). Direct access is very important to the insured if the ceding company becomes insolvent.[231]

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[230] Paragraph 3 of the 2008 ALTA direct access reinsurance agreement states in relevant part: "Provided Insured shall give to Reinsurer notice of any claim under the Policy within a reasonable time after notice of the claim is given to or received by Ceder and is pursuing its remedies under the Policy against Ceder, unless prevented by law or regulation, then in the event that under the terms of the Policy Insured has sustained a loss or losses which, in the aggregate, exceeds Ceder's Primary Loss Risk, the liability of Reinsurer under this Agreement shall be extended to and in favor of Insured. Failure to so notify as provided in this paragraph shall not defeat the rights of the Insured hereunder unless Reinsurer shall establish that it was actually prejudiced by the failure, and then only to the extent of the prejudice. Thereafter, if Insured requests payment of Reinsurer's liability under this Agreement directly to Insured, then this Agreement may be enforced by Insured directly against Reinsurer to the extent of Reinsurer's liability to Ceder hereunder, without diminution, defense, setoff or counterclaim which Reinsurer may have against Ceder. Any defense to liability which Ceder has against Insured shall inure to Reinsurer." The first ALTA reinsurance agreement containing a standard direct access provision was promulgated in 1985.

[231] Paragraph 6 of the ALTA direct access reinsurance agreement states, in relevant part: "In the event of the

ALTA has also drafted a Tertiary Facultative Reinsurance Agreement. Under that form of agreement, the ceder retains a portion of the risk, ceding risk at a level above the retained amount to one or more secondary insurers, and the secondary insurers cede the balance of the risk above their retained amounts to third tier (tertiary) insurers.

There has been very little litigation over reinsurance treaties or contracts.[232]

An insured can also request coinsurance rather than a reinsurance contract. The term "coinsurance" is used in the title insurance business to mean the simultaneous issuance of more than one policy, by different insurers, to the same insured for the same parcel.[233] Each policy amount is for a portion of the property's value, with the aggregate of policy amounts equaling its value. Each coinsurance policy contains an endorsement tying the policies together. The American Land Title Association has adopted the ALTA 23-06 Coinsurance Endorsement for this purpose.

Title insurers follow differing practices in how they underwrite coinsurance policies. In simplest terms, the tradition followed in the Eastern states is for each insurer to separately search and examine title, while in the Midwest and other regions of the country it is more common for the insurers to agree that one company will conduct the search and examination and the others will rely on that work in giving the policies. Under the latter system, the insurer that conducts the search and examination is termed the lead coinsurer.

Another source of recovery that can be available to an insurer for liability it has sustained is an insurance policy that it obtains from another insurer. All or some title insurers carry some form of general liability insurance or excess liability insurance. There is no standard insurance contract of

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insolvency of Ceder, the reinsurance under this Agreement shall be payable by Reinsurer directly to Ceder, pursuant to Section 4 or to its liquidator, receiver or statutory successor, except when the direct access provisions of Section 3 and the notice provisions of Section 4 have been implemented, in which case, it shall be paid directly to Insured."

[232] Some years ago, a reinsurance treaty between Fidelity National Title and Intercounty National Title led to a protracted series of lawsuits. See *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 161 F.Supp.2d 876 (N.D.Ill. 2001) and the related decisions discussed at §17.8.3. A more recent dispute involving a reinsurance contract, under which First American ceded risk to at least Old Republic and Stewart Title, has caused the issuance of a series of non-dispositive orders. In one decision, the Florida court held that First American as ceder owed a duty of good faith to the reinsurers in its underwriting of insurance risks, and may be sued for negligence as well as breach of contract by the reinsurers that allege that it took improper risks, apparently especially as to construction liens. *Old Republic Nat'l Title Ins. Co. v. First American Title Ins. Co*., 2015 WL 1349817 (M.D.Fla.) (unpublished). A later decision in the same dispute permitted the consolidation of two suits brought by different reinsurers in two states. *Stewart Title Guar. Co. v. First American Title Ins. Co*., 2015 WL 1393134 (S.D.Tex.) (unpublished). Later, the court ruled on a motion to dismiss First American's claims against Stewart Title, the main point of which was the assertion that Stewart Title had refused in bad faith to pay under the reinsurance contract. *Old Republic Nat'l Title Ins. Co. v. First American Title Ins. Co*., 2015 WL 3605192 (M.D.Fla.) (unpublished). There has been litigation over whether or not certain reinsurance treaties violate the Real Estate Settlement Procedures Act, when the reinsurer is a customer of the title insurer. See, for example, *Gerhart v. Beazer Homes Holding Corp*., 2009 WL 799256 (E.D.Cal.) (unpublished), in which the court dismissed a class action suit against a large home builder, in which the plaintiffs claimed that a reinsurance treaty between the builder's subsidiary and a title insurer was a disguised kickback. Such RESPA litigation is beyond the scope of this treatise.

[233] This use of the term coinsurance is not related to the so-called coinsurance provision of the ALTA title insurance policies, which states that the amount of insurance coverage is prorated under certain circumstances and is discussed at §3.2.3.3.

this type. The insurance policy typically runs in favor of the insurer only. Such a policy may or may not overlap with or insure any risk related to insurance policies issued by the title insurer.[234]

Finally, it is very common for one title insurer to issue a letter of indemnity to another title insurer to protect against an identified risk having to do with a particular parcel. A title insurer issues such a letter when it has issued a policy that is currently in effect and another insurer has been asked to insure a new transaction and has discovered a title risk that has not been cleared up of record, but which is not excepted in the existing policy. The indemnifying title insurer is willing to protect the new title insurer against the risk based on its assumption (or verification) that the recorded matter, such as an unreleased mortgage, is no longer a viable defect or encumbrance. The insurer thus assumes only a small risk in issuing such a letter.

Although there is no standard form of letter of indemnity, all or most versions state that the indemnifying insurer's liability is no greater than the amount of its existing policy. Most letters require the new insurer to give immediate notice to the indemnitor of any claim that would trigger coverage, and permit the indemnifying insurer to adjust that claim.

The indemnifying title insurer has two additional incentives to issue a letter of indemnity. First, all title insurers desire to receive similar letters in exchange in the future from other insurers. Second, the title insurer has the concern that its refusal to indemnify might cause the new title insurer to recite an exception that a buyer or lender might claim renders the title unmarketable. Such a marketability claim could convert a flyspeck or curable title defect into a lost contract or loan, and cause the existing title insurer to pay a loss.

The issuance of letters of indemnity is an ancient practice.[235] However, the volume of such letters has greatly increased since the 1990s. In some states, if not all, every title insurer spends a terrific amount of labor in investigating, requesting and issuing letters of indemnity. In certain states, the title insurers have entered into indemnity treaties, which recite the conditions under which each member insurer will be deemed to have indemnified any other member insurer against a risk on its existing policies. Also, in recent years, the most common reason for the issuance of a letter of indemnity has been a mortgage that is not released of record by the lender despite the fact that the loan was paid in full. Title insurers in many states have succeeded in obtaining laws that permit them to release paid-off mortgages, as is further discussed in §13.5.1. These laws allow the title insurer to cure the unreleased mortgage in conjunction with the issuance of a letter of indemnity, or in lieu of one.

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[234] In *Travelers Indemnity Co. of Connecticut v. Attorney's Title Ins. Fund, Inc.*, 194 F.Supp.3d 1224 (M.D.Fla. 2016), affirmed by 733 Fed.Appx. 524 (Mem), a title insurer settled a lawsuit emanating from a major title insurance policy claim, under which it assigned its rights under its two general liability insurance policies to the other parties. The court ruled that the carriers had no duty to indemnify the title insurer, because both policies contained exclusions for issues arising out of the handling of title insurance claims.

[235] See *Sugarman v. Fraser*, 71 Misc. 416, 128 N.Y.S. 718 (N.Y.A.D. 1911), in which it was reported that Lawyers Title requested a letter of indemnity from Title Guarantee Company, because Title Guaranty had "previously passed the same title," and the issuance of the letter "would preclude further delay" in closing the sale, in which the buyer had objected to title.

6 Title Insurance Commitment

6.1 Commitment As Offer Of Insurance

A title insurance commitment is also known as a preliminary title report or title binder. The phrase title insurance commitment is used in the ALTA forms, and in this treatise for the sake of consistency.

The 2006 ALTA commitment form stated that its sole purpose was to serve as an offer of insurance.[1] The 2016 ALTA Commitment for Title Insurance displays that fact much more prominently.[2] The following appears at the beginning of the first page of the commitment:

> **NOTICE**
>
> IMPORTANT—READ CAREFULLY: THIS COMMITMENT IS AN OFFER TO ISSUE ONE OR MORE TITLE INSURANCE POLICIES. ALL CLAIMS OR REMEDIES SOUGHT AGAINST THE COMPANY INVOLVING THE CONTENT OF THIS COMMITMENT OR THE POLICY MUST BE BASED SOLELY IN CONTRACT.
>
> THIS COMMITMENT IS NOT AN ABSTRACT OF TITLE, REPORT OF THE CONDITION OF TITLE, LEGAL OPINION, OPINION OF TITLE, OR OTHER REPRESENTATION OF THE STATUS OF TITLE. THE PROCEDURES USED BY THE COMPANY TO DETERMINE INSURABILITY OF THE TITLE, INCLUDING ANY SEARCH AND EXAMINATION, ARE PROPRIETARY TO

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[1] Condition 4 of the 2006 ALTA title insurance commitment said explicitly: "This Commitment is a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title. Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment."

[2] The 2016 ALTA Commitment for Title Insurance was adopted on August 1, 2016. It replaces the 2006 form ALTA commitment, which ALTA decertified as of August 1, 2018. At the same time, ALTA decertified the Plain Language Commitment Form (6-17-06) and the Short Form Commitment (10-16-08).

> THE COMPANY, WERE PERFORMED SOLELY FOR THE BENEFIT OF THE COMPANY, AND CREATE NO EXTRACONTRACTUAL LIABILITY TO ANY PERSON, INCLUDING A PROPOSED INSURED.
> THE COMPANY'S OBLIGATION UNDER THIS COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THIS COMMITMENT. THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

The article published by ALTA about the 2016 commitment explained this notice as follows:

> The Forms Committee also recognized court decisions holding title insurers and agents liable for negligence or negligent misrepresentation in the preparation of title insurance commitments. The committee approached this particular issue by including a bold-face "Notice" at the top of the form and incorporating it into Condition 3(a). The Notice specifically precludes third-party liability and underscores that the procedures utilized to determine the insurability of the title are proprietary to the company and create no liability to any person outside the terms of the Commitment. A company may continue to separately provide abstract or search reports if it chooses.[3]

The issue of abstractor negligence and negligent misrepresentation claims based on a title insurance commitment or policy is fully discussed in Chapter 15.

A title insurance commitment is an offer to the proposed insured named in Schedule A to insure the title to the property identified in Schedule A (or Schedule C, when used), subject to the matters recited on Schedule B-II (property-specific exclusions to coverage) and upon fulfillment or removal of the requirements and conditions listed on Schedule B-I.[4] Most states that have considered the issue have held that a title insurance commitment does not also serve as an abstract of title or a representation of the state of title. Some states have held that a title insurance commitment is or may be such a representation. See §15.12 for a state-by-state discussion of that subject.

In most states, the statutory framework for title insurance and modern decisions interpreting

[3] American Land Title Association *Title News*, August, 2016 issue, p. 6.

[4] See *Lawyers' Title Ins. & Trust Co. v. Kelly*, 132 N.Y.S. 721 (Sup.Ct.App.Div. 1912), stating that a commitment is not an enforceable contract; that the issuer "expressly assumes no liability, except under a policy to be issued thereafter;" and that the commitment "is a mere offer or application, which ripens into a contract only when the conditions of the offer have been met." In *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished), the court cited numerous decisions that explain that an insurance binder is an offer of insurance; that it recites the most important terms of the policy to be issued; and that it "gives temporary protection pending the insurer's investigation of the risk and issuance of a formal policy." The court held that the title insurance commitment was an offer of insurance that merged into the policy, when issued.

the commitment have held that a title insurance commitment is not an abstract of title or title search.[5] As a California court noted, that state has codified by statute the purpose of a commitment (there called a preliminary report):

> Insurance Code sections 12340.10 and 12340.11 make "clear that no reliance may be placed on a preliminary report or a policy of title insurance to show the condition of title." (Cal. Title Insurance Practice (Cont. Ed. Bar Supp.1988) § 2.11, p. 14.) "A preliminary report is not an abstract of title. It only reflects the terms under which the insurer is willing to issue a policy of title insurance. The terms and conditions under which the policy of insurance may be issued may or may not reflect the true condition of record title. The insurer may choose to ignore or omit a possible exception to title based on an underwriting decision." … Given Insurance Code sections 12340.10 and 12340.11, it is clear that "any title search or examination is performed by the insurer solely for the purpose of seeking to evaluate its underwriting decision in issuing the policy, not for the benefit of the insured."…[6]

Likewise, in *Caravan Products Co. v. Ritchie*,[7] the court stated that a title insurance commitment is a binder of insurance:

> The designation "Preliminary Report of Title" on the instrument delivered to plaintiff is a misnomer. That document is more than what that designation would imply--a mere report, abstract or search of title. It is a "binder," i.e., a binding receipt affording coverage pending the agreed issuance of a policy under which the title company agrees to "guaranty" the title subject only to specifically noted and listed "estates, liens, defects and questions."[8]

In *Schaible v. Louisville Title Ins. Co.*, the court also emphasized the nature of a commitment as a binder of insurance:

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[5] See the cases collected by state at §15.12. A Florida court became confused about the nature of the commitment in *Livingston v. American Title & Ins. Co*., 133 So.2d 483 (Fla.App. 1961). The court construed a commitment that used the unfortunate label of "interim title insurance binder" and observed that a legal encyclopedia's definition of "binder" is "a temporary issuance of a permanent policy." 133 So.2d at 485. The court thus refused to find that the commitment was merely an offer to insure. Florida is one of the few states that still clings to the notion that a title insurance commitment is akin to an abstract of title. See the discussion of Florida at §15.12, and particularly *Shada v. Title & Trust Co. of Fla*., 457 So.2d 553 (Fla.App. 1984).

[6] *Fidelity Nat'l Title Ins. Co. v. Miller*, 215 Cal.App.3d 1163, 264 Cal.Rptr. 17 (Cal.App. 4 Dist. 1989) (quoted with approval in *Southland Title Corp. v. Superior Ct. of California*, 282 Cal.Rptr 425 (1991); see also *Siegel v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 1181, 54 Cal.Rptr.2d 84 (Cal.App. 2 Dist. 1996).

[7] 55 N.J. 71, 259 A.2d 223 (N.J. 1969).

[8] 259 A.2d at 226 [quoted with approval in *Lawyers Title Ins. Corp. v. Edmar Construction Co.*, 294 A.2d 865 (D.C.App. 1972)].

> [T]he binder, or executory contract to insure, contains the specific provision that the defendant, upon the meeting of certain requirements will issue, "its policy of title insurance, on its usual form, … ." The acceptance of the binder and the acceptance of the policy when issued, after payment of premium assessed and the meeting of all other requirements, would appear to bind both insured and insurer under the policy contract.[9]

In order to serve as an enforceable offer to insure, the commitment must be genuine. A forged or fake commitment is void and is not binding on the insurer named in the instrument.[10]

6.2 Integration And Merger With Policy Terms

The Conditions section of the ALTA title insurance policies contain a provision that covers three distinct subjects: (a) that the policy terms provide the exclusive remedy for a breach of the contract, (b) that the policy and all endorsements are one integrated contract, and (c) that the title insurance commitment merges into the policy and does not survive as a separate contract after the policy's issuance. This provision is found at Conditions 15 of the 2006 ALTA policies, which says:

> 15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT
> (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
> (b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.
> (c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.
> (d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

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[9] 118 Ohio App. 328, 194 N.E.2d 588, 591 (1963).

[10] *DLJ Mortgage Capital, Inc. v. Kontogianis*, 102 A.D.3d 489, 959 N.Y.S.2d 18 (N.Y.A.D. 1 Dept. 2013) (title insurers not liable to lender under fake title commitments issued by real title agents on completely fake loans).

Commitment to Insure

This provision is discussed in three sections of this book. The principle that the policy and any endorsements are to be construed as a whole, and that an endorsement control only to the extent that it modifies the policy (sometimes known as the integration provision), is discussed at §9.1.3.5. The so-called "exclusive remedy" provision, Conditions 15(b), is the provision that declares that the policy is not an abstract of title, and that all claims based on the policy are governed by its terms. That provision is covered in §15.6. The subject of the merger of the title insurance commitment into the policy is discussed in this section.

The commitment is an offer to issue a policy. The 2006 ALTA commitment states that liability under the commitment terminates when the policy is issued:

> All liability and obligation under this Commitment shall cease and terminate [stated time period] after the Effective Date or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue the policy or policies is not the fault of the Company.[11]

The 2006 ALTA Plain Language commitment states, similarly:

> If the Requirements shown in this Commitment have not been met within [stated time period] after the Commitment Date, our obligation under this Commitment will end. Also, our obligation under this Commitment will end when the Policy is issued and then our obligation to you will be under the Policy.[12]

The 2016 ALTA Commitment for Insurance, adopted on August 1, 2016, separates the commitment expiration provision and the integration provision. Condition 6(f) provides the integration provision, which states:

> When the Policy is issued, all liability and obligation under this Commitment will end and the Company's only liability will be under the Policy.[13]

That statement is effectively repeated in Condition 5(g) of the 2016 commitment, which says that, "[i]n any event, the Company's liability is limited by the terms and provisions of the Policy."

Congruently, Conditions 15(a) and (b) of the 2006 ALTA policies state that the commitment merges into the policy, and that the sole contract is the policy, once issued:

> (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

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[11] 2006 ALTA Commitment for Insurance (adopted June 17, 2006).

[12] 2006 ALTA Plain Language Commitment Form (adopted June 17, 2006).

[13] The termination provision of the 2016 ALTA Commitment for Insurance is found at Condition 2.

> (b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.

Likewise, Conditions 3 of the 2006 ALTA Commitment for Insurance states:

> In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.

The effect of these consistent provisions in the commitment and policy is that the commitment merges into the policy when it is issued.[14] The failure to issue the policy immediately after closing is not a breach of the commitment. Thus, when an insurer defended its proposed insured in litigation affecting title, thus satisfying its policy duties, it was not in breach for having issued the policy after the litigation began. The court reasoned that the issuance of the policy was an administrative act:

> The issuance of a clean policy merely confirms the obligations already undertaken by the title company. Since Chicago Title ... defended the plaintiff in the rescission action pursuant to the terms of the insurance commitment, it is irrelevant that the actual title policy was not issued until after the instant action was commenced.[15]

Once the policy is issued, and the commitment is merged into it, there is no viable cause of action under the commitment.[16] Thus, when an insured admitted that the policy did not provide coverage for a post-policy act, the insurer was found to have no liability under the commitment for the same issue.[17] In *First American Title Ins. Co. v. Seaboard Sav. & Loan Ass'n*,[18] the court stated, in

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[14] See *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc.*, 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished), which so held in a lengthy and thoughtful decision.

[15] *Goettler v. Peters*, 217 A.D.2d 863, 629 N.Y.S.2d 843, 845 (N.Y.A.D. 3 Dept. 1996).

[16] In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), the insured sued on both the commitment and policy. The court said it would "briefly address ... whether any potential contractual liability arises under the subject title commitment and the title policy. ... [Insurer] argues that the title commitment expressly states that all liability under said commitment ceased to exist when the title policy was issued. ... We conclude that, based upon the express language of the title policy, any contractual liability of defendant would arise solely under the policy."

[17] In *Kirwan v. Chicago Title Ins. Co.*, 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001), the court held that a matter not disclosed by the proposed insured was excluded, and the claim was controlled by the terms of the policy: "By the time the Kirwans disclosed the Vanderwerfs' claim, the commitment had 'evaporated' by its express terms and the policy controlled, meaning that Chicago Title did not need to show that it had

construing an earlier form of title insurance commitment, that the merger provision of the commitment meant that the insurer could not be liable under the commitment after the policy was issued:

> [T]he trial court was bound to give effect to the last sentence in paragraph 3 of the Conditions and Stipulations of the commitment. That sentence, which is part of the same paragraph relied on by the trial court in imposing liability upon First American, states that "**such liability is subject to the Insuring Provisions, Exclusion from coverage, and the Conditions and Stipulations of the form of policy** ... committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein." (Emphasis added.) The trial court mentioned this language but concluded that it provided no bar to recovery by Seaboard. That conclusion was in error. The effect of the quoted language is to make the form policy, in this case the ALTA Loan Policy, as modified, part of the commitment. In other words, this language meant that there could be no greater liability under the commitment than that which existed under the form policy, as modified.

A dispute sometimes arises as to whether or not the policy accurately reflects the insurance promised in the commitment to insure. When a matter is excepted in the commitment and that exception is not removed before the policy is issued, the policy is accurately issued with the exception. The insured may not sue the insurer for breach of contract for failing to assure that the title defect had been removed.[19]

When the commitment and policy terms are not consistent, the policy controls, based on the merger clause, unless the insured can establish its right to reform the policy based on mutual mistake.[20] The commitment may be amended before closing. There are three primary means of

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suffered prejudice from the nondisclosure."

[18] 227 Va. 379, 315 S.E.2d 842 (1984).

[19] In *Arellano v. Montoya,* 384 B.R. 586 (Bkcy.D.N.M. 2008), the mortgage broker received a check at closing which included the payoff amount of the existing mortgage, but he fraudulently failed to pay off the mortgage. The court ruled that the borrowers had no recourse against the title insurer or its agent. The title policy correctly excepted the mortgage and the agent had not performed the loan closing. It found that it is industry custom to convert a requirement (the release of the mortgage) to an exception when the requirement had not been met before close of escrow. It also held that First American did not breach the policy contract, saying that "First American did not contract to not issue policies if the exceptions were not cleared up."

[20] In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co*., 320 P.3d 406 (Colo.App. 1 Div. 2014), the title insurance commitment made a requirement that the lender get a deed putting the borrower in title, which it failed to do before the borrower signed the loan documents. However, the insurer issued the policy anyway. The court held that the insurer became obligated to indemnify the insured due to the defective lien when it waived the requirement and issued the policy. In *United Bank v. Chicago Title Ins. Co.*, 168 F.3d 37 (1st Cir. (Me.) 1999), the commitment stated that access was via a "private right of way." The policy made no such statement. The insured advanced the dubious proposition that the statement in the commitment was an assurance that the property was served by a private easement.

modifying a title insurance commitment. The first is by an endorsement which changes the terms of Schedules A and B, or which adds an affirmative assurance. See §9.11 for a discussion of endorsement coverages.

The second method is known as a marked-up commitment, or "mark-up." It is common in many states for title company closers to mark up the title insurance commitment at closing. This type of closing is sometimes referred to as a "New York style" closing. See §13.1 for a further description of the "New York style" closing. There are numerous variations in the method of marking up a commitment. The essential element is that the closer delivers to the insured a binder of insurance which reflects the way in which Schedules A and B of the policy will appear, deleting requirements and exceptions as agreed, and attaching any endorsements. Typically, the closer insists on receiving all documents and money needed to record the instruments to be insured and make the title clearances committed to in the mark-up, plus the title premium. The marked-up commitment dictates the terms of the policy. Under most circumstances, the marked-up commitment is binding on the insurer, who may not issue a policy inconsistent with its terms.[21] However, in *Hess v. Baccarat*,[22] two versions of a marked-up title commitment existed. The version held by the insured deleted an easement, but the one in the insurer's file did not. The insurer prepared the policy from its version,

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The court rejected the argument, because the commitment was merged into the policy and the statement did not survive. See also *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished). However, in *Lee v. Fidelity Nat'l Title Ins. Co.*, 188 Cal.App.4th 583, 115 Cal.Rptr.3d 748 (Cal.App. 1 Dist. 2010), the preliminary title report listed two tax parcel numbers, excepted taxes for both parcels, and attached a map with arrows pointing to both tax parcels, but the insured received a deed for only one parcel and the policy insured that one parcel. The insurer was found not to be entitled to summary judgment based on the integration clause, because the insureds had the right to attempt to prove that they reasonably relied on the commitment as a representation that the policy would insure both parcels.

[21] In *Peretz Strahl, Inc. v. Fidelity Nat'l Title Ins. Co. of N.Y.*, 2005 WL 2276028, 2005 N.Y. Slip Op. 51480 (N.Y.Sup. 2005) (unpublished), a mark-up was issued that omitted an exception. The exception was put back into the policy, however, because its removal was contrary to the office underwriting guidelines. The court struck the exception from the policy, saying: "It is clear that the marked up title certificate represents the agreement of the parties as to what items were to be covered under the policy and what items excluded. Absent any evidence that there was a subsequent agreement to modify the agreement, the title policy cannot alter the agreement memorialized by the marked up title certificate." Similarly, in *Hess v. Baccarat*, 287 A.D.2d 834, 731 N.Y.S.2d 296 (2001), two versions of a marked-up title commitment existed, one omitting an easement and the other not. The mark-up removing the easement was not binding on the insurer after it issued the policy, because the commitment merged into the policy. Also, in *Frydman v. Fidelity Nat'l Title Ins. Co.*, 68 A.D.3d 622, 891 N.Y.S.2d 381, 2009 N.Y. Slip Op. 09530 (N.Y.A.D. 1 Dept. 2009), the court said that a marked-up commitment that might have shown the intent to remove a possession exception was merged into and controlled by the policy, when issued, which contained the exception. *Fresh Pond Rd. Associates v. TRW Title Ins. of N.Y.*, 176 A.D.2d 660, 575 N.Y.S.2d 316 (N.Y.A.D. 1991) held that an insured had proven a question of material fact by producing a marked-up title report with handwritten markings that seemed to indicate that a possession exception would be removed. The *Frydman* court relied on *Baccarat* and distinguished *Fresh Pond* because, in *Frydman*, there was no hand mark-up showing a closer's agreement to remove the possession exception. In *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012), the insurer had issued a mark-up at closing. The bank's closing agent stole the loan money. The court found that the insurer was not obligated to issue a policy insuring the mortgage, which failed for want of consideration.

[22] 287 A.D.2d 834, 731 N.Y.S.2d 296 (N.Y.A.D. 2001).

excepting the easement. The insurer was not bound by the inconsistent version held by the insured, because the commitment merged into the policy, and the insured failed to promptly complain about an inaccuracy when it received the policy. See §6.2 for further discussion of the merger clause.

The third method of altering the commitment is the use of a "pro forma" policy. The pro forma is neither a commitment nor a policy of insurance. Rather, it is a draft policy in the form desired by the proposed insured, minus only recording information for the instruments to be recorded and insured. The pro forma is sometimes delivered only when the insurer is prepared to issue the policy as shown. In other transactions, it is circulated, as with any other draft document, for comment and review. Absent a separate and unequivocal promise by the insurer to issue the policy as shown in the pro forma, the insurer is not so bound.[23] The 2016 ALTA Commitment for Title Insurance plainly states that any pro forma ordered by the proposed insured is not an accurate representation of the state of title.[24]

The terms of the policy may also be dictated by a party's escrow instructions. Escrow instructions are neither an insurance binder nor a policy. However, by signing the instructions, the title company with a dual role of insurer and escrowee may be found obligated, as escrowee, to do what is necessary to issue the policy in the desired form before allowing escrow to break. A shorthand method of dealing with this type of breach of the escrow instructions can be to reform the policy. In *C.A.M. Affiliates, Inc. v. First American Title Ins. Co*,[25] a tax exception was removed from the policy because the lender's escrow instructions said that all tax liens were to be paid before loan funds were disbursed. The court said that the title agent, by accepting the instructions, had committed to remove all tax liens. The commitment had two tax exceptions, one for five years' delinquent taxes and the other for two years' taxes that had been sold at a scavenger sale. The closer was given funds to redeem the sold taxes, but not to pay off the delinquencies. The policy excepted the delinquent taxes. Further, the escrow officer testified that the tax exception should not have appeared. The court rejected the argument that the closer had no authority to bind the insurer on a marked-up commitment because she was an escrowee for the lender, and escrow activities are excluded from the agency relationship. The court disagreed:

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[23] *Aouate v. Hotel Europe, Inc.*, 792 So.2d 596 (Fla.App. 3 Dist. 2001), illustrates the confusion that a pro forma can create. The insurer issued a "pro forma" endorsement protecting against liens and a pending lawsuit. The coverage was conditioned on the escrow of a large sum, which the seller did not set up or fund. The buyer refused to close because of the title defects. The court ruled that title was marketable, as evidenced by the pro forma endorsement. The buyer offered the testimony of the title officer, to show the unfulfilled conditions attached to the protections contained in the endorsement. The court refused the testimony. In a decision that might have been issued in France's Reign of Terror, the appeals court affirmed, saying that the title officer's testimony would have been mere "parole evidence" the trial court did not need to hear, because "the terms at issue were clear and unambiguous" on the face of the [pro forma] document.

[24] Condition 8 of the 2016 ALTA Commitment for Title Insurance states that "[t]he Company may provide, at the request of a Proposed Insured, a pro-forma policy illustrating the coverage that the Company may provide. A pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure."

[25] 306 Ill.App.3d 1015, 240 Ill.Dec. 91, 715 N.E.2d 778 (Ill.App. 1 Dist. 1999).

> Stearns [the escrow officer] had the actual authority to waive exceptions to title commitments. Paragraph 2 of the Agency Contract between Republic and First American states, "Agent is authorized to issue, in the name of Principal, title insurance commitments, binders and policies (including endorsements thereof)." This language expressly granted Republic the actual authority to endorse, or waive, provisions in the title commitments and policies. Stearns acted pursuant to this grant of authority when she waived exception 2 and, contrary to the parties' intentions, erroneously failed to waive exception 1.

If the terms of the policy when issued are materially different from the commitment, mark-up, pro forma or escrow instructions, the insured must take immediate action to reform the policy to match the mutual intent of the parties. In *MacDonald v. Lawyers Title Ins. Corp.*,[26] the insured was permitted to reform a policy that contained exceptions for liens not shown in the commitment. However, the insured is estopped to dispute the terms of the policy once a reasonable time has passed, because passage of time without protest signifies the acceptance of the policy's terms:

> An applicant who is advised of a ground upon which he is entitled to reject a policy tendered to him by the insurer should notify the insurer of his refusal to accept the policy as written; the notice should be given promptly, that is, at once, or at least within a reasonable time after the cause of rejection was, or should have been, discovered. A rejection cannot be made by a secret unexpressed intention. An applicant is regarded as having accepted the policy as written, if he reads it, or has it read to him, and does not notify the company of his rejection thereof.
>
> If the period of retention is so great that a return of the policy thereafter would be unreasonable, the court may determine the matter as a question of law. The court will rule as a matter of law that the insured's delay was unreasonable where the facts reasonably admit of no other conclusion.[27]

Following these principles, the court in *Imperial Savings Ass'n v. Lewis*[28] found the insured estopped to object to an arbitration provision in the policy. The 2016 ALTA Commitment for Insurance has obviated any issue about notice of the arbitration provision, by reciting its own arbitration provision at Condition 9.

The fact that certain terms found in the policy are not recited in the title insurance commitment does not render those terms unenforceable, because the insured may reasonably expect the policy to contain conditions and exclusions.[29] As a "binder" of coverage, the title insurance

[26] 1996 WL 114719, 79 F.3d 1141(Table) (4th Cir.) (unpublished).

[27] 1 *Couch on Insurance 2d* § 12:10 (1984) (footnotes omitted), as cited in *Imperial Savings Ass'n v. Lewis*, 730 F.Supp. 1068, 1072-3 (D. Utah 1990).

[28] *Imperial Savings Ass'n v. Lewis*, 730 F.Supp. 1068 (D. Utah 1990).

[29] *Farrington v. Commonwealth Land Title Ins. Co.*, 86 Wash.App. 399, 936 P.2d 1157 (1997).

commitment need not recite every provision of the policy.[30] When the commitment did not recite the standard exceptions which would appear on the policy, one court found that fact did not prohibit the insurer from putting them in the policy, saying:

> [W]e do not agree that the provision should be denied effect because it was not set forth in the preliminary commitment. Certainly, it would seem desirable that general exceptions be specifically set forth in the preliminary commitment or that a copy of the standard form policy be delivered to the insured at the same time as the preliminary commitment. At the very least, this case demonstrates that an insured should receive a copy of the standard form policy in a closing conference conducted at the title company office. We cannot say, however, that Transamerica's failure to take either course renders the provision nugatory.
>
> Both the earnest money agreement and the preliminary commitment made references to the exceptions, and the policy form setting them forth was available for Muench's examination. … Accordingly, we hold that the exceptions are enforceable in this instance.[31]

In *Kirwan v. Chicago Title Ins. Co.*,[32] the insureds argued that the policy and commitment terms were inconsistent in describing the effect of an insured's failure to disclose an off-record adverse claim of title. The insureds argued that the commitment provided more coverage than the policy, because the commitment says that the insurer must be prejudiced by a failure to disclose, while the policy does not. Thus, they said, Exclusion 3(b):

> ... leaves a bona fide purchaser who relies on a title commitment at risk, and without coverage, for the interval between a commitment and the policy date. ... [I]f the insured learns of a claim within this interval, the insurer has no duty to defend. ... It creates a "catch" for innocent insureds who learn of an adverse claim after closing while awaiting their policy, and leaves them uninsured though their premium is paid.

Given the different purposes of the commitment and policy, the court found it logical that their terms would be different:

> The Kirwans argue that "[n]either South Dakota nor Nebraska law permits a title

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[30] In *Schaible v. Louisville Title Ins. Co.*, 118 Ohio App. 328, 194 N.E.2d 588, 591 (1963), a form of commitment which bound the insurer to issue "its policy of title insurance, on its usual form," was found to "bind both insured and insurer under the policy contract." However, in *Edison v. Chicago Title Ins. Co.*, 2010 WL 559120 (E.D.Mo.) (unpublished), the insured survived the insurer's motion to dismiss based on Exclusion 3(a) based on his assertion that the policy was not issued at closing, and the exclusion was not disclosed in the commitment.

[31] *Muench v. Oxley*, 90 Wash.2d 673, 584 P. 2d 939 (Wash. 1978).

[32] 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001).

> insurer to vary terms between a title commitment and a subsequent policy," ... but no supporting authority is advanced-- perhaps because the argument must ignore the distinction between the commitment or binder and the policy. In our view, the title commitment was a separate agreement which had a different purpose than the actual title insurance policy. The commitment in effect "guaranteed" the issuance of a certain type of title insurance, subject to the conditions and stipulations in the commitment, but to be covered, adverse claims had to be disclosed to Chicago Title if knowledge thereof was acquired by the insured between binder and policy.

The court upheld the commitment's merger provision, which ties the two documents together and makes it clear that the policy terms control after it is issued. The court said that this "bait and switch" argument:

> ... ignores the fact that the commitment provides that "all liability and obligations hereunder shall cease ... when the policy ... committed for shall issue." In short, the terms of the commitment provide that it ceases to exist once the policy issues because the commitment is only an agreement to issue a policy. Therefore, the obligations of the commitment are replaced by those of the policy. There is no showing in this record that the terms and conditions of the policy were not known to the Kirwans, or knowable by them had they asked Chicago Title. Without such evidence, there plainly is no misrepresentation.

Words used in the policy are interpreted based on the policy's definitions and terms, and the commitment's terms are not relevant or dispositive in interpreting the policy.[33] In a Michigan decision, however, the insurer argued that the policy definition of "actual knowledge" did not control on the question of what information the proposed insured was required to disclose to the insurer before closing, because the non-ALTA commitment in that transaction required the proposed insured to disclosure its "knowledge or intimation" of a title risk.[34] The court acknowledged that the

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[33] *Feldman v. Urban Commercial, Inc.*, 78 N.J.Super. 520, 189 A.2d 467 (Ch. 1963), aff'd, 87 N.J.Super 391, 209 A.2d 640 (App.Div. 1965), cited in 9 Appleman, *Insurance Law and Practice*, § 5201, p. 12.

[34] In *Lawyers Title Ins. Corp. v. First Federal Savings Bank & Trust*, 744 F. Supp. 778 (E.D. Mich. 1990), the commitment obligated a proposed insured to report "knowledge or intimation" of a title defect. The court found that phrase to be broader than the "actual knowledge" required under Exclusion 3(b). The commitment at issue in the *First Federal* case is a form unique to Michigan. The court found, by contrast, that "The ALTA Model Commitment, in harmony with the ALTA Model Contract, provides that the insurer shall be relieved of liability [i]f the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim, or other matter affecting the estate or interest or mortgage thereon covered by this Commitment ... ." Thus, there is no such inconsistency between the ALTA commitment and policy forms. In *Archambo v. Lawyers Title Ins. Corp.*, 646 N.W.2d 170 (Mich. 2002), again construing the Michigan form of title insurance commitment, the court found that the commitment and policy are two separate contracts, and the disclosure provision of the commitment is erased by the issuance of the policy. The Michigan title commitment disclosure provision said: "This commitment is delivered and accepted upon the understanding that the party to be insured has no personal knowledge or intimation of any defect, objection, lien or encumbrance affecting subject land other than these set forth herein and in the title insurance application. Failure to disclose such information

commitment phrase was broader than "actual knowledge," but said that the policy language controlled even as to the proposed insured's pre-policy duties:

> The terms of the commitment and mortgage title insurance policy involved here make clear that the latter was intended to supersede the former. As noted earlier, the commitment is intended to be only an interim agreement. By its terms, its obligations exist for only six months or until the policy of insurance is issued. The policy declares that it is the entire agreement between the parties. In addition, it is clear that the terms of the policy completely occupy the same subject matter as the commitment. Both instruments specifically disclaim liability if the insured withholds any material information as to possible defects in title. However, the documents are directly inconsistent in describing the level of awareness required before liability will be excluded; the policy requires actual knowledge, while the commitment requires only knowledge or intimation. There is simply no way that these two standards can be reconciled. One must prevail over the other. ... [I]t is the later agreement which must control.[35]

The 2006 ALTA Commitment overcomes this obstacle by using the policy term "actual knowledge."

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shall render this commitment and any policy issued pursuant thereto, null and void as to such defect, objection, lien or encumbrance." In *Archambo*, the proposed insured failed to disclose a recorded federal tax lien. The insurer argued that this provision created a condition precedent to the issuance of the policy, and that Archambo's failure to disclose the tax lien voided the policy. Archambo argued that, once issued, the policy could not be voided by the failure to disclose, and that the terms of the policy controlled because of its integration clause. Further, he said, the policy does not require disclosure of recorded liens. Thus, not only was the policy in force, he argued, it provided coverage against Archambo's own federal tax lien. The trial court agreed with Archambo. On appeal, the court reversed, in a split decision, finding the policy void. Archambo appealed to the Supreme Court, which sided with the trial court and Archambo. The high court analyzed the commitment language this way: "In this case, the Court of Appeals held that a condition precedent contained in the commitment was not met, and thus that the policy never became effective. We do not agree. The relevant language of the commitment provides that '[f]ailure to disclose [the known lien] shall render ... any policy ... null and void *as to* such ... lien ...' (Emphasis added.) First, clearly this is not a condition precedent to the insurance company's *obligation to issue* a policy. The condition speaks to voiding part of a subsequently issued policy, not to avoiding the obligation to issue a policy. Second, this condition is also not a condition precedent to the effectiveness of the entire policy. That is, if this condition was not met, the policy would nevertheless become effective when issued. Rather, this condition is an attempt to render the policy, *as to those liens* of which a claimant had knowledge and failed to disclose, null and void… . In other words, this condition is an attempt to render the policy null and void, 'as to' an undisclosed lien, upon the failure to disclose such lien. But, it is not an attempt to render the entire policy null and void 'as to' all liens upon such a failure." The difference in language was crucial, because the wording of Exclusion 3(b) is narrower than the Michigan commitment language. "Because the policy took effect, there are two contracts, the commitment and the policy. Under the commitment, plaintiff was required to disclose the known tax lien, even though it was recorded. However, under the policy, plaintiff was not required to disclose the known tax lien because it was recorded. Therefore, the issue is which of these two contracts is controlling. ... Because the subsequently issued policy contains an integration clause that evidences the parties' intent to abrogate the commitment, the policy controls. The policy does not require the disclosure of known recorded liens, and thus plaintiff is not excluded from coverage under § 3(b) of the policy."

[35] *Lawyers Title Ins. Corp. v. First Fed. Sav. Bank & Trust*, 744 F. Supp. 778, 783 (E.D. Mich. 1990).

The 2016 ALTA Commitment for Insurance goes further. In that form, Condition 1 incorporates the policy definitions for Knowledge, Known, Land, Mortgage, Policy, Public Records and Title; further, it defines the terms Proposed Insured and Proposed Policy Amount, which do not appear in the policies.

6.3 Proposed Insured And Third Party Beneficiaries

The proposed insured is the only party with a right to make a claim under a title insurance commitment.[36] The 2016 ALTA Commitment for Insurance emphatically states that only the proposed insured may make a claim under the commitment. Condition 6(a) states that "[o]nly a Proposed Insured identified in Schedule A, and no other person, may make a claim under this Commitment." See §7.1 for a complete discussion of the definition of "insured" and "proposed insured." A seller is not a third party beneficiary of a commitment.[37] Further, when the seller was aware of a tax assessment, the court said that it had no argument that it relied on a commitment that did not contain an exception for the assessment:

> There is no showing, on this record, of reliance, damage or an expectation of a search and disclosure. This defendant knew of the assessments long before the plaintiff ever issued a preliminary commitment. When the defendant's agent ordered title insurance, the defendant had already listed the property subject to the buyer assuming the sewer assessment. The defendant's awareness and knowledge are evidenced by the deletion of the assumption requirement from the listing. Again, long before asking the plaintiff to insure title, the defendant had contractually agreed with its purchasers (the only insureds) to convey title free of the assessments. There is no showing that this defendant expected an "abstract" of title or that even if it had, that it relied thereon in any manner. In fact, had the assessments been disclosed, the defendant would have had to pay them from the closing proceeds. The defendant is merely paying, through subrogation, that which it had knowledge of and had agreed to pay long before the plaintiff became involved.[38]

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[36] When the proposed insured failed to close on the purchase of the property because it could not get financing, it had no right to pursue the title insurer for having missed a large judgment lien, because it was not an insured. The Texas court especially noted that the proposed insured never paid a policy premium. *Hispanic Housing & Education Corp. v. Chicago Title Ins. Co.*, 2002 WL 1303426 (Tex.App. -Houston (1 Dist.)) (unpublished). In *Izynski v. Chicago Title Ins. Co*., 963 N.E.2d 592 (Ind.App. 2012), a title insurance commitment had been issued to a prospective buyer who did not purchase. The broker showed the commitment to the Izynskis, who made a later offer. The day before closing, the Izynskis learned of a dam easement not shown in the commitment. The commitment was amended, and the policy excepted the easement. The appeals court reversed the dismissal of the Izynskis' tort claims against the insurer based on the commitment. It admitted that they would not have tort claims under their policy, but might have such claims based on the commitment that was issued to the prior prospective buyer, because it was *not* issued to them.

[37] *Kenny v. Safeco Title Ins. Co.*, 113 Cal.App.3d 557, 169 Cal.Rptr. 808 (1980).

[38] *Transamerica Title Ins. Co. v. Johnson*, 103 Wash. 2d 409, 693 P.2d 697, 700-1 (1985).

Commitment to Insure

A title insurance commitment sometimes recites the proposed insured as a party "to be named," or similar language. The naming of a proposed insured allows the insurer to commit to insure a known party, and to search the records for any liens that will attach to the property on conveyance to that party. A commitment that does not name a specific proposed insured lacks a significant term, and suggests that there is no identifiable party who would be entitled to rely on the commitment. Thus, when the commitment does not recite a particular party as being the proposed insured, the claimant must establish that he or she was the proposed insured. Several courts have addressed the issue of whether or not a purchaser at sheriff's sale is a third party beneficiary of a title report prepared for the foreclosing lender, which typically lists the proposed insured as "to be named" or "purchaser at sheriff's sale." See the cases discussed at §7.7.

6.4 Commitment Conditions And Requirements

As further discussed above in §6.1, the title insurance commitment is, in contract terms, an offer. The commitment states the terms under which that offer must be accepted. These include payment of premium and performance of the requirements stated in Schedule B. As stated in *Schaible v. Louisville Title Ins. Co.*:

> The acceptance of the binder and the acceptance of the policy when issued, after payment of premium assessed and the meeting of all other requirements, would appear to bind both insured and insurer under the policy contract.[39]

The insured's acceptance of the offer to insure must take place within the commitment's effective period, or the offer to insure is null.[40]

When all requirements have been met before expiration of the commitment, the insurer is ordinarily obligated to issue the policy. If the policy has not yet been issued, a claim may be dealt with as if it had been. All policy terms and conditions are applicable in resolving the claim.[41] An insurer may be precluded from denying the existence of an insurance contract based solely on the insured's failure to meet a purely technical element of a requirement. For example, in *MacDonald v. Lawyers Title Ins. Corp.*,[42] the trustee began the foreclosure before being appointed and failed to give some required notices. The court found that the defects were not fatal to the foreclosure, and not a sufficient basis for the insurer to deny that a policy obligation existed. The court held:

> Lawyers Title cannot use the technical errors of the foreclosure sale to escape its duty

[39] 118 Ohio App. 328, 194 N.E.2d 588 (1963).

[40] In *Clair v. First American Title Ins. Co*., 2007 WL 1063989, 2007-Ohio-1681 (Ohio App. 9 Dist.) (unpublished), the plaintiff sued on a commitment and alleged that he had paid a premium. The appeals court held that he had not proven the conditions precedent to issuance of a policy, particularly the premium payment, and therefore the commitment expired by its terms.

[41] *Drilling Service Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972).

[42] 79 F.3d 114 (Table), 1996 WL 114719 (4th Cir. (Va.)) (unpublished).

to issue a title insurance policy on the Property.

The kind of judicial underwriting conducted in *MacDonald* should apply only to strictly formalistic requirements. A court should not rewrite insurance policies without fully understanding and considering the policy risk to which it binds the insurer. For example, it would not be appropriate to relieve the proposed insured of the duty to meet requirements necessary for a valid conveyance or mortgage lien. Similarly, it would be wrong to eliminate any requirement having to do with the risk for which the claim is made, such as receipt of a *true and valid* affidavit, or an *accurate* survey.

When substantive conditions are not satisfied, the offer of insurance has not been unconditionally accepted, and there is no contract.[43] One court explained this principle in this fashion:

> The actual issuance of a policy is the culmination of a number of stages, including researching, examining and interpreting of documents, preliminary commitments and supplemental reports. [citations omitted] For a contract of insurance to be obligatory in the absence of the issuance of the policy, it must be complete and unconditional so far as to leave nothing to be done but the formal issuance of the policy.[44]

Thus, when the commitment expired with the insurer never having been told what instrument to insure, or which liens were to be removed from title before the policy was issued, all liability terminated, even though the premium had been paid.[45]

Also, when the policy is issued, the requirements are normally deemed satisfied, even if they have not been met as specified.[46]

The subsections below address the three main issues on this topic: the requirements for payment of the premium, delivery and recording of the conveyance that creates the insured estate or interest, and expiration of the commitment.

Another common type of requirement in the commitment is that a particular lien or title

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[43] *Bank of New York Mellon v. Commonwealth Land Title Ins. Co*., 2016 WL 6820475 (Penn.Super.) (unpublished) (when commitment made release of prior mortgage a requirement for issuance of policy, and policy was not issued because mortgage was not released, no policy came into being or was owed, and proposed insured had no right to sue for alleged breach of policy or bad faith).

[44] *White v. West*, 1996 WL 585267, p. 3 (Wash.App.Div. 2) (unpublished).

[45] Id.

[46] When a commitment called for a mortgage to be executed by the corporation which owned the property, but the insurer prepared and recorded a mortgage by the shareholders instead, and issued its policy insuring the mortgage, the insurer was not permitted to deny liability on the basis that the commitment requirements had not been met, in *Kiniski v. Archway Motel, Inc.*, 586 P.2d 502 (Wash.App. 1978). In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), the title insurance commitment made a requirement that the lender get a deed putting the borrower in title, which it failed to do before the borrower signed the loan documents. However, the insurer issued the policy anyway. The court held that the insurer became obligated to indemnify the insured due to the defective lien when it waived the requirement and issued the policy.

defect be released or removed. The insurer does not owe a policy if the commitment states that a lien must be removed and it is not.[47] Also, the insurer is not subject to liability to the insured or any other party for having made a requirement for the release of a lien or instrument. Judgments and tax liens are indexed by name. A person with a common name may be asked to remove a lien against a person with an identical or similar name, but that is not his or her debt. The insurer is not liable to that person for requiring the removal of such a lien.[48]

6.4.1 Payment Of Premium

FORM 27, Appendix A
Letter canceling commitment for failure to pay premium

Payment of premium is an essential condition to the issuance of the policy.[49] It is an express requirement in Schedule B, Part I of the commitment. If the premium is not paid, the insurer is not obligated to issue the policy. A policy issued at closing is void if the premium is not received by the insurer, or the tendered payment instrument fails.[50]

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[47] *Bank of New York Mellon v. Commonwealth Land Title Ins. Co*., 2016 WL 6820475 (Penn.Super.) (unpublished).

[48] In *Fisher v. Congress Title*, 247 Fed.Appx. 372, 2007 WL 1862683 (3rd Cir. (N.J.)) (unpublished), a title agent that allegedly paid off judgments that were not the seller's debts, but which were against people with names similar to his, was found not to be liable under the debt-validation provisions of the Fair Debt Collection Practices Act.

[49] "No premium was ever paid. No title policy issued. By the clear terms of the insurance contract, the responsibility of Chicago could be and was avoided by the failure of occurrence of these conditions subsequent." *Cambridge Acceptance Corp. v. American Nat. Motor Inns, Inc.*, 96 N.J.Super 183, 232 A.2d 692, 708 (Ch.Div. 1967). When the proposed insured failed to close on the purchase of the property and did not pay the policy premium, the commitment expired and the proposed insured had no right to pursue the title insurer for having missed a large judgment lien. *Hispanic Housing & Education Corp. v. Chicago Title Ins. Co.*, 2002 WL 1303426 (Tex.App.-Houston (1 Dist.)) (unpublished).

[50] In *GMAC Mortgage Corp. of Pa. v. Weisman*, 1998 WL 132791 (S.D.N.Y.) (unpublished), the title insurer issued a policy at the "New York style" table closing. However, the purchaser presented NSF checks at closing, including the funds to be used to pay the title insurance premium. The entire transaction was unwound for failure of consideration. Things got worse when the lender's counsel then defalcated with the lender's loan proceeds which were returned to him. The lender then made a claim on the policy. The court found, however, that "[t]he failure to pay the title insurance premium voided the policies because there was a complete failure of consideration. [citations omitted] Thus, First American cannot be held liable on a title insurance policy issued to GMAC for which GMAC never paid any premiums. The payment of the premium was a condition precedent to liability here." Id. at 9. The lender further asserted that, since the policy had been issued at closing, the insurer had a duty to notify the lender prior to cancelling the policy, and/or that the policy was "binding" once issued whether or not the premium was paid. The court rejected the argument, stating: "However, this is not an issue of an insurance policy being cancelled or terminated. Rather, this is an issue of a title insurance policy being deemed void for total failure of consideration. GMAC designated the borrower, Pantoja, to be responsible for making the premium payment to First American on its behalf. Pantoja's check bounced and GMAC must suffer the consequences. As for the 'binding' insurance argument, the cases cited by Plaintiff involved insurance binders issued prior to the actual policy and insurance policies where some premiums were paid. In this case no premiums were paid as required at the closing because the check bounced." Id. at 10.

In a loan transaction, the failure to pay a premium for an owner's policy is conclusive evidence that the borrowers did not request or expect a policy. An insurer was found not to be obligated to inform the borrowers that no policy would be issued just because they were recited on the commitment as proposed insureds; rather, the borrowers' failure to pay the premium was evidence that they did not contract for insurance.[51] Another court explained that the insured must prove that he or she paid the premium rather than ask the court to assume that fact:

> All of appellants' claims of contract violations are premised on the fact that they had an insurance contract with US Title. However, no evidence exists in the record which supports this fact. Appellants allege that an insurance premium was sent to US Title, that it was embezzled by Budny [the closer], thus explaining the lack of an entry in US Title records reflecting receipt of the premium, and that they thus had a constructive insurance contract with US Title. However, even if Budny had embezzled the premium as part of a fraud on the Milbrandts, the Milbrandts have failed to provide any evidence whatsoever that a premium was in fact paid. They provide no ledger entry, no cancelled check, and no evidence of any extension of credit to Huber. Without evidence of a premium payment, whether or not it was received by US Title, appellants cannot claim that they entered into an insurance contract with the company. Thus, appellants fail to support their assertion of a material issue of fact, and their claims related to the existence of an insurance contract must fail.[52]

When a party does not pay the premium, that fact is evidence that the offer to insure found in the commitment has not been accepted:

> Warrington never testified that he accepted the offer to issue a policy. He testified that he received the preliminary report after closing the August 1, 1973, transaction. ... Warrington indicated to Transamerica that the Oregon Mutual mortgage transaction, for which the July 27, 1973, title report was ordered, was not going to go through so that no title insurance would be necessary. Therefore, there was no contract between Warrington and Transamerica.[53]

In addition, if there is a special charge for a particular coverage or endorsement, the insurer is not liable for that coverage unless the premium is paid.[54]

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[51] *Shine v. Commonwealth Land Title Ins. Co. of Houston*, 1996 WL 134962 (Tex.App.-San Antonio), writ den. Nov. 15, 1996 (unpublished).

[52] *Milbrandt v. Huber*, 149 Wis.2d 275, 440 N.W.2d 807, 813 (Wis.App. 1989).

[53] *Warrington v. Transamerica Title Ins. Co.*, 40 Or.App. 841, 596 P.2d 627 (Or.App. 1979).

[54] See *Muench v. Oxley*, 90 Wash.2d 673, 584 P. 2d 939, 944 (Wash. 1978): "Moreover, the standard form policy here was not offered strictly on a 'take it or leave it' basis. Another policy, which does insure against defects not of record,

There is no duty to pay the premium, except a reasonable cancellation fee, if the transaction fails, since in such instance the insured risk does not come into being.[55] Conversely, mere acceptance of the premium by the insurer does not prohibit it from later cancelling a commitment on a transaction that has not yet closed:

> Under the facts in this case, the mere retention by plaintiff (after becoming aware of the forgery) of the premium paid by defendants for the binder, in and of itself, did not work a waiver or an estoppel precluding plaintiff's assertion of defendants' failure to comply with a condition precedent to coverage under the binder.[56]

See §6.12 regarding the duty to pay the premium, if owed, and related issues.

The fact that no premium has yet been paid is not an absolute bar to reliance damages under the commitment, however. The commitment says that the insurer will be liable for damages incurred by the proposed insured in obtaining or curing title in reliance on the insurer's promise to issue a policy, even if no policy is issued. See §6.9 for a discussion of damages under the commitment.

The claim administrator pays especially careful attention to the issue of whether or not the premium was paid if no policy has been issued. Often, a policy is not issued precisely because no premium was paid. If no premium has been paid, and the commitment has expired, the commitment has lapsed. There is no duty to issue a policy and no liability on the putative policy.[57] The insurer may write to inform the proposed insured that the commitment is cancelled for failure to pay the premium.

6.4.2 Payment Of Consideration For Purchase Of Insured Interest

FORM 29, Appendix A
Cancellation for failure to pay adequate consideration

A universal requirement for the binding of coverage is found in the Schedule B, Part I requirement that the proposed insured pay consideration for the interest to be insured. This requirement is fundamental to the risk of title insurance. Most states' laws protect *bona fide* purchasers "for value" against all manner of adverse title claims. These protections are not available unless the insured owner is able to prove that he or she has paid value.

The requirement for the payment of valuable consideration was found not to have been met,

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was available at a higher premium. Thus, the extent of risks insured against was negotiable in the sense that a more extensive coverage could be obtained." Also see §12.3.4 for more cases regarding the survey exception and "extended" coverage.

[55] See §6.12 regarding collection of the premium, when owed, and related issues.

[56] *Glass v. Stewart Title Guaranty Co.*, 354 S.E. 2d 187 (Ga.App. 1987).

[57] *Cambridge Acceptance Corp. v. American Nat. Motor Inns, Inc.*, 96 N.J.Super 183, 232 A.2d 692 (Ch.Div. 1967).

and the insurer had no liability under the title insurance commitment, when the purchase money was stolen by the closer and thus the seller did not receive consideration.[58] The requirement of consideration was also not met when the insured lender failed to fund the loan.[59] In the latter case, the court concluded:

> It is undisputed that, because Heritage never funded either of the closings, title never passed from the intended seller to buyer or from the intended buyer to Heritage, nor were the prior security deeds ever satisfied and cancelled of record. Therefore, Minnesota Title never issued its final title policies to Heritage, nor was it obligated to do so, because the conditions precedent to issuance of the policies were never met. … Accordingly, defendant is entitled to summary judgment on plaintiff's claims under the title binders.[60]

Similarly, the consideration requirement was held not to have been met by a loan assignee, when the original lender failed to fund the loan.[61] Likewise, the insured did not meet the commitment requirements when it failed to disburse construction funds as called for in a pending disbursement endorsement attached to the commitment, and failed to obtain a further endorsement of the policy after the advance. See §10.1.4 regarding the pending disbursement endorsement to the construction loan policy.

6.4.3 Delivery And Recording Of Insured Instrument

FORM 30, Appendix A
Cancellation for failure to meet requirement

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[58] *District-Realty Title Ins. Corp. v. Jack Spicer Real Estate, Inc.*, 280 Md. 422, 373 A.2d 952 (1977). The ALTA-suggested requirement as to payment of consideration, which appears in most title commitments, is "payment of the full consideration to, or for the account of, the grantors or mortgagors."

[59] *First Financial Savings & Loan Ass'n. v. Title Ins. Co. of Minnesota*, 557 F.Supp. 654 (N.D.Ga. 1982). In *First Financial*, the parties were told by the closer that the deed and mortgage would not be recorded until the draft funding the buyer's loan had cleared. When the lender's draft did not clear, and the lender filed bankruptcy, the documents were not recorded and the transaction was unwound.

[60] 557 F.Supp. at 663. In *First Financial*, the lender, Heritage, had sold the two loans at issue without funding. The loan assignees sued the closers for negligent and intentional misrepresentation, based on letters issued to Heritage certifying that its funds had been disbursed. The closers had been told that the loans would be assigned. The court found that there was at least a cause of action by the assignees for negligent misrepresentation against the closers.

[61] *Gerrold v. Penn Title Ins. Co.*, 637 A.2d 1293 (N.J.Super.A.D. 1994) ("The condition of payment set forth in the title commitment was not satisfied, resulting in a failure of consideration.").

Another uniformly-promulgated requirement is for the delivery and recording of the instrument creating the proposed insured's interest in the property. A key issue concerning this requirement is the point at which policy coverage is bound. Courts in Ohio and Georgia have held that, if the insurer discovers that a deed is forged before coverage is bound, the requirement is not met by the void instrument, and the commitment may be cancelled or lapses.[62] However, a later decision by the Georgia Supreme Court disavowed the first decision, saying:

> Fidelity's argument [based on the *Glass* case] "ignores that one of the very purposes of title insurance is to protect a party from the consequences of forgery in the chain of title, which necessarily results in the party not receiving an interest in the land." …
>
> Title insurance protects against "defective titles," OCGA § 33-7-8, and a forged deed conveys a defective title… . Exclusions from coverage are to be strictly construed… . We therefore conclude that, in the absence of language in a title insurance commitment that plainly excludes coverage for a forgery, a commitment must be construed to provide coverage for forgeries. *Glass* is disapproved to the extent it stands for the contrary proposition.[63]

The two Georgia decisions are not necessarily in conflict, however. In *Glass*, the insurer was permitted to cancel the commitment because the insured closed the transaction and the insurer discovered the forgery before the deed was recorded. In *Keyingham*, the attorney title agent closed the loan, disbursed the closing funds and accepted the forged deed after personally conducting the verification of identity, which was based on a phony driver's license. Thus, the insurer sought to deny liability after its title agent had bound coverage by closing the transaction.

When the insured does not get coverage bound before the commitment expires, the commitment lapses. Thus, when the commitment requirements were not met because the insurer was not told what deed of trust to insure, or what liens were to be paid off, and no policy was issued, the commitment expired before the claim was presented, and could not be enforced.[64]

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[62] See *Glass v. Stewart Title Guar. Co.*, 181 Ga.App. 804, 354 S.E.2d 187 (Ga.App. 1987), in which the appellate court said "[w]e reject as patently absurd defendants' contention that, pursuant to the language of the binder, the parties intended that compliance with the condition precedent in this case could have been accomplished via a forged warranty deed ... ." Likewise, in *Gayheart v. Midland Title Security, Inc.*, 2004-Ohio-2536, 2004 WL 1109525 (Ohio App. 5 Dist.) (unpublished), the court found that a forged deed did not meet the commitment's requirement that a "proper deed" be "executed, delivered and filed for record." It found controlling a prior appellate case, *Domoney Corp. v. USLife Title Ins. Co*., 1985 WL 10495 (Ohio App. 10 Dist.) (unpublished). In that case, the grantor gave a forged deed. The *Domoney* court found that the commitment did not protect against the forgery because the deed "did not meet the condition of the title insurance commitment that a *proper* warranty deed conveying fee simple title to the premises be approved, executed and filed for record." (emphasis added)

[63] *Fidelity Nat'l Title Ins. Co. v. Keyingham Investments, LLC*, 288 Ga. 312, 702 S.E.2d 851 (Ga. 2010).

[64] *White v. West*, 1996 WL 585267 (Wash.App.Div. 2) (unpublished).

6.5 Expiration Of Commitment

FORM 26, Appendix A
Cancellation for lapse of effective period

The ALTA commitment expires within a stated time from its effective date, which is often either six months or 90 days.[65] If the conditions stated in the commitment are not met before the commitment expires, the commitment is null and void.[66] When a lender closed on a commitment that had expired 43 days earlier, there was no longer any duty to issue a policy, and the insurer had no liability to protect against the title defect.[67]

However, the mere lapse of more than 180 days from the effective date to the recording of the deed vesting the insured in title does not negate the binding of policy coverage. When the proposed insured had paid the premium and complied with all of the requirements, including the recording of the deed that vested him in title, the insurer was precluded from asserting the lapse provision to deny coverage when the insured submitted a claim shortly thereafter.[68] Also, when a policy was requested and issued after the commitment had expired, the expiration of the commitment would be waived as a defense if the commitment had been relied on by the proposed insured and a pattern of conduct showed that such reliance was not unreasonable.[69] Also, when the insurer accepted the premium on a lapsed commitment and its agent told the proposed insured that the effective date was "being extended to allow for the issuance of the final policy," the insurer was estopped from denying liability based on the commitment expiration.[70] Also, expiration of the commitment is not a defense to a claim based solely on misrepresentation of title and not on the

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[65] This provision is found in the preamble to the 2016 ALTA Commitment for Insurance, which says "[i]f all of the Schedule B, Part I—Requirements have not been met within ______ [time period] after the Commitment Date, this Commitment terminates and the Company's liability and obligation end." That statement is reiterated in Condition 2, which says "[i]f all of the Schedule B, Part I—Requirements have not been met within the time period specified in the Commitment to Issue Policy, this Commitment terminates and the Company's liability and obligation end." The 2006 ALTA Commitment states "[a]ll liability and obligation under this Commitment shall cease and terminate ______ [time period] after the Effective Date or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue the policy or policies is not the fault of the Company."

[66] *First Nat'l Bank of Franklin, Tex. v. Associated Attorneys Title Agency, Inc.*, 759 S.W.2d 481 (Tex.App. 1988); *White v. West*, 1996 WL 585267 (Wash.App.Div. 2) (unpublished). In *Gayheart v. Midland Title Security, Inc.*, 2004-Ohio-2536, 2004 WL 1109525 (Ohio App. 5 Dist.) (unpublished), the deed to the proposed insured was attacked and found void before the insurer was even advised that the deed had been recorded. The court ruled that the commitment lapsed, and there was no coverage.

[67] Id.

[68] *Cotterkey Investments, Ltd. v. First American Title Ins. Co.*, 2007 WL 5435015 (Ariz.App. Div. 1) (unpublished).

[69] *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976).

[70] *Universal Title Ins. Co. v. NCNB Nat'l Bank of Florida*, 532 So.2d 736, 737 (Fla.App. 1988).

insurance contract.[71] See Chapter 15 regarding claims based on abstractor negligence and tortious misrepresentation of title.

6.6 Knowledge Of Proposed Insured--Duty To Disclose

The proposed insured has a duty to disclose to the insurer those matters affecting title of which it has actual knowledge. The 2006 ALTA Commitment expressed this as an affirmative duty of the proposed insured:

> If the proposed Insured has or acquired actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions.[72]

The 2016 ALTA Commitment for Insurance couches the disclosure duty as a defense to liability. Condition 5(b) states:

> The Company shall not be liable under Commitment Condition 5(a) if the Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.

The duty to disclose applies to all matters affecting title of which the proposed insured has knowledge.[73] Thus, the proposed insured has a duty to tell the insurer that it may have missed a

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[71] *Lane v. Security Title & Trust Co.*, 382 S.W.2d 326 (Tex.App. 1964).

[72] Conditions 2, 2006 ALTA Commitment for Insurance.

[73] In *Kirwan v. Chicago Title Ins. Co.*, 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001), the proposed insureds got a letter several days before closing from a lawyer saying that his clients were the true owners of the property. They did not tell the title insurer. The court held that the insureds were required by the commitment to disclose the risk: "The language of the title commitment is clearly intended to force the insureds to tell Chicago Title what they know or come to know about the property and its title, which is not of record, so that the risk which Chicago Title assumes in the policy can be assessed and guarded against." The appeals court adopted the trial court's rationale as to the legal and economic significance of the disclosure requirement: "The rationale of title insurance is a coverage of risks ascertainable to both parties from the public records and not otherwise ascertainable by the proposed insured and the insurer. Permitting an insured to obtain coverage for something he or she knew about, but which was unknown and unknowable to the insurer, upsets the actuarial basis and justification for title insurance. Common sense supports the application of an exclusion to such situations[.]"

recorded lien or encumbrance of which the proposed is aware.[74] The insurer has the right to amend the commitment to except the matter. See §6.7 regarding amendment of the commitment. If the proposed insured does not disclose a title matter and agrees to buy subject to it, the disclosure exclusion is carried forward into the policy as Exclusion 3(a), as a matter the insured has assumed or agreed to. See §6.8 regarding reliance under the commitment.

When the proposed insured is aware of the title matter before closing, the disclosure provision of the commitment reinforces Exclusions 3(a) and 3(b) of the policy. The exclusions and the commitment disclosure provision were all found applicable in *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*[75] Similarly, in *Kirwan v. Chicago Title Ins. Co.*,[76] the court found that, when the insured failed to disclose an adverse title claim before closing, the matter was removed from coverage under Exclusion 3(b):

> The clear language of the commitment allows Chicago Title to exclude or limit coverage on Schedule B when the policy is issued for an adverse claim which comes to light after the commitment but before the policy is issued. However, nondisclosure results in a new and undisclosed adverse claim being excluded from coverage. By the time the Kirwans disclosed the Vanderwerfs' claim, the commitment had "evaporated" by its express terms and the policy controlled ... .

The disclosure provision is an acknowledgment that the title insurance applicant makes representations about the risk to be insured, as does any other insurance applicant. Misrepresentation may include the willful suppression of a fact material to the risk.[77]

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[74] See *Universal Title Ins. Co. v. NCNB National Bank of Florida*, 532 So. 2d 736 (Fla. App. 1988) (knowledge of prior mortgage was question of fact preventing summary judgment in favor of insured). However, in *Archambo v. Lawyers Title Ins. Corp.*, 646 N.W.2d 170 (Mich. 2002), the court found that the proposed insured had no duty to disclose a recorded federal tax lien against himself. It said: "[t]he policy does not require the disclosure of known recorded liens, and thus plaintiff is not excluded from coverage under § 3(b) of the policy." The court may have been influenced by the insured's testimony that he thought the lien had expired. In *First Nat'l Bank of Jeanerette v. Lawyers Title Ins. Corp.*, 2010 WL 3734056 (W.D.La.) (unpublished), findings adopted in 2010 WL 3734020 (W.D.La.) (unpublished), the court found an insured lender obligated to inform the title insurer of a federal tax lien that appeared on the credit report and automated loan underwriting report, but not the commitment, and that its failure to inform the insurer caused the lender to "suffer" the lien. In *Gardner Group, LLC v. Commonwealth Land Title Ins. Co*., 2017 WL 193165 (D.Kan.) (unpublished), the seller was found to have had an affirmative duty to disclose to the buyer the existence of a recorded easement that the seller had granted that was not excepted in the title commitment. The court did not find that the seller's duty ran to the title insurer. However, the court supported its ruling with a title insurance decision, *Stewart Title Guar. Co. v. Dude*, 708 F.3d 1191 (10th Cir. 2013), in which the affiant concealed facts about a recorded mortgage in an owner's affidavit. *Dude* is further discussed at §5.11.

[75] 956 F.Supp. 989 (S.D.Ala. 1997).

[76] 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001).

[77] For example, the proposed insured may not withhold the knowledge that the title evidence on which the policy is based fails to show mortgages of record. *Applefield v. Commercial Standard Ins. Co.*, 176 So.2d 366 (Fla.App. 1965). In *Kirwan v. Chicago Title Ins. Co.*, 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001), the court made two analogies to other lines of insurance to illustrate the fact that the disclosure requirement

> It is well settled that, where an application for insurance has been submitted to an insurer and, before the policy is issued, a change of conditions material to the risk occurs or is discovered by the applicant, he is under an obligation to inform the insurer promptly. The knowing suppression or failure to make timely disclosure of such information constitutes a material misrepresentation.[78]

The commitment disclosure duty corresponds with Exclusion 3(b). See §11.3.4 regarding the types of matters which the proposed insured has a duty to disclose before the policy is issued, and §11.3.1 as to misrepresentation and concealment.

6.7 Gap Exception; Amendment Or Rescission Of Commitment

The commitment excepts from coverage all matters which occur, or for which notice is first recorded, between the effective date of the commitment and the date on which the insured gets an interest which is valid as to the rest of the world. Two provisions of the commitment directly pertain. The first is the right to amend the commitment to add matters existing as of the original effective date, but not shown. Condition 2 of the 2006 ALTA Commitment for Insurance states:

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in the title insurance commitment is a universal insurance concept, and thus not a trap for the unwary, as they had claimed. In *Kirwan,* the proposed insureds got a letter several days before closing advising that Vanderwerf claimed an interest in the property to be sold. The court found that the insurer had no duty to defend or indemnify. It said: "The Kirwans' position that Chicago Title cannot exclude coverage for the Vanderwerf litigation, given that it was not of record or disclosed, is tantamount to a driver buying automobile insurance on Monday and complaining because the insurance company will not cover the accident occurring 2 days before on Saturday." ... The disclosure enables the insurer to assess the risk, describe it as it wants in Schedule B 'Exceptions from Coverage,' and charge a premium which is reflective of the risk being carried. The insured can then determine whether the coverage set forth in the policy, with exceptions, is worth the proposed premium. The fact that the adverse claim later proves nonmeritorious does not dispense with the insurer's understandable desire to know what the insured knows and which is not of record. In this way, the insurer can assess the risk posed by the adverse claim uncovered after the commitment, but before the policy is issued. We have little doubt that if this was a health care policy with exclusions for known preexisting conditions, a claim that a known but undisclosed condition such as leukemia should be covered because its treatment later proved successful, would likely not succeed in the patient's suit for the cost of treatment. The Kirwans' argument is similarly unpersuasive." The Kirwans also argued that the interest claimed in the letter was not sufficiently material to require disclosure. The Kirwans said that what they got was just "a vague, threatening letter from a South Dakota lawyer claiming his client had an interest in the land. The letter ambiguously claimed either a right to sale proceeds for the land, or an interest in title. Neither the buyers nor their attorney took the threat seriously; in any event, the transaction had already closed." The court said that it was not the insured's position to decide what was material. It found that, no matter how it might be characterized, the interest claimed in the letter was excluded because the insured did not tell the insurer about it. The letter to the Kirwans was from an attorney and clearly asserted that the Vanderwerfs had either a right to the sale proceeds or an interest in title to the land. That is all the Kirwans needed to know in order to alert Chicago Title to this "adverse claim." Whether they believed it to be meritorious and serious is completely beside the point. Once the Kirwans got notice, they were duty bound to give notice to Chicago Title, and since they failed to do so, the policy, which was issued and superseded the binder, excluded the Vanderwerfs' claim from coverage."

[78] *Weir v. City Title Ins. Co.*, 125 N.J.Super. 23, 308 A.2d 357, 360-1 (App.Div. 1973).

> … If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions.[79]

See §6.6 regarding the proposed insured's duty to disclose actual knowledge of defects.

The 2006 form commitment was replaced by the ALTA Commitment for Title Insurance, adopted on August 1, 2016. The ALTA voted to decertify the 2006 form as of December 31, 2017. Condition 4 of the 2016 ALTA Commitment for Title Insurance states:

> The Company may amend this Commitment at any time. If the Company amends this Commitment to add a defect, lien, encumbrance, adverse claim, or other matter recorded in the Public Records prior to the Commitment Date, any liability of the Company is limited by Commitment Condition 5. The Company shall not be liable for any other amendment to this Commitment.

The insurer may discover a title defect after the commitment is issued but before the transaction closes. This may be the result of the insurer's own re-examination of the records, or the prompting of a party to the transaction. When the insurer obtains such knowledge, from whatever source, it has the right to either amend or rescind the commitment.[80] A report of the actions of the ALTA Forms

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[79] Similar language is found in earlier versions of the commitment.

[80] *Sullivan v. Tomgil Building Corp.*, 46 Misc.2d 613, 260 N.Y.S.2d 465 (Sup. Ct. 1965). When the proposed insured already knew of the matter before insurer added it to the commitment, there were no reliance damages incurred by the insurer's failure to report the matter originally. In *Kirwan v. Chicago Title Ins. Co.,* 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), aff'd 261 Neb. 609, 624 N.W.2d 644 (2001), the court illustrated the relationship between the right to amend and the assumption of risk under the commitment: "The fact is that the policy commitment is written to force the insured to disclose known potential adverse claims not of record so that Chicago Title can amend Schedule B (the matters not insured against) to include an adverse claim which arises after the commitment is issued, but before the policy is issued. The ability to amend the schedule is expressly provided for in paragraph 2 of the conditions and stipulations of the commitment, and thus there was no representation that late-disclosed adverse claims could not be excluded by the policy issued after the commitment. The Kirwans' position that Chicago Title cannot exclude coverage for the Vanderwerf litigation, given that it was not of record or disclosed, is tantamount to a driver buying automobile insurance on Monday and complaining because the insurance company will not cover the accident occurring 2 days before on Saturday. The clear language of the commitment allows Chicago Title to exclude or limit coverage on Schedule B when the policy is issued for an adverse claim which comes to light after the commitment but before the policy is issued." The insurer was found to be entitled to amend the commitment when it learned that the legal description was incorrect, in *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 64 P.3d 22 (Wash. 2003). The court rejected the argument that the insurer had no such right: "Indeed, the implication that Transnation was not at liberty to correct the legal description once it had, in Michak's words, 'failed to uncover the release of this easement when it prepared its Commitment,' … runs counter to this court's decision in *Barstad v. Stewart Title Guaranty Co.,* 145 Wash.2d 528, 39 P.3d 984 (2002). There, this court made clear that "a preliminary commitment is *not* a representation of the condition of title, but a 'statement of terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted.' … As Transnation has observed, by permitting no correction of the legal description, the Court of

Committee about the 2016 modification explained that this new language clarifies "the insurer's right to amend the commitment for matters appearing in the public records at commitment date that are not included as a requirement or an exception."[81] Stated differently, the 2016 amendment to the commitment removes any such implication that could be found in the language of Condition 2 of the 2006 and earlier commitment forms.

The commitment also excepts matters in the "gap" between the effective date of the commitment and the recording of the instrument to be insured:

> 2. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:
>
> Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the Effective Date but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.

The "gap" exception is a general exception for all matters which first affect the property after the effective date. The insurer has no duty to discover matters in the "gap" unless it undertakes that responsibility by some affirmative act.[82] When the effective date is extended, either before or after closing, the insurer may remove the general exception and insert as specific exceptions any matters it finds in the "gap." The gap exception is not waived or removed unless the proposed insured negotiates that coverage with the insurer.[83]

Insurers may be induced by a variety of means to protect against matters in the recording gap. At a "New York-style" table closing, this is accomplished by the insurer removing the gap exception and extending the effective date of the commitment to the expected date of recording. The insurer typically delivers the insured instruments for recording. In escrow states, the escrow instructions

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Appeals majority effectively 'transformed Transnation's preliminary commitment into an abstract of title, a guarantee of the condition of the title,' and 'impose[d] duties upon Transnation which exist neither by statute [n]or in the applicable document itself.'" In *Michak*, the Supreme Court also reversed the court of appeals' ruling that an amendment to the commitment would be effective only if the proposed insured actually knew of the amendment and understood its effect.

[81] American Land Title Association *Title News*, August, 2016 issue, p. 6.

[82] *Cape Cod Bank & Trust Co. v. Avram*, 697 F.Supp. 8 (D.D.C. 1988); *Oak Park Trust & Savings Bank v. Intercounty Title Co. of Illinois*, 287 Ill.App.3d 647, 678 N.E.2d 723 (Ill.App. 1 Dist. 1997). However, an insurer was found to have a duty to disclose a restriction recorded after the effective date of the commitment but before closing, because it was notarized by an officer of the title agency and disclosed by other commitments to insure issued the same date. *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). Also, a title insurer was denied summary judgment as to a matter that it alleged fell within the recording gap, because the insureds asserted that the policy was issued without exception for the gap matter, but without further comment by the court on the effect of the gap exception, in *Boyce v. Cassese*, 941 So.2d 932 (Ala. 2006).

[83] *Mandor v. Lawyers Title Ins. Corp.*, 28 N.Y.2d 739, 321 N.Y.S.2d 120 (N.Y.App. 1971).

usually require the escrowee to obtain an update of title immediately before breaking escrow. See §13.1 for further discussion of this and other closing styles.

The insurer is not obligated to protect against matters in the gap unless it binds itself to that coverage in some fashion. Thus, when an escrow company was instructed not to break escrow unless the insurer was prepared to issue a policy free of any intervening matters, it was the escrowee's obligation to obtain that assurance from the insurer. The insurer, for its part, was not obligated to protect against a gap lien by paying funds and recording the documents, at the escrowee's direction, especially given the fact that the insurer never saw the escrow instructions regarding the state of title.[84]

In a "New York-style" closing, the insurer may be liable for gap liens that result from delayed recording of the insured instruments, whether or not the delay is the insurer's fault. In *Banco Popular De Puerto Rico v. First American Title Ins. Co.*,[85] for example, the mortgage to be insured was rejected by the register of deeds the first time it was delivered for recording. As a result, a judgment obtained priority over the mortgage before its eventual recording. The agent nonetheless issued a policy free of the judgment. The insurer was found liable on the policy, not on negligence in the recording process.

The gap exception applies to matters after the effective date of the title insurance commitment. Therefore, its removal does not protect the insured against matters that existed prior to the effective date and which are not covered because of other exceptions in the commitment.[86]

To be effective, the insurer must advise the proposed insured of the amendment to the commitment before the transaction is consummated. When the insurer accepted escrow instructions obligating it to issue the policy in a certain form, it was not permitted to add an easement to Schedule B without advising the proposed insured before breaking escrow.[87] If the insurer conducts a table (non-escrow) closing, it should tell the proposed insured of the additional matter to be added to the policy before the closing is consummated.

Sometimes, the defect is so fundamental that the insurer is not willing to insure the transaction once it is made aware of the matter. In such a case, the insurer may rescind the offer to insure.[88] The insurer is well advised to promptly cancel a commitment in writing, and return with the letter any premium paid. The insurer does not waive the right to cancel a commitment by accepting

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[84] *Siegel v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 1181, 54 Cal.Rptr.2d 84 (Cal.App. 2 Dist. 1996).

[85] 1997 WL 586156 (D.C. Puerto Rico) (unpublished).

[86] In *Ulysses I & Co., Inc. v. Feldstein*, 766 N.Y.S.2d 37, 2003 N.Y. Slip Op. 17725 (A.D. 1 Dept. 2003), the commitment excepted the rights of a prior contract purchaser. The insured argued that he obtained coverage against the contract purchaser by removal of the gap exception. The court rejected the argument: "This so-called 'gap provision' merely provides coverage for events insured against during the period prior to the recording of the deed; it does not extend coverage to matters excluded by express limitations contained elsewhere in the same provision."

[87] *Gebrayel v. Transamerica Title Ins. Co.*, 888 P.2d 83 (Or.App. 1995).

[88] *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co.*, 641 N.E.2d 861, 864 (Ill.App. 1994).

payment of premium, but has a duty to return premium if it refuses the risk.[89]

If the insurer cancels the commitment, it has a duty to pay losses incurred by the proposed insured in clearing or attempting to obtain title in reliance on the commitment.[90] See §6.9 regarding damages under the commitment.

6.8 Reliance On Commitment

FORM 31, Appendix A
No reliance on commitment

As a condition to making a claim under the commitment, the proposed insured must prove that it relied on the commitment. Condition 3 of the 2006 ALTA Commitment for Insurance states:

> Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.

The 2016 ALTA Commitment for Title Insurance contains Condition 5, which adds several important limitations to the proposed insured's right to recover for reliance damages:

> 5. LIMITATIONS OF LIABILITY
> (a) The Company's liability under Commitment Condition 4 is limited to the Proposed Insured's actual expense incurred in the interval between the Company's delivery to the Proposed Insured of the Commitment and the delivery of the amended Commitment, resulting from the Proposed Insured's good faith reliance to:
> (i) comply with the Schedule B, Part I—Requirements;
> (ii) eliminate, with the Company's written consent, any Schedule B, Part II—Exceptions; or
> (iii) acquire the Title or create the Mortgage covered by this Commitment.
> (b) The Company shall not be liable under Commitment Condition 5(a) if the

[89] *Glass v. Stewart Title Guaranty Co.*, 354 S.E. 2d 187 (Ga.App. 1987).

[90] *Livingston v. American Title & Ins. Co.*, 133 So.2d 483 (Fla.App. 1961).

Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.

(c) The Company will only have liability under Commitment Condition 4 if the Proposed Insured would not have incurred the expense had the Commitment included the added matter when the Commitment was first delivered to the Proposed Insured.

(d) The Company's liability shall not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Conditions 5(a)(i) through 5(a)(iii) or the Proposed Policy Amount.

(e) The Company shall not be liable for the content of the Transaction Identification Data, if any.

(f) In no event shall the Company be obligated to issue the Policy referred to in this Commitment unless all of the Schedule B, Part I—Requirements have been met to the satisfaction of the Company.

(g) In any event, the Company's liability is limited by the terms and provisions of the Policy.

The policy, by contrast, does not state an explicit reliance requirement. The reason this provision exists in the commitment is that, under the commitment, loss is measured as the costs incurred by the proposed insured in attempting to close the transaction up to the time the commitment is amended or cancelled.

The requirement of reliance also dictates the elements of damage that may be claimed in a claim under a commitment. For example, assume that a valid easement was not disclosed under the commitment or policy, and that the claim was resolved by payment of money to the insured. Under the policy, the measure of loss would ordinarily be the diminution in value to the land caused by the easement. Under the commitment, by contrast, the proposed insured's loss would usually equal the cash outlay made by that party in justifiable reliance on the status of title as originally shown in the commitment. The insurer is not liable under the commitment for the diminution in the property's value as a result of the easement. It also has no duty to clear the easement from the title on behalf of the proposed insured.

A proposed insured proves reliance on the commitment by showing that it took actions to obtain or clear title while proceeding on the mistaken assumption that title was in the condition shown. Reliance must be justified. A proposed insured that actually knows about the title matter not shown on the commitment has no right to rely. For example, in *JIJ Corp. v. Yamato Development Canada, Inc.*,[91] a litigation guarantee was issued that did not except a deed of trust. The insurer apparently removed the deed of trust because a reconveyance was recorded. However, a short time later, a document was recorded purporting to revoke the reconveyance. The guarantee was amended to show the deed of trust a week after it was issued. The revocation was not excepted in the guarantee, but the insurer sent a copy of the document to the attorney who ordered the commitment. The court found that the attorney and client had no right to rely on the guarantee as a representation

[91] 1999 WL 211855 (Wash.App.Div. 1) (unpublished).

that the deed of trust had been extinguished. Further, because the guarantee was amended after only one week, there was no evidence that any damage was incurred during the short time in which it failed to show the deed of trust.

The proposed insured cannot prove reliance when it receives the commitment after it obtains title. A lack of reliance may be established when the proposed insured did not apply for title insurance until after taking title.[92] A proposed insured cannot establish reliance on a commitment if it is issued before closing but the insured admits that he or she did not review it.[93] If the insurer cannot establish that a proposed institutional lender did not review the commitment, it will typically have to overcome the lender's assertion that it customarily does review the commitment before closing a loan.[94] A proposed insured that does not close on the transaction, whether a purchase or loan, may collect from the insurer only those expenses it is able to prove it incurred in reliance on the state of title as shown in the commitment, in eliminating title exceptions or in taking action to obtain the interest in the property that was to have been insured.[95] The fact that coverage is conditioned on reliance does not make the commitment illusory:

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[92] *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co.*, 641 N.E.2d 861 (Ill.App. 1994); *Manley v. Cost Control Marketing & Management., Inc.*, 583 A. 2d 442 (Pa.Super.Ct. 1990); *Driscoll v. Title Guarantee & Trust Co.*, 119 Misc. 754, 197 N.Y.S. 323 (Sup.Ct. App. Term 1922); *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*, 361 F.2d 764 (8th Cir. 1966). Conversely, when the proposed insured testified that he did not see the commitment before closing, the insurer was unable to establish his knowledge of a mortgage disclosed on the commitment but not the policy. Thus, the insurer was not permitted to reform the policy based on mutual mistake. *Baumann v. Puget Sound Title Ins. Co.*, 184 Wash. 9, 49 P.2d 914 (1935). Similarly, in *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*, 956 F.Supp. 989 (S.D.Ala. 1997), the insured ordered the title insurance policy after receiving its conveyance. Further, the deed recited six state tax liens to which the property was subject. The commitment did not. The court found no liability under the commitment, saying: "Global's non-reliance upon Commonwealth for advisement as to whether the purchased land was encumbered is of utmost importance, for this fact displaces the general rule that a title insurer is liable for all title defects not specifically listed as exceptions to coverage." Id at 4. However, the insurer was not entitled to reform the policy to make exception for the tax liens, because the mistake was not mutual. Id. at 6.

[93] *Lawrence v. Chicago Title Ins. Co.*, 192 Cal.App. 3d 70, 237 Cal.Rptr. 264 (Cal.App. 1 Dist. 1987) (lender did not rely on commitment that it did not review before closing). An assignee of a deed of trust did not rely on a commitment prepared for another party and which the assignee did not review before purchasing the loan. *White v. West*, 1996 WL 585267 (Wash.App.Div. 2) (unpublished).

[94] In *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), a third party testified that the bank was aware of the encumbrance not shown in the commitment, and the evidence about when the commitment was delivered to the lender was equivocal. The court accepted the testimony of the lender that it would not typically close a commercial loan without first reviewing the title insurance commitment.

[95] In *George v. Lemay Bank and Trust Co.*, 618 S.W.2d 671 (Mo.App. 1980), the proposed buyer did not prove that he suffered any loss or expense as a result of encumbrances on the property, when he elected not to close on the purchase. Similarly, in *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997), an insurer was not liable to a purchaser for having failed to disclose a restriction on a commitment, because the buyer "did not see the title insurance commitment prior to closing and did not rely upon any representations in the commitment in deciding to proceed to closing in this matter. As such, we determine that any alleged acts of [insurer] in failing to note the protective covenants ... are not the proximate cause of any damage to [insured]." *Tess* is discussed in Comment, *Title Insurance Law Newsletter*, January 1997, p. 3. See the introduction to this text for further information about that periodical.

> Chicago Title's promise under the title commitment is neither empty nor optional. The commitment only excludes recovery for damages caused by a defect in title if the insured did not *rely* on the commitment to acquire the title. It clearly covers losses suffered by an insured who relies on the commitment. Such a promise is not illusory, but contingent upon the loss occurring after the insurance takes effect.[96]

A person who is already the owner of the land will not typically be able to establish that he or she took action in reliance on the state of title as shown in the title insurance commitment, particularly if the title issue is a matter created or allowed by the owner, or which attaches to the property due to that person's ownership of the property.[97]

However, some courts have permitted people already in title to recover under title insurance commitments, when the title matter not excepted in the commitment also was not known to the proposed insured and the insurer did not establish that the owner ordered insurance in order to get coverage against a known defect in title.[98] See §11.3.3 for a complete discussion of cases in which the insurer has asserted Exclusion 3(b) as to matters that the insured concealed or misrepresented in applying for insurance.

To some extent, the reliance requirement of the commitment is also carried forward into the policy in Exclusion 3(a), for matters "created, suffered, assumed or agreed to" by the insured. In *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*,[99] the purchaser applied for insurance

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[96] *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co.*, 641 N.E.2d 861, 864 (Ill.App. 1994).

[97] In *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co.*, 641 N.E.2d 861 (Ill.App. 1994), a purchaser ordered a title insurance commitment two days after obtaining a deed to the property. The Army Corps of Engineers notified the proposed insured that it claimed title to the property. The insurer cancelled the commitment when it was notified of the claim. The court ruled that the insurer was permitted to cancel the commitment, and that the lack of reliance was a bar to any loss payable under the commitment. In *Edwards v. First American Title Ins. Co*., 2014 WL 575953 (Ariz.App. 1 Div. 2014) (unpublished), the court dismissed an action brought by an insured owner against the insurer for fraud, due to its failure to include exceptions in the commitment or policy for two judgments that had been entered against the insured and that automatically attached to the property when he took title.

[98] In *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975), the insureds already owned the property when they applied for title insurance, but were not aware of the title defect when they applied for insurance. The court found that their lack of reliance on the commitment did not void coverage for the defect. It relied on this statement from 45 C.J.S. Insurance § 968, p. 1162: "A present owner who insures his own title, which subsequently proves to be defective, although in fact he has lost nothing because he never did have the interest he supposed he had, may recover for the loss of what he supposedly had… ." Similarly, in *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976), the insured requested a policy after owning the property for some time. The insurer presented evidence that she was aware of the boundary line dispute against which she obtained coverage by presenting a survey, and the neighbor brought suit not long afterward. However, the court refused to rescind the insurance or to apply Exclusions 3(a) or 3(b) because there was no proof that the insured had definite knowledge, when she applied, that the lawsuit was imminent. In *Livingston v. American Title & Ins. Co.*, 133 So.2d 483 (Fla.App. 1961), the proposed insured discovered that there was a title defect and then did not close. The fact that the insured had not parted with any money was an affirmative defense to his claim under the commitment loss.

[99] 361 F.2d 764 (8th Cir. 1966).

shortly after obtaining the deed. The purchase agreement obligated the insured to assume all existing obligations affecting the real estate. The court concluded that the insured had agreed to accept title in whatever form it was later revealed to be:

> If Research had applied for title insurance prior to closing the deal we would have an entirely different situation. In that event, it would be reasonable to conclude that Research was relying on the title insurer to advise it of the true state of the record title and intended to assume, in the context of the policy condition, only those obligations which the title search revealed. However, in this case the application for title insurance was made after the deal had been closed and there is no evidence showing that Research was relying on the title insurer to advise it of encumbrances. The only possible conclusion is that the "assumed or agreed to" condition applies to the four Berg deeds of trust since Research did assume by deed all existing obligations, did not rely on the title insurer to advise it of encumbrances, and did have reason to believe the prior owners had placed such encumbrances on the property.[100]

Sometimes, the commitment contains an exception for a matter, but the policy does not include the same exception. In such cases, the insurer may seek to reform the policy on the grounds of mutual mistake. See §11.2.3 for a complete discussion of reformation of the policy.

6.9 Measure Of Loss Under Commitment

FORM 31, Appendix A
No reliance on commitment

The classes of damage payable under the commitment are as stated in Condition 3 of the 2006 ALTA Commitment for Insurance, which says:

> Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.

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[100] 361 F.2d at 769.

The liability provision of the 2016 ALTA Commitment for Insurance, found in Condition 5, is recited in §6.8. The proper measure of loss is the expenses incurred by a named proposed insured in taking action to purchase or clear title to the property, in reliance on the title as described in the commitment. The 2016 ALTA Commitment for Insurance puts a cap on liability, found at Condition 5(d), which states:

> The Company's liability shall not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Conditions 5(a)(i) through 5(a)(iii) or the Proposed Policy Amount.

Thus, while the measure of loss under a policy for an omitted lien would be the amount of the lien, the proper measure of loss under the commitment might be the sums spent attempting to remove the lien, or to obtain title in the event the lien thwarted that attempt. When the proposed insured discovered that there was a record title defect and then did not close, he stated a cause of action for breach of the commitment. However, the fact that the insured had not parted with any money was an affirmative defense to loss.[101]

6.10 Commitment Exceptions

A title insurance commitment contains Schedule B-II, which recites exceptions for matters that affect the title to the parcel to be insured. Exceptions are discussed in full in Chapter 12. So-called special exceptions are discussed at §12.7. The claim that a title insurance commitment is in the nature of an abstract of title is discussed in Chapter 15. These special duties notwithstanding, the commitment itself provides that the exclusive remedy under the commitment is according to its terms. See §6.11 for further discussion of the exclusive-remedy provision.

Because of the commitment's purpose of providing information in addition to committing to insure risk, much information is provided in a commitment which it is not appropriate to include in a policy. For example, the commitment may contain an array of facts regarding taxes, including the tax parcel number, amount of last year's taxes, amount of any installments due, information regarding charges which do not rise to the level of assessments, special assessments, water, sewer and utility charges, and the fact that the property is in a tax incremental financing or special services tax zone. This is useful information for the person doing tax prorations for the closing statement. However, it has no place in the policy, which should contain a simple statement as to the tax liens affecting the property. Information is sometimes conveyed in a commitment in the form of a "note," or is labeled "for information only."[102] Insurers in every jurisdiction have an obligation not to

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[101] *Livingston v. American Title & Ins. Co.*, 133 So.2d 483 (Fla.App. 1961).

[102] It is not proper to label the entire commitment in such fashion. "The words 'Preliminary report only. No liability hereunder' printed on the litigation report are not sufficient to exculpate the title company from responsibility for its own negligent acts. An agreement insulating one from liability for his own negligence must specifically so provide and is strictly construed against the party asserting the exemption, especially where he is the author of the agreement [citations omitted]." *Viotti v. Giomi*, 230 Cal.App.2d 730, 41 Cal.Rptr. 345 (Cal.App. 1 Dist. 1964).

intentionally misrepresent the status of title.[103] In some jurisdictions, an insurer may "insure over" a title matter. See §3.4.4 for a complete discussion of that subject.

6.11 Commitment Terms As Exclusive Remedy

Condition 4 of the 2006 ALTA Commitment states that the sole remedy of the proposed insurer for breach by the insurer shall be as provided by the terms of the commitment:

> This Commitment is a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title. Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

In *W.E. Erickson Construction, Inc. v. Chicago Title Ins. Co.*,[104] the court found that a claim of negligent misrepresentation in the title insurance commitment was barred by this provision.

6.12 Collecting Premiums And Cancellation Charges; Pirating Of Commitment Information

Because the title insurance commitment is a valuable source of information as well as an offer to insure, the failure of a proposed insured to pay the premium is more than merely a rejection of the offer to insure. There are three general categories of situations in which the premium is not paid, with different results for each.

First, the proposed insured may obtain the interest which was to be insured, but elect not to purchase the title insurance. Such a party is not an insured, as discussed above. Nonetheless, the party may be found obligated to pay for the reasonable cost of producing the information which he or she relied on in closing the transaction.

When the transaction closes, the insurer may also seek payment from the party who ordered the title work. An attorney who orders title insurance on behalf of a client may be liable personally for payment of the premium, but only when the attorney expresses his or her intent to be personally liable for the premium. This may be established by a pattern of conduct over time.[105] An insurer may refuse to issue title work for a person unless the ordering party guarantees payment.[106]

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[103] In *Milbrandt v. Huber*, 149 Wis. 2d 275, 440 N.W. 2d 807 (Wis.App. 1989), the title agency apparently intentionally made its commitment appear to show one Huber in title, when in fact title was vested in Mathes. The court affirmed summary judgment for the insurer, however, based on the fact that there was no evidence that a premium was ever paid.

[104] 641 N.E.2d 861 (Ill.App. 1994).

[105] *Title Guar. & Trust Co. v. Rudershausen*, 164 N.Y.S. 15 (A.D. 2 Dept. 1917); *Title Guar. & Trust Co. v. Maloney*, 165 N.Y.S. 280 (A.D. 2 Dept. 1917); *Wisconsin Title Service v. Kirkland & Ellis*, 168 Wis.2d 218, 483 N.W. 2d 275 (Wis.App. 1992).

[106] In *Williams v. Blount*, 741 P.2d 595 (Wyo. 1987), the title insurer told a bank officer that it would not do title work

Second, the proposed insured may not close the transaction. In such cases, the party cannot obtain insurance, but again may be obligated to pay for the labor incurred by the title insurer, particularly if the parties had agreed in advance that a cancellation fee would be owed.

In *Lawyers' Title Ins. & Trust Co. v. Kelly*,[107] the transaction died. The court approved the insurer's cancellation fee, but refused to order the proposed insured to pay the full premium as if the transaction had taken place. Similarly, a cancellation fee of 50% of the premium was enforced in *Inland Title Co. v. Comstock*.[108] In *Inland Title*, a commitment was ordered by phone and delivered to the seller in contemplation of a sale. The owner asked for a revision of the commitment. No sale occurred. The court found that the commitment was an accepted offer, and thus a contract.[109] In *C & W Manhattan Assoc. v. Attorney's Title Co. of Henderson County, Texas,*[110] by contrast, the title agent made a claim in quantum meruit against the proposed insured for the benefit of its title search. The court rejected the claim, finding that the party had received no benefit.

> Prior to the time that appellant canceled the order for the title insurance, appellee updated the title examination and apparently was ready to issue the policy. This work, however, was performed by appellee for its own benefit and not for the benefit of appellant. Appellee, by updating the title, was merely apprising itself of the condition of the title in order that it may decide whether to issue a policy.[111]

In *Eagle Land Title Agency, Inc. v. Affiliated Mortgage Co.*,[112] the customer agreed in advance to pay for certain expenses plus 20% of the search and examination fee in the event of cancellation of a series of orders. Some orders closed and some did not. The cancellation agreement was found to be "valid as liquidated damages" and not a penalty, and therefore enforceable. However, a seller was not obligated to pay a title premium and document preparation fees charged by the title agent when the seller did not order the commitment, agree to pay the fees, or sell the property.[113] The title work was ordered by the broker after it found a buyer. The sellers elected not to sell. The court found no

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for a certain person "unless you guarantee payment because he is having financial difficulty." The statement about the party's financial condition was found protected by a conditional privilege, since it was a statement between two parties having an interest in the subject of the communication, and said honestly in order to protect that common interest. The party about whom the statement was made failed to prove malice, a requisite in a suit for defamation.

[107] 132 N.Y.S. 721 (S.Ct.App. Term 1912).

[108] 116 Idaho 701, 779 P.2d 15 (Idaho 1989).

[109] 779 P.2d at 18.

[110] 614 S.W.2d 883 (Tex.App. 1981).

[111] Id. at 885.

[112] 1996 WL 362051 (Ohio App. 10 Dist.) (unpublished).

[113] *Remax Master Realty v. Divito*, 2000 WL 748125 (Ohio App. 7 Dist.) (unpublished).

privity of contract between seller and title agent, and no promise to pay.

The intentional dissemination of a policy containing a mistake, done with the purpose of entrapping the recipient title agent into assuming the liability for the title defect, was found grounds for a judgment based on fraud in *Executive Re Indemnity, Inc. v. National Title Resources Corp.*[114] In this strange case of jealous rivalry, National Title was found liable in fraud for passing on an order to Network Title, its rival, with National's commitment attached. The order originally came to National as part of an existing claim based on a mortgage not disclosed in the commitment. Rather than issue the new policy itself, National sent the order and commitment to Network. Notes on the file copy of the commitment warning of the missed mortgage were intentionally whited out. When Network Title took the bait of preparing its commitment in reliance on the defective commitment, the owner of National "became very excited and told his employees that he had 'screwed'" the other company. After paying the claim, the underwriter for Network obtained judgment against National for fraud. The court rejected the argument that Network's negligence in failing to search the title should bar the judgment.

Third, the proposed insured may close the transaction but obtain insurance from another insurer. Of course, a party is free to choose its insurer. However, on occasion, the first insurer's work product is adopted wholesale by a second company, depriving the first insurer of the premium and allowing the second company to collect a premium without having invested any substantial labor. In this last situation, the proposed insured or the party who ordered the first commitment should be obligated to pay the reasonable cost of producing the title information, especially if that party has handed over the first title commitment to the second insurer with the express or implied agreement that the insurer will work from that information. However, as the cases below show, it is difficult for the first insurer to establish a cause of action directly against the second insurer in such a situation.

A title company may claim a copyright to the information in the commitment, and that a competitor violates those rights by copying the exceptions.[115] However, there is no copyright protection for "sweat of the brow"--that is, a copyright claim based solely "on the strength of sheer industry" it takes to compile non-original information.[116] In *Mid-America Title Co. v. Kirk*,[117] one company sued another, claiming that its copyright was violated when its commitment was copied word for word. The action survived a motion to dismiss for failure to state a claim on which relief may be granted. However, the court warned that the action would not make it past summary judgment if the defendant proved "that all examiners will seek out the same data and that, effectively, all title commitments will be essentially identical."[118] Similarly, in *Pacific Title, Inc. v.*

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[114] 1997 WL 536979 (Minn.App.) (unpublished).

[115] Generally, see Annotation, *Title Insurance Company's Rights in Title Information*, 38 ALR4th 968.

[116] 991 F.2d at 421, n. 6. The "sweat of the brow" argument was rejected by the United States Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991).

[117] 991 F.2d 417 (7th Cir. (Ill.) 1993).

[118] 991 F.2d at 422.

Pioneer National Title Ins. Co.,[119] Pioneer National Title appointed Pacific Title its agent in a certain county. Later, the agency contract was terminated and Pioneer appointed a new agent, to whom it gave copies of the policies issued by Pacific. The new agent used the policies as a "starter" title plant. Pacific sued Pioneer, claiming that it had an exclusive right to use the information in the policies. The court rejected the argument, holding that the agency contract made no provision that the policies would remain the property of the agent, or that Pioneer would not share the information with others. Further, the court found that the information in the policies was not "secret" or "confidential" trade information to which Pacific could claim an exclusive right, since it was derived from the public records and was not a patent-worthy invention, process or secret formula.

[119] 33 Wash.App. 874, 658 P.2d 684 (1983).

7 Insureds and Claimants

The benefits of a title insurance policy run to the insured. A claim administrator must determine if the claimant is the insured, particularly if the claimant is not the named insured shown on Schedule A of the policy. Also, if there has been a transfer of the property after the policy date, the claim administrator must determine if the grantee is a successor insured, or if the transfer has caused the policy to terminate. If a natural person who was the named insured has died, or if an entity insured has been dissolved, the administrator must determine which party has become the successor insured by operation of law. If the loan secured by the insured lien has been assigned, the administrator must determine if the claimant is the owner of the loan and thus the insured.

Issues concerning the named insured are discussed at §7.1. The policy also provides that certain other parties become insureds by succeeding to the interest of the named insured. Under the loan policy, a subsequent holder of the indebtedness is a successor insured, as discussed at §7.4. The subject of those parties who become successor insureds, either by operation of law or on a transfer of the property to a related party identified in the policy as a successor insureds, is discussed at §7.2. The Texas promulgated owner's policy also has a definition of successor insureds that is broader than the 1992 policy. The Texas definition is discussed at §7.6. The issue of the rights of parties who hold interests in or who are members of the named insured is discussed at §7.5. The claims made by parties who claim to be beneficiaries of the policy are discussed at §7.7.

Title insurance policies state that the policy terminates when the insured conveys the property to a purchaser, but continues in effect to protect the insured as long as the insured "retains an interest" in the property, or remains liable under covenants of warranty. The subject of the policy's continuation and termination is discussed at §7.3 (owner's policies) and §7.9 (loan policies).

7.1 Named Insured

Policy coverage is afforded to the named insured.[1] When the policy incorrectly names the

[1] A policy must be issued in order for any party to obtain the status of insured. When no policy was issued, and the purported proposed insured discovered that the title insurance commitment it had received was fake, it never became an insured. *Federal Deposit Ins. Corp. v. United General Title Ins. Co*., 2014 WL 3611835 (E.D.N.Y. 2014) (unpublished).

wrong party as the insured, it may be reformed to correct the named insured to conform to the parties' intent.[2]

An owner's policy may be issued to a party that owns a partial fee simple interest in the property. If the property is owned by more than one person or entity and not all owners obtain title insurance, the policy does not protect the owners who elected not to obtain insurance.[3]

A person who receives an interest in the property from an owner insured does not become an insured. For example, a person who later marries the insured does not become an insured by virtue of the marriage.[4] Such a grantee falls under the category of a "purchaser" from the insured who does not receive policy benefits. When two people are both insured as owners, the conveyance by one party to the other insured extinguishes the grantor's policy coverage, but the policy continues in effect as to the grantee insured.[5] However, if the named insured conveys a partial interest in the property, retaining the balance, the policy remains in effect in favor of the insured. The ALTA policies do not contain a term that would reduce the amount of insurance on a conveyance by the insured of a partial interest in the property. See §7.3, concerning the conditions that cause an owner's policy to terminate.

An essential tenet of insurance is that, to qualify for insurance, a party must have an insurable interest in the property. A party claiming rights through the insured may be deemed to have a sufficient interest in the property to qualify him or her to make a claim under the policy on behalf of the insured.[6] However, a party does not establish that it is an insured merely by proving that it holds

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However, the same court refused to dismiss the action as to a claim on a file in which a title agent issued both a fake commitment and a fake policy.

[2] *Title Ins. Co. of Minn. v. Costain Arizona, Inc*., 164 Ariz. 203, 791 P. 2d 1086 (Ariz.App. 1990). In *Stockton Mortgage, Inc. v. Tope*, 233 Cal.App.4th 437, 183 Cal.Rptr.3d 186 (Cal.App. 3 Dist. 2014), reh.den. (Jan. 13, 2015), rev.den. (March 25, 2015), the loan policy named the trustee under the deed of trust as the insured. The beneficiary-lender, which was a related entity, assigned the loan. Then a tax debt was discovered and paid. The court held that the named insured, the trustee under the deed of trust, never had an insurable interest in the land or was the owner of the debt, and thus never had coverage, while the beneficiary of the deed of trust had already assigned the debt and was no longer an insured.

[3] In *Mississippi Valley Title Ins. Co. v. Malkove*, 540 So.2d 674 (Ala. 1988), title was vested in four people but the policy named only two as insureds. The court found that the policy provided no coverage to the non-insured property owners.

[4] In *Van de Bovenkamp v. United Title Co*., 2006 WL 3530473 (Cal.App. 2 Dist.) (unpublished), the court held that the policy issued to an individual did not cover the interest of his spouse, whom he married after the policy date and who did not take title: "Nothing in the [complaint] asserted the existence of a contract or insurance policy to which she was a party. … As appellants concede, she was not involved in the purchase of the property and is not a title owner. That she is now married to Ernst and has been sued by the Developer does not give her standing to pursue a claim under a policy that could not have included her."

[5] *Hawkins v. Weichert Title Agency*, 2011 WL 4466883 (N.J.Super.A.D.) (unpublished).

[6] In *Warczak v. Attorneys' Title Guaranty Fund, Inc*., 2015 WL 3884451, 2015 IL App (2d) 140677-U (Ill.App. 2 Dist. 2015) (unpublished), the court stated that, because Illinois courts have held that the beneficiary of a passive Illinois land trust is entitled to bring a lawsuit about land while it is titled in the name of the trustee, such a beneficiary also has

an interest in the land that would be insurable.[7] See §7.5 concerning the rights of parties who have interests in the named insured.

The policy is not an assurance as between the named insureds as to what their respective rights in the property may be. Thus, the insurer is not obligated to defend one insured in a lawsuit brought by a co-owner to recharacterize their interests in the property.[8]

7.2 Successor Insureds Under Owner's Policy FORM 69, Appendix A Voluntary conveyance terminating coverage

All versions of the ALTA owner's policy provide that the definition of "insured" includes not only the named insured but also a party to whom title passes by operation of law from the named insured. Conditions and Stipulations 1(a) of the 1992 ALTA owner's policy states:

> "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such 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.

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the right to make a claim under a title insurance policy in which the trustee of the land trustee was the named insured.

[7] In *Sandler v. New Jersey Realty Title Ins. Co*., 36 N.J. 471, 178 A.2d 1 (1962), the named insured conveyed the property to his son, who later reconveyed the property to the father. The court held that the policy was revived when the insured reacquired an insurable interest in the property. See §7.3 for a complete discussion of cases that have considered the issue of when an owner's policy terminates. In *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 498 N.W.2d 905 (Wis.App. 1 Dist. 1993), the court found that the corporation insured was the alter ego of its sole shareholder, and that the shareholder had an insurable interest in the real estate. The court extrapolated from its questionable ruling on insurable interest to a finding that the shareholder had standing as an insured. The New Jersey Supreme Court rejected a similar theory based on alter ego, however, noting that the doctrines of alter ego and piercing of the corporate veil are legal constructs used to allow creditors to get at assets that are being sheltered to defraud creditors. Those concepts are not used to determine who is insured under a policy. "Here, the Shotmeyers set up different, legitimate business structures to further their personal and business plans. They did not use their partnerships to commit fraud or defeat the ends of justice. The alter ego doctrine, therefore, does not apply." *Shotmeyer v. New Jersey Realty Title Ins. Co*., 195 N.J. 72, 87, 948 A.2d 600, 608 (N.J. 2008). *Shotmeyer* was cited with approval in the later New Jersey case of *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Ins. Co*., 2009 WL 1874060 (D.N.J.) (unpublished).

[8] In *Kachel v. Chicago Title Ins. Co*., 1999 WL 123807 (S.D.N.Y.) (unpublished) aff'd 2001 WL 527480 (S.D.N.Y.) (unpublished), the court held: "No matter what the respective rights are among the insureds, none of the insureds obtained insurance against title claims by their co-owners. Rather, they, as do all title insurance purchasers, sought to insure that the property they bought had free and clear title." Id. at *1. In *Lawyers Title Ins. Corp. v. JDC (America) Corp.* 818 F.Supp. 1543 (S.D.Fla. 1993), aff'd 52 F.3d 1575 (11th Cir. 1995), a loan policy was issued to a lender. The lender was also a member of the owner-borrower joint venture. When the lender foreclosed, the other joint venture members attacked the mortgage on the grounds that the lender was foreclosing against itself. The court found that the insurer had no duty to defend the action, because the policy was not intended to protect the insured against a dispute with its co-owners and borrowers.

Most transfers by "operation of law" occur as a result of a change in legal status of the insured, such as the death or dissolution of the titleholder, as discussed below. An agent of the named insured is not a successor insured.[9]

The sale of stock in an insured corporation is not a transfer of the real estate from the named insured. Therefore, a stock transfer does not invoke any term of the policy.[10] However, the stock purchaser does not become an insured.[11] In addition, the policy does not insure against any matter after the date of policy. Therefore, the purchaser of the stock ordinarily seeks an endorsement, where available, extending the date of policy. In addition, any knowledge of the outgoing officers, directors and employees continues to bind the insured corporation as to any title defect. This defense to coverage is partially or fully waived if the insurer issues a non-imputation endorsement at the time of the stock sale.

The terms "distributee" and "corporate successor" are not defined in the ALTA policies, but courts have supplied common sense definitions for those terms.[12] The 1992 ALTA Owner's policy

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[9] In *Alameda Corridor Trans. Authority v. Stewart Title Ins. Co*. 2004 WL 2943877 (9th Cir.(Cal.)) (unpublished), the cities of Los Angeles and Long Beach bought a rail line. The claim involved an easement that crossed the property. The cities obtained a policy from Stewart Title that did not except the sewer easement. The cities incurred an expense in the relocation of the sewer that was borne by the Alameda Corridor Transportation Authority ("ACTA"). The cities and ACTA sued Stewart Title for the relocation cost. Stewart won on summary judgment before the district court, and the Ninth Circuit affirmed, saying: "Neither the purchase and sale agreement nor the insurance policy name ACTA as a grantee or an insured. The Cities also did not seek to add ACTA as an insured by paying for an additional endorsement. … Plaintiffs argue that ACTA became an insured under the policy 'by operation of law' when it contracted with the Cities to take responsibility for management and construction of the project. 'Operation of law' can be defined as '[t]he means by which a right or a liability is created for a party regardless of the party's actual intent.' Black's Law Dictionary 1124 (8th Ed. 2004). … Here, there is no basis for concluding that ACTA is a successor to any interest in the land by operation of law 'regardless of the party's actual intent.' Any interest it acquired was through the contract it intentionally entered into with the Cities. Because no insured party suffered loss or damage, plaintiffs' claims are excluded under Exclusion 9(c) of the policy." The case may be the first in which a party has claimed to be a successor insured because it took over management of the property.

[10] Also Weinreich, *Commercial Transactions: Who Does the Title Insurance Cover?*, 6 Probate & Property 42 (1992).

[11] *Hawkins v. Oakland Title Ins. & Guar. Co*., 165 Cal.App.2d 116, 331 P.2d 742 (1958).

[12] In *Durbano & Garn Investment Co., LC v. First American Title Ins. Co*., 2014 UT App 150, 330 P.3d 119 (Utah App. 2014), cert.den. 337 P.3d 295, Oct. 1, 2014, the court said that the most accurate meanings of the terms "distributee" and "corporate successor" should be inferred from the characteristics of the other terms in the definition. It said: "'That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.' *Beecham v. United States*, 511 U.S. 368, 371 (1994). Here, all of the neighboring words listed in the policy--heirs, devisees, survivors, personal representatives, next of kin, and fiduciary successors--are descriptive of one who 'succeed[s] to the interest of the named insured' regardless of the successor’s intent. And while this type of transfer is generally not complete absent some affirmative act on the part of the successor—e.g., accepting delivery of an executor’s deed to effect a devise of property as called for in a will—the underlying rights and obligations to the property or interest 'come to the transferee without any act or cooperation on [its] part.' … See also Black’s Law Dictionary 1201 (9th ed.2009) (defining 'operation of law' as the 'means by which a right or a liability is created for a party regardless of the party’s actual intent'). Because the underlying rights and obligations devolve automatically by operation of law, the

states that "corporate or fiduciary successors" are successor insureds. This refers to a successor to a named insured that held title in a fiduciary capacity, such as a trustee, and does not encompass the trustee of a new trust to whom the insured conveyed the property after date of policy.[13] See §7.3 for a complete discussion of the effect of a voluntary transfer by the named insured to a related party for no consideration.

The term "by operation of law" is also not defined in the policy, but almost every court has applied its standard definition, meaning a transfer that is automatic, and that occurs according to a legal principle or statute.[14]

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modest steps required to complete the transfer are merely confirmatory." In *Kwok v. Transnation Title Ins. Co*., 170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), rev.den. April 29, 2009, the Kwoks argued that, because no consideration changed hands and no transfer tax was paid on the conveyance from the insured LLC to them as trustees of a revocable trust, the deed was not a purchase, and every type of transfer other than a purchase falls under the "by operation of law" category of transfer. The court disagreed, saying: "But such an interpretation not only ignores the controlling phrase by operation of law, it deprives it of all meaning. A transfer can occur that does not involve a purchase, but nevertheless does not arise by operation of law. For example, a gift of the property may not involve the exchange of any consideration, but a donee cannot be said to succeed to the property by operation of law. A transfer of property by gift is clearly a voluntary act that does not arise automatically upon death or dissolution." 170 Cal.App.4th at 1571, 89 Cal.Rptr.3d at 148. In *Butera v. Attorneys' Title Guar. Fund, Inc.*, 321 Ill.App.3d 601, 704 N.E.2d 949, 254 Ill.Dec. 537 (Ill.App. 1 Dist. 2001), a trustee deeded to a corporation controlled by the trust's beneficiaries. The court found that the corporation was found not a successor "distributee," because the trust was not dissolved, and the corporation would not have been the distributee by the trust's own terms if it had been dissolved: "While the Policy uses the term generally, a distribution from a trust does have a specific meaning. Black's Law Dictionary defines a trust distribution as "[t]he cash or other property paid or credited to a trust beneficiary." Black's Law Dictionary 488 (7th Ed. 1999)." In *First American Title Ins. Co. v. Kessler*, 452 So.2d 35 (Fla.App. 1984), the court used the commonly-accepted view of a distributee by operation of law, in finding that, when the insured trust dissolved, the policy continued in force in favor of the distributees of the trust. In *Alameda Corridor Trans. Authority v. Stewart Title Ins. Co*. 2004 WL 2943877 (9th Cir.(Cal.)) (unpublished), the court said: "'Operation of law' can be defined as '[t]he means by which a right or a liability is created for a party regardless of the party's actual intent.' Black's Law Dictionary 1124 (8th Ed. 2004). … Here, there is no basis for concluding that ACTA is a successor to any interest in the land by operation of law 'regardless of the party's actual intent.' Any interest it acquired was through the contract it intentionally entered into with the Cities."

[13] "A 'fiduciary successor,' more frequently called a 'successor fiduciary,' is a 'fiduciary who is appointed *to succeed or replace a prior one*.' Black's Law Dictionary 640 (7th ed.1999) (emphasis added)… In this case, the Trust did not succeed or replace any *prior fiduciary*--it simply was the entity to which Mrs. Carney voluntarily transferred her interest in the Property. The Trust thus was not a fiduciary successor." *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Ins. Co*., 2009 WL 1874060 (D.N.J.) (unpublished). In *Horowitz v. Stewart Title Guar. Co*., 2017 WL 2836990 (D. Hawaii) (unpublished), the court held that individual grantees on several successive voluntary conveyances were not successor insureds by operation of law, because they were not assisting the insured entity in winding up its affairs.

[14] In *Durbano & Garn Investment Co., LC v. First American Title Ins. Co*., 2014 UT App 150, 330 P.3d 119 (Utah App. 2014), cert.den. 337 P.3d 295, Oct. 1, 2014, the court said the phrase means that "the underlying rights and obligations to the property or interest 'come to the transferee without any act or cooperation on [its] part.' … See also Black’s Law Dictionary 1201 (9th ed.2009) (defining 'operation of law' as the 'means by which a right or a liability is created for a party regardless of the party’s actual intent'). Because the underlying rights and obligations devolve automatically by operation of law, the modest steps required to complete the transfer are merely confirmatory." In *Shotmeyer v. New Jersey Realty Title Ins. Co*., 195 N.J. 72, 948 A.2d 600 (N.J. 2008), the court said that a transfer occurs by "operation of law" only when it is automatic or involuntary under the law. However, in *North Fork Land & Cattle, LLLP v. First American Title Ins. Co*., 362 P.3d 341, 2015 WY 150 (Wyo. 2015), the court refused to apply the legal meaning of the legal phrase "by operation of law," and the numerous decisions such as *Shotmeyer* that have

When the insured is a natural person, a party may become a successor insured on a transfer by operation of law if the party was an heir, distributee, devisee, survivor or next of kin. The successor insured must receive title after the death of the insured; a transfer by the insured during his or her life is not by operation of law.[15] The personal representative of the named insured's estate is also a successor insured, having the capacity to make a claim under the policy on behalf of the insured's estate.

When the insured is an entity, a party that takes title to the property by operation of law on the dissolution of the entity becomes a successor insured. In order for the transferee to qualify as a successor insured, the named insured must first be dissolved, and its assets distributed thereafter.[16] A transfer of the real estate before a dissolution of the insured entity does not qualify the transferee as an insured.[17] A voluntary dissolution of the insured entity causes the policy to terminate if the

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provided its ordinary definition. The court said that it wanted instead to consider "how a reasonable insured would understand the policy language," based on the phrase's "plain meaning." It resorted to various sources, such as a 1944 U.S. Supreme Court decision about a bank consolidation that interpreted the term "wholly by operation of law." The *North Fork* court concluded that three successive voluntary transfers, from the named insured to several related entities, were all by operation of law. The primary motivator behind the ruling appeared to be the court's determination that, if the insureds had held 2006 ALTA policies, at least the first such transferee might have been considered a successor insured.

[15] In *Fidelity Nat'l Title Ins. Co. v. Ruggiri*, 2013 WL 812502 (Conn.Super.) (unpublished), the court said that a deed from the insured to her husband was not by operation of law because the individual gave the deed while alive, even though it was in anticipation of her death while she was terminally ill. The deed terminated both the policy and the pending claim, which was in litigation; the policy claim was not an asset of the estate and the husband had no standing to sue.

[16] *Historic Smithville Development Co. v. Chelsea Title & Guar. Co.*, 184 N.J.Super. 282, 445 A.2d 1174 (Ch. 1981), aff'd in part, rev'd in part, 190 N.J.Super. 567, 464 A.2d 1177 (App.Div. 1983) (successor on corporate dissolution became the insured). In *Grill v. Ticor Title Ins. Co.*, 2011 WL 320422 (Cal.App. 3 Dist.) (unpublished), a corporation distributed the insured parcel of real estate to its shareholder as the corporation was being dissolved, and the insurer acknowledged that the shareholder became a successor insured.

[17] In *Durbano & Garn Investment Co., LC v. First American Title Ins. Co*., 2014 UT App 150, 330 P.3d 119 (Utah App. 2014), cert.den. 337 P.3d 295, Oct. 1, 2014, Durbano & Garn Investment Company bought land and got a policy in 1993. In 1994, it gave a quit claim deed to its related entity, Durbano Properties. Durbano Properties learned of a title problem when it contracted to sell the property in 2002. Durbano & Garn filed a claim. The court held that the policy had terminated, and rejected the argument that Durbano Properties was a "distributee" or "corporate successor" to the named insured. The court said that the most accurate meanings of the terms "distributee" and "corporate successor" should be inferred from the characteristics of the other terms in the definition. It said: "'That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.' *Beecham v. United States*, 511 U.S. 368, 371 (1994). Here, all of the neighboring words listed in the policy--heirs, devisees, survivors, personal representatives, next of kin, and fiduciary successors--are descriptive of one who 'succeed[s] to the interest of the named insured' regardless of the successor’s intent. And while this type of transfer is generally not complete absent some affirmative act on the part of the successor—e.g., accepting delivery of an executor’s deed to effect a devise of property as called for in a will—the underlying rights and obligations to the property or interest 'come to the transferee without any act or cooperation on [its] part.' … See also Black’s Law Dictionary 1201 (9th ed.2009) (defining 'operation of law' as the 'means by which a right or a liability is created for a party regardless of the party’s actual intent'). Because the underlying rights and obligations devolve automatically by operation of law, the modest steps required to complete the transfer are merely confirmatory." Because the deed to the related entity was signed long before there was any plan to dissolve the insured corporation, the policy terminated when that deed was issued. In *Kwok v. Transnation Title Ins. Co.*,

successor entity is found not to have taken title by operation of law. In *Fairway Development Co. v. Title Ins. Co. of Minn.*,[18] the court held that the policy terminated when the title holding partnership was voluntarily terminated and a new one formed, because the successor reconstituted partnership did not receive title to the property by operation of law. This case spawned what is known as the *Fairway* endorsement, which provides that a reorganization of the insured partnership shall not cause the policy to terminate. The 2006 ALTA Owner's policy states that successor insureds include a successor to the named insured by "reorganization," a new term, which likely does away with the *Fairway* issue.

In some jurisdictions, title insurers offer endorsements that expressly recognize that a successor owner of the property is a successor insured, although the party did not take title by operation of law. These "successor owner" endorsements are of two types. The prospective version expands the definition of "insured" to include transferees in various classes, such as trustees of revocable trusts. The second type is issued after a transfer, and names the grantee as an insured.[19] Successor insured endorsements are available in many jurisdictions, permitting a transferee to become an insured if the endorsement is secured.[20] This fact emphasizes that a voluntary transferee does not have a reasonable expectation of coverage without such an endorsement.[21]

The ALTA Homeowner's Policy expands the list of successor insureds to include certain parties who obtain title other than by operation of law. Conditions 2.b of the 2010 version of that

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170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), rev.den. April 29, 2009, the named insured was a limited liability company. After the policy date, the members conveyed the property to themselves as trustees of a revocable trust. The insured testified that he decided to dissolve the LLC after the deed to the trust had been issued. Then he reversed his testimony and said he had planned to dissolve the LLC before the deed was signed, and that the trustees were the intended distributees. The court said the entity must be dissolved first to make the grantees distributees. Also, the members of the LLC were individuals, so the deed to them as trustees was not a distribution to the members of the LLC.

[18] 621 F.Supp. 120 (N.D. Ohio 1985).

[19] See a discussion of the availability of these endorsements as blunting the argument that the policy remained in force after a voluntary transfer, in *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), rev.den. Apr. 29, 2009, and *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Ins. Co*., 2009 WL 1874060 (D.N.J.) (unpublished).

[20] See *Kwok v. Transnation Title Ins. Co*., 170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), review denied Apr. 29, 2009, that said: "The transfer of property by an insured into a family trust is a voluntary act and not one that arises by operation of law. (See Croskey et al., *Cal. Practice Guide: Insurance Litigation*, The Rutter Group 2008, ¶ 6:2558.1, p. 6H-8 (rev.# 1, 2004) ['When the insured transfers title to his or her family trust, ... the CLTA Standard Policy does *not* automatically extend coverage to the trustee. However, an endorsement for that coverage may be purchased'; see also *Title Insurance Practice,* Cont.Ed.Bar 2d Ed. 2008, § 6.61, p. 167 [same].)]" 170 Cal.App.4th at 1571, 89 Cal.Rptr.3d at 148.

[21] In *Proto-Cam, Inc. v. Warner Norcross & Judd*, 2008 WL 5385812 (Mich.App.) (unpublished), a lawyer was sued for malpractice because he knew the insured intended to deed the property to a related entity, and the client claimed he should have protected the client from termination of the title insurance policy, but the claim was barred by the statute of limitation.

policy states:

b. This Policy also insures:
(1) anyone who inherits Your Title because of Your death;
(2) Your spouse who receives Your Title because of dissolution of Your marriage;
(3) the trustee or successor trustee of a Trust to whom You transfer Your Title after the Policy Date; or
(4) the beneficiaries of Your Trust upon Your death; or
(5) anyone who receives Your Title by a transfer effective on Your death as authorized by law.

This provision adds to the list of successors a trustee under either a living or testamentary trust, or a spouse who receives title to the property as part of a divorce proceeding.

The 2006 ALTA Owner's and Loan policies further expands the list of successor insureds who take title other than by operation of law. That policy's definition includes "successors to an Insured by its conversion to another kind of Entity." Also included is a grantee under a deed from an insured if "delivered without payment of actual valuable consideration" and if the insured is sole owner of the grantee, the grantee wholly owns the insured, or the insured and grantee are both owned by the same entity. "Entity" is defined as a corporation, partnership, trust, LLC or "other similar legal entity." The continuation provision (Conditions 2) has been similarly revamped to include successor entities of the classes listed in this definition. The language of these two definitions is elegantly simple, given the complexity of the issue.

The 2006 ALTA policies thus recognize as successor insureds the grantees in many types of voluntary transfers for no consideration in which the grantee was not a successor insured under the 1992 and prior policies, and that transfers in fact caused those policies to terminate.[22] There are limits to the spectrum of such grantees who become successor insureds, however. The 2006 ALTA policy language is unambiguous in saying that the insured must *wholly* own the grantee, or vice versa. A partnership that takes title from the named insured, but in which a party other than the named insured is also a partner, does not qualify as a successor insured, and the 2006 policy terminates on such a transfer. Further, in order for the grantee to qualify as a successor insured, the conveyance must be without payment of "actual valuable consideration." In *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc.,*[23] the insureds argued that the conveyance to their own limited liability company was not a "purchase" because no consideration passed at the time of the deed. However, the court found the consideration to be in the fact that the deed "provided the Gebhardts with all of the benefits conferred by a Virginia limited liability

[22] In *Keys v. Chicago Title Ins. Co.*, 2012 WL 4510471 (S.D.Miss.) (unpublished), the insured individual got a 2006 policy. She submitted a claim on the policy, then transferred the property to herself as trustee of a revocable trust. When the insurer did not pay the claim, she sued it in her individual capacity only. The court held that she had standing to sue, particularly since she remained the insured in her capacity as trustee. The court also held that Ms. Keys, as trustee, did not have to submit a new notice of claim after she transferred the property to herself as trustee.

[23] 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000).

company, including limited liability and certain estate planning benefits." Thus, it would appear that the Maryland court has already ruled that a shielding from liability is "actual valuable consideration."

7.3 Owner's Policy Termination; Warranty Liability

The owner's title insurance policy continues in effect as to the named insured as long as the insured retains an estate or interest in the land, including a purchase-money mortgage, or has liability on warranties of title. The 2006 ALTA Owner's policy states:

> The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

However, coverage under most forms of the ALTA owner's policy terminates when the insured makes a voluntary conveyance of the property.[24] The policy also terminates when the insured loses title involuntarily, such as on foreclosure, or when the insured disclaims his or her interest in

[24] For example, in *Washington Temple Church of God in Christ, Inc. v. Global Properties and Associates, Inc*., 37 Misc.3d 1211(A), 2012 WL 5187556, 2012 N.Y. Slip Op. 51997(U) (N.Y.Sup. 2012) (unpublished), the court held that an owner's policy terminated when the insured sold the property, and that the insurer had no duty to defend the insured in a lawsuit about the property that was filed after the sale. See also *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc*., 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000), and other cases cited in this section. However, in *Cocco v. Hamilton*, 2010 WL 2011003 (N.J.Super.A.D.) (unpublished), the court refused to find that the policy terminated on a sale by the insured to a purchaser, as to a claim made by the insured before the sale took place. The court did not even recite the provision of Conditions 2, which states that the policy does not continue in force in favor of a purchaser. Further, although the court overturned summary judgment in favor of the insurer, the decision did not unequivocally grant summary judgment in favor of the insured. In *Back Creek Partners, LLC v. First American Title Ins. Co.*, 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013), the court found that a lawsuit brought against the insureds after they sold the property, about matters that occurred after the policy date, for which the insureds tendered their defense only after trial, did not create a duty to defend, primarily because the policy terminated on the voluntary conveyance. In *First American Title Ins. Co. v. Two Seventy Three Water Street, LLC*, 2013 WL 811878 (Conn.Super.) (unpublished), the court found that a deed from the named insured (under an ALTA 1992 Owner's policy) to a new entity whose members were the same as the owners of the insured terminated the policy, and the insured did not retain an interest in the property after the conveyance. The fact that such a transfer would not cause the termination of a 2006 ALTA Owner's policy did not change the policy coverage. However, the court said there was a disagreement amongst the jurisdictions about whether or not such a transfer terminates the insured's pending claim. The insured had submitted a claim, and the insurer had made a disputed loss payment, before the transfer. Therefore, it did not grant summary judgment to the insurer. However, in *North Fork Land & Cattle, LLLP v. First American Title Ins. Co*., 362 P.3d 341, 2015 WY 150 (Wyo. 2015), the court used tortured reasoning to find that a voluntary transfer for no consideration did not cause the policy to terminate. The court acknowledged that its ruling was directly opposite many prior decisions to the contrary from other states.

the property.[25] A leasehold owner's policy terminates on the extinguishment, expiration or termination of the leasehold estate, or on the assignment of the leasehold interest from the insured to another party without warranty.[26] The insurer has no duty to defend an insured in a lawsuit filed after the policy has terminated.[27]

The ALTA Homeowner's Policy, by contrast, states that the policy "insures You forever, even after You no longer have Your Title." That phrase has been held to cause the policy to continue after a voluntary transfer by the insured.[28]

Conditions 2 of the 2006 ALTA Owner's policy says that it does not continue in effect in favor of a purchaser. Thus, a purchaser from the insured does not become an insured.[29] A voluntary

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[25] In *Gumapac v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 3150657 (C.D.Cal.) (unpublished), the court found that an owner's policy terminated when the insured's title was extinguished by foreclosure, after which time the owner could not suffer a loss due to the alleged defect in title. In *Royale Westminster Retirement, LLC v. Commonwealth Land Title Ins. Co*., 2011 WL 2582101 (Cal.App. 4 Dist.) (unpublished), a title insurer was found not to have any duty to indemnify or defend a person who had already disclaimed any ownership in the property because his title stemmed from a forged deed.

[26] *Soldiers', Sailors', Marines' & Airmen's Club, Inc. v. Carleton Regency Corp*., 95 A.D.3d 687, 945 N.Y.S.2d 40, 2012 N.Y. Slip Op. 03958 (N.Y.A.D. 1 Dept. 2012). However, in *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc.*, 2012 WL 4856391 (D. Utah) (unpublished), the court held that the lessor's voluntary and unilateral termination of the lease did not terminate the policy, although Conditions 2 says the policy continues only as long as the insured retains its interest in the land. The court accepted the insured's view that, if the policy terminated when the lease did, this "would make the most serious category of title insurance claims (those involving total loss of title) self-invalidating." It ruled that "Condition 2 limits coverage only for voluntary conveyances… ."

[27] *Washington Temple Church of God in Christ, Inc. v. Global Properties and Associates, Inc*., 37 Misc.3d 1211(A), 2012 WL 5187556, 2012 N.Y. Slip Op. 51997(U) (N.Y.Sup. 2012) (unpublished); *Fidelity Nat'l Title Ins. Co. v. Butler*, 2017 WL 2774337 (Cal.App. 3 Dist.) (unpublished) (insurer had no duty to defend insured owners who were sued about title issue years after they conveyed property; all policy duties ended on voluntary transfer of property). In *Back Creek Partners, LLC v. First American Title Ins. Co.*, 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013), the court found that a lawsuit brought against the insureds after they sold the property, about matters that occurred after the policy date, for which the insureds tendered their defense only after trial, did not create a duty to defend, primarily because the policy terminated on the voluntary conveyance. Using *Gebhardt* as its primary precedent, the court stated that, "[i]f the Smith Action had alleged claims relating to defects in the title Back Creek conveyed to its buyers, those defects passed to Back Creek's successors-in-interest at the time of conveyance and would not be covered."

[28] In *CSK Investments, LLC v. Select Portfolio Servicing, Inc.*, 2011 WL 1158551 (D.Ariz.) (unpublished), the court found that a Homeowner's policy continued in force after the individual named insured contributed the property to a partnership. In *First American Title Ins. Co. v. Ordin*, 2011 WL 4062208 (Cal.App. 2 Dist.) (unpublished), a court refused to overturn an arbitrator's finding that the Homeowner's policy continued even after three transfers to related entities—first a corporation, then a trust, then an LLC—all controlled by the named insureds. That ruling may have been based on the successor insured provision rather than the "insures you forever" phrase, however, the court said.

[29] *Covalt v. First American Title Ins. Co*., 105 F.3d 669 (Table), 1997 WL 4273 (10th Cir. (Wyo.) 1997) (unpublished); *Stevens v. Dakota Title and Escrow Co*., 2004 WL 2381386 (Neb.App.) (unpublished); *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc*., 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000); *McRae v. Westcor Land Title Ins. Co.*, 2017 WL 1239682 (D.Md.) (unpublished) (purchaser at arm's length did not become insured under policy, despite their assertion that they took title by operation of law).

transfer to a party related to the insured is not by operation of law, and the grantee does not become a successor insured.[30] See §7.2 for a complete discussion of which classes of parties qualify as successor insureds under the owner's policy. The policy does not terminate if the named insured conveys only part of the insured parcel, however.[31]

The term "purchase" has been construed to include all transfers that are not by operation of law, both arm's-length sales and conveyances from the insured to a related party for no consideration.[32] In *Butera v. Attorneys' Title Guar. Fund, Inc.*,[33] the court held that "'purchase' in real

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[30] Also, on the transfer of the property from one related corporation to another, the grantee corporation does not succeed by operation of law, and is not an insured, even if the transfer was for no consideration. See *Pioneer Nat'l Title Ins. Co. v. Child, Inc*., 401 A.2d 68 (Del. 1979). In *Lawyers Title Ins. Corp. v. Cae-Link Corp.*, 45 F.3d 426 (Table) (4th Cir. (Md.) 1995) (unpublished), the insurer issued its policy to Singer Corporation. Singer formed a new corporation, Link Military Simulation Corporation. At that time, Singer conveyed the real estate to Link. The stock of Link was later sold to CAE-Industries of Canada, which then merged Link into a CAE subsidiary. The court found the conveyance to Link to be voluntary, thus terminating the coverage of the policy. The *Cae-Link* case is discussed in Reinhardt and Rader, Recent Developments in Title Insurance Law, 31 Tort & Insurance L.J. 513 (1996). In *Realty Alliance of Texas, Ltd. v. Stewart Title Guar. Co.*, 1997 WL 13651 (Tex.App.-Houston) (unpublished), a seller asserted that the insurer had paid a claim as a volunteer because, before the claim was made, the insured had conveyed the property to a corporation he controlled, by a limited warranty deed. The insurer accepted the claim "after much deliberation," because it considered the case "a close call." However, the numerous decisions issued since then have erased any uncertainty in this issue.

[31] In *First American Title Ins. Co. v. 273 Water Street, LLC*, 157 Conn.App. 23, 117 A.3d 857 (Conn.App. 2015), the court held that the policy did not terminate on a voluntary conveyance of part of the land, even though the land conveyed was the portion of the property on which the insured claimed to have suffered a loss. In *Centennial Development Group, LLC v. Lawyers Title Ins. Corp*., 233 Ariz. 147, 310 P.3d 23 (Ariz.App. Div. 1 2013), when an insured discovered an easement after buying the property and elected to give most of the land back to the seller in lieu of foreclosure of its purchase money deed of trust, the deed back to the seller did not cut off the insured's right to sue the insurer for the alleged diminution in value. In *Centennial*, the policy did not terminate, because the insured still owned some of the insured land.

[32] In *Kwok v. Transnation Title Ins. Co*., 170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), review denied Apr. 29, 2009, the Kwoks argued that, because no consideration changed hands and no transfer tax was paid on the conveyance from the insured LLC to them as trustees of a revocable trust, the deed was not a purchase, and every type of transfer other than a purchase falls under the "by operation of law" category of transfer. The court disagreed, saying: "But such an interpretation not only ignores the controlling phrase by operation of law, it deprives it of all meaning. A transfer can occur that does not involve a purchase, but nevertheless does not arise by operation of law. For example, a gift of the property may not involve the exchange of any consideration, but a donee cannot be said to succeed to the property by operation of law. A transfer of property by gift is clearly a voluntary act that does not arise automatically upon death or dissolution." 170 Cal.App.4th at 1571, 89 Cal.Rptr.3d at 148. Notwithstanding *Kwok*, however, a California court ruled in an unpublished decision that "by operation of law" includes every type of transfer without consideration, causing the successive grantees to become successor insureds. The named insured transferred the property, and there followed a series of additional voluntary conveyances to various parties and entities in which the named insured had an interest or to whom he was related. The court held that none of the transfers terminated the policy. It said the policy was only extinguished when title was defeated by a competing owner. *Shah v. Fidelity Nat'l Title Ins. Co*., 2016 WL 4987150 (Cal.App. 6 Dist.) (unpublished). The court did not cite *Kwok* and based its rulings on the musings found in two books written by professors.

[33] 321 Ill.App.3d 601, 704 N.E.2d 949, 254 Ill.Dec. 537 (Ill.App. 1 Dist. 2001).

estate law covers any acquisition of title by the voluntary act of the parties." The court synthesized the prior decisions in perhaps the most articulate expression of the dividing line between transfers by operation of law and those that represent a purchase:

> ATG contends successors "by operation of law" under the Policy are those who acquire enforceable property rights without the necessity of conveyance of a deed, as distinct from those who purchase property where paper title changes hands. In each of the examples provided in the Policy, the individuals or entities have relationships to the named insured that preexisted the exchange of title. The "heirs," "devisees," "corporate successors," etc., are successors of the named insured because they take the property not from the insured, but through the named insured by operation of law.
>
> We agree that this interpretation of the policy language gives meaning to all the terms in the provision and fulfills the intent of the parties. It is also consistent with the results reached by the Historic Smithville and Child courts. In Child, the property was deeded by the named insured Child Foundation to the du Ponts, who then deeded it to another entity, Child, Inc. Applying our interpretation, it becomes clear that Child, Inc., was a stranger to the property, having no preexisting relationship to either the Child Foundation or the du Ponts. On the other hand, the property in Historic Smithville was transferred to the shareholders and through the named insured corporation based on their relationship to the corporation.
>
> This interpretation also correlates with public policy. Title insurance is an unusual type of insurance. It is not a recurring policy: there is a single premium, and the policy remains outstanding forever to protect the property owner. ... In its definition of "insured," ATG's title insurance policy anticipated changes in the title owner of the insured property, and, thus, changes in the named insured. The Policy, however, placed limits on who could obtain the property and still remain insured under the Policy. Our interpretation of successors "by operation of law" restricts the definition of "insured" to certain foreseeable groups of individuals. Transfers by purchase, on the other hand, would expose the insurer to significantly greater risk because the number of possible transferees is limitless.

Thus, a voluntary transfer by an insured who is a natural person to an entity formed by the insured, such as a limited liability company, has also been repeatedly held to terminate the coverage of the policy, absent a specific provision making the transferee a successor insured.[34] A deed into a trustee

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[34] In *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc*., 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000), the insureds argued that the conveyance was not a "purchase" because no consideration passed at the time of the deed. However, the court found consideration in that the deed "provided the Gebhardts with all of the benefits conferred by a Virginia limited liability company, including limited liability and certain estate planning benefits." The Gebhardts also argued that the payment of a transfer tax was not evidence of a transfer, and the value figure was put on the deed solely to calculate the tax due. The court responded: "[t]he argument is circular, however, in that a transfer tax is a tax imposed on the transferring of property.' [citation omitted] If there had been no conveyance, there would have been no tax." See also *Shotmeyer v. New Jersey Realty Title Ins. Co.*, 195 N.J. 72, 948 A.2d 600 (N.J.

of a trust formed for estate planning purposes is a voluntary conveyance that terminates the policy.[35] The issue of policy termination on transfers to related entities for no consideration, particularly for estate planning, has received considerable scholarly comment.[36]

When the insured retains a recognized property right in the land, the policy continues for the protection of that interest.[37] However, the insured does not retain an interest in the land after he or she has transferred it to a related entity of which the insured is a member or partner. A number of courts have held that a partnership or member interest is personal property, and does not constitute an interest in the real estate retained by the insured after his or her conveyance to a limited liability company or partnership in which the insured is a member or partner.[38] In addition, the interest of the

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2008) (voluntary transfer from general partnership to limited partnership controlled by same parties); *Proto-Cam, Inc. v. Transamerica Title Ins. Co*., 2008 WL 2553340 (Mich.App.) (unpublished) (voluntary transfer from one corporation to another corporation controlled by the same people). In *Stevens v. Dakota Title and Escrow Co*., 2004 WL 2381386 (Neb.App.) (unpublished), the court held that the policy terminated on a deed from the insured individual to his corporation: "Black's Law Dictionary 1124 (8th ed.2004) defines 'operation of law' as the 'means by which a right or a liability is created for a party regardless of the party's actual intent.' In the instant case, Aslan received title to the subject property via a warranty deed from Stevens. This conveyance was voluntary and was the result of an affirmative act, not an obligation of law."

[35] In *Covalt v. First American Title Ins. Co.*, 105 F.3d 669 (Table), 1997 WL 4273 (10th Cir. (Wyo.) 1997) (unpublished), the court found the policy terminated because the definition of insured included only the named insured and "the heirs, devisees, [and] personal representatives of such Insured," and "the Maytag Trust was not an insured under this language." When the individual insured transferred the property into a trust in stages before her death, and her children made a further conveyance to settle their rights in the property after the insured's death, the transfers were voluntary and not distributions by operation of law. *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Ins. Co*., 2009 WL 1874060 (D.N.J.) (unpublished). The court made this comment: "This case emphasizes the need for persons making estate planning arrangements to pay close attention to title insurance policies for real property which has been voluntarily transferred by the insured property owner to a trust."

[36] See Rivin and Stikker, *Title Insurance for Estate Planning Transfers*, Probate & Property, May/June 1998, p. 15; Murray, *Title Insurance Issues in Limited Liability Company Transactions*, 16 The Practical Real Estate Lawyer 27 (September 2000); and Palomar, *Limited Liability Companies, Corporations, General Partnerships, Limited Partnerships, Joint Ventures, Trusts--Who Does The Title Insurance Cover?,* 31 Real Property, Probate and Trust J. 605 (Winter 1997). Rivin and Stikker describe the types of endorsements which have been developed to avoid policy termination, and note that the First American Title Eagle Protection policy form provides protection for the "trustee or successor trustee of a trust in which you are the trustor/settlor to whom you transfer your title after the Policy Date."

[37] If the insured conveys without warranties and without taking back a mortgage, the policy expires completely. *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734 (Tex.App. 1977); *Sylvania v. Stein*, 177 N.J.Super. 117, 425 A.2d 701 (Ch. 1980).

[38] In *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc.*, 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000), the Gebhardts, the insureds, formed a limited liability company and conveyed the property to it. The Gebhardts remained in the property, paid the taxes, and were the members of the LLC. A title dispute arose, and the insurer rejected the claim because the policy had terminated. The Gebhardt LLC sued for breach. The Gebhardts argued that they were the effective owners of the property, and therefore should continue to have insurance coverage despite the conveyance. The court rejected the argument: "[W]hen the Gebhardts conveyed their interest in the property to the L.L.C., they effected a "transfer from one entity or person to another." ... The Gebhardts and the L.L.C. are separate entities. The Gebhardts may not file suit in their own names on behalf of the L.L.C. Nor may they be held individually

insured in the property must be the same estate that was insured. In *Proto-Cam, Inc. v. Transamerica Title Ins. Co.*,[39] the insured conveyed the fee simple estate and leased the property back. The court held that the leasehold estate was not a retained interest in the property, saying "[w]hile it may be said that plaintiff retained an interest in the use and enjoyment of the land, plaintiff did not retain an interest in the land itself. Rather, it transferred its interest in the land itself to Tennine." Insureds sometimes assert that, following the conveyance of the property to a trust of which the insured is the beneficiary, the insured "retains an interest" in the property due to his or her beneficial interest in the trust.[40]

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liable for wrongful conduct of the L.L.C. While the Gebhardts have an interest in the L.L.C., they no longer have an interest in the property. Rather, it is the L.L.C. that has the interest in the property. To hold otherwise would be to disregard the nature and viability of limited liability companies." Similarly, in *Gray v. First American Title Ins. Co.*, 2003 WL 220606 (Cal.App. 2 Dist.) (unpublished) (reh.den. 3/4/2003), the insureds conveyed to a partnership of which they were members. The court found that the Grays did not retain an interest in the land, and the partnership was not an insured. In *Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co*., 143 Idaho 411, 146 P.3d 677 (Idaho 2006), the policy was found to have terminated on the transfer of the property from the insureds to their limited liability company. In *Shotmeyer v. New Jersey Realty Title Ins. Co*., 195 N.J. 72, 948 A.2d 600 (N.J. 2008), the policy was found to have terminated on the transfer of the property from the insured general partnership to a limited partnership having the same partners. The court relied on *Gebhardt* in rebuffing the claimant's alter ego argument. In *Londen Land Company, LLC v. Title Resources Guar. Co*., 2012 WL 313574, 467 Fed.Appx. 708 (Table) (9th Cir. (Ariz.)) (unpublished), the policy terminated when the insured limited liability company deeded the property to another LLC controlled by the same person. The title claim that the insurer had already accepted was mooted when the insurer discovered the transfer. After the trial court ruled in the insurer's favor, the insured asked the insurer for a successor owner endorsement, and an underwriter sent an e-mail telling the insured she may not need an endorsement to prevent policy termination. The underwriting counsel was not aware of the pending litigation against the company. The insured filed a motion for relief from the judgment, pleading that the e-mail supported her position that coverage had not terminated. The court denied the motion, observing that "[t]here could be no end to litigation if the Courts were undo summary judgment orders every time, without more, an employee/agent of a party is found to have spoken a legal view arguably inapposite the party line." *Londen Land Company, LLC v. Title Resources Guar. Co*., 2011 WL 643421 (D.Ariz.) (unpublished). The Ninth Circuit affirmed.

[39] 2008 WL 2553340 (Mich.App.) (unpublished).

[40] In *Bengeyfield v. First American Title Ins. Co*., 2005 WL 2045947 (Mich.App.) (unpublished), the court ruled that an insured does not "retain an interest" in the property after conveying to his trust, and the policy terminates on that transfer. See also, *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Ins. Co*., 2009 WL 1874060 (D.N.J.) (unpublished), which held that "A 'fiduciary successor,' more frequently called a 'successor fiduciary,' is a 'fiduciary who is appointed *to succeed or replace a prior one*.' Black's Law Dictionary 640 (7th ed.1999) (emphasis added)… In this case, the Trust did not succeed or replace any *prior fiduciary*--it simply was the entity to which Mrs. Carney voluntarily transferred her interest in the Property. The Trust thus was not a fiduciary successor." In *Butera v. Attorneys' Title Guar. Fund, Inc.*, 321 Ill.App.3d 601, 704 N.E.2d 949, 254 Ill.Dec. 537 (Ill.App. 1 Dist. 2001), the court did not reach the question of the beneficial interest in an Illinois land trust directly, but it did hold that the beneficiaries did not retain an interest when the insured trustee conveyed the property to a corporation owned by the beneficiaries. In *Butera*, the insured was an Illinois land trust of which the Buteras held the beneficial interests. The trustee deeded to a corporation controlled by the Buteras, which conveyed to the Buteras. Thus, the transfer was from trustee to beneficiary rather than the reverse, and there was a second conveyance also. The court said the Buteras did not retain an interest in the land. Also, see the discussion of the nature of a beneficial interest in a trust in *Kwok v. Transnation Title Ins. Co*., 170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), review denied Apr. 29, 2009. In that case, the insured was a limited liability company whose members were a husband and wife. The property was conveyed from the LLC to

The policy also continues in effect if the insured takes back a mortgage secured by the insured parcel at the time the insured sells the property.[41] Coverage terminates when the mortgage is released or assigned, however. Thus, when an insured took back a purchase money mortgage but later assigned it, policy coverage terminated.[42]

Policy coverage also continues in favor of an insured to protect against a claim that the insured has breached a warranty of title due to a matter for which the policy provides coverage.[43] Some practitioners advocate the use of warranty deeds in transfers to trusts and other related entities, on the theory that this invokes the continuation clause protection for "liability by reason of covenants of warranty." However, the insurer has no duty to defend the grantee. The insured must be personally liable on its warranties for the policy to remain in force. A seller's title insurer was not liable for a judgment against the grantor based on warranties, when the judgment exculpated the insured personally and was enforceable by its terms only against the grantor's title insurer.[44] However, an insurer was rejected when it sought to deny liability for a judgment against the insured

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the husband and wife as trustees of a revocable trust. The individuals argued that they had always had a beneficial interest in the property, which they retained after the transfer. The court rejected the argument, holding that the insured LLC was a separate legal entity, and the individuals who claimed to retain beneficial interests in the property had never been the insureds. The court said there was no evidence that the Kwoks had maintained the same interests in the two different entities. Further, they were seeking to disregard the same separate entity that they had created for their own protection. Most importantly, however, the court said the discussion of beneficial interests was not applicable, because "the issue before us is not whether there was a change in the beneficial ownership of the property, but rather whether appellants, as trustees of their family trust, succeeded as insureds under the terms of the policy. There is nothing in the policy definition of 'insureds' that identifies 'beneficial owners' as insureds." 170 Cal.App.4th at 1571, 89 Cal.Rptr.3d at 147-8. In *Mulhearn v. Lawyers Title Ins. Co*rp., 2014 WL 213554 (Cal.App. 2 Dist.) (unpublished), rev.den. April 9, 2014, the policy insured Mr. Mulhearn in his fiduciary capacity as the title-holding trustee of a trust. Mr. Mulhearn was sued both as a trustee and as an individual. The insurer defended the claims brought against him as a trustee, but not in his individual capacity. The court held that Mr. Mulhearn had not proven that he was a beneficiary of the trust as he claimed but that, even if he was, *Kwok* had established that a beneficiary of a trust is not an insured entitled to be defended by the insurer.

[41] In *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997), this provision was inaccurately extended to apply on the grounds that the insured owner remained liable on a debt secured by a deed of trust on the property. *Aboussie* was followed in a second Missouri decision shortly thereafter, which also held that a policy remained in effect as to an insured who was still liable on a note secured by the insured property. *Belden v. Chicago Title Ins. Co*., 958 S.W.2d 54 (Mo.App.E.D. 1997), reh.den. In *Aboussie*, the insured no longer held an interest in the land, however. The insured had conveyed the property away after the title defect was discovered.

[42] *Youngblood v. Lawyers Title Ins. Corp.*, 923 F.2d 161 (11th Cir. 1991).

[43] See *Grill v. Ticor Title Ins. Co.*, 2011 WL 320422 (Cal.App. 3 Dist.) (unpublished), in which the court said it would be premature to dismiss a lawsuit based on policy termination despite three transfers of the property, because the title insurer had permitted one transfer of the property while the claim was pending and the successor insured alleged that he might be liable for breach of warranty. In a later decision in the same case, however, the court held that the lawsuit was barred by the statute of limitations, and that the highly unusual warranties given by the insured did not prolong the policy or toll the statute of limitations. *Grill v. Ticor Title Ins. Co*., 2017 WL 344326 (Cal.App. 3 Dist.) (unpublished).

[44] *Far West Federal Bank, S.B. v. Transamerica Title Ins. Co.*, 99 Or. App. 340, 781 P. 2d 1259 (Or.App. 1989).

on proof that the insured was in such poor financial condition that he had no assets that the judgment creditor could seize.[45]

Also, the policy provides indemnity solely by reason of *liability* under covenants of warranty. Courts have found a number of reasons for holding that an insured does not have liability under warranties made to the insured's related entity. Some courts also held that any liability under the covenants of warranty is too speculative to require the insurer to defend or take any action. In *Gray v. First American Title Ins. Co.*,[46] the insureds conveyed to their partnership by grant deed, and argued that the policy continued by virtue of their warranty liability. However, the court held that no such liability had been proven. The court rejected the argument because of the speculative nature of the potential liability: "[t]he Grays were no longer insureds when they tendered the claim, and the claim concerned possible future events, we need not and do not discuss these other issues." A limited warranty deed has been found not to invoke warranty coverage for a matter created by the insured, which is excluded from coverage by Exclusion 3(a).[47] Also, the warranty protection of the policy was not invoked by a lawsuit against the former-owner insured that alleged fraudulent concealment of a title defect, but not breach of warranty.[48] Several other courts have found no warranty liability because the deeds were made without warranties, or with warranties against the grantor's acts only.[49]

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[45] See *Southern Title Ins. Co. v. Crow*, 278 So.2d 294 (Fla.App. 1973), cert den. 284 So.2d 221 (Fla. 1973).

[46] 2003 WL 220606 (Cal.App. 2 Dist.) (unpublished), reh.den. March 4, 2003.

[47] In *ASK Realty II Corporation v. First American Title Ins. Co*., 2004 WL 1254005 (D.Md. 2004) (unpublished), the insured was sued for its own actions while in title. The court found no duty to indemnify or defend, due to Exclusion 3(a): "Most applicable to the dispute between FATICO and ASK is the exclusion of risks 'allowed' by ASK. The ordinary meaning of allowed is permitted or consented to, similar to the term 'suffered' used in other title insurance policies, which 'has been deemed synonymous with 'permit,' which implies the power to prohibit or prevent the claim from arising.' … If ASK permitted one of the covered risks to arise through its own knowing and intentional inaction, though it had the power to prevent the claim from arising, this risk would be excluded from coverage. In sum, based on these authorities and the ordinary meaning of the phrase 'created, allowed or agreed to,' the FATICO policy does not cover any defect in the title resulting from knowing and intentional action or inaction by ASK. FATICO's duty under the title insurance policy to defend ASK does not extend to any legal claims against ASK for such a defect. ... By the very nature of these claims, Amzel and Batchelor's lawsuit only concerned knowing and intentional conduct by ASK. This is precisely the kind of conduct by the insured that is excluded by the FATICO title insurance policy as 'created, allowed or agreed to' by ASK. Even if the lawsuit succeeded, there was no possibility that the claim would be covered by the policy, and thus FATICO had no duty to defend ASK under the policy."

[48] *Miller v. First American Title Ins. Co*., 2006 WL 2440850 (Cal.App. 2 Dist.) (unpublished). In *Mortazavi v. Federal Ins. Co*., 2019 WL 2609779 (Cal.App. 4 Dist.) (unpublished), the court found that the insurer had no duty to defend the insured former owner in a lawsuit brought by his purchaser alleging that the insured had failed to disclose the existence of encroaching structures that the insured had built after the policy date.

[49] *Covalt v. First American Title Ins. Co.*, 105 F.3d 669 (Table), 1997 WL 4273 (10th Cir. (Wyo.) 1997) (unpublished) (transfer to trustee by quit claim deed); *Chicago Title Ins. Co. v. 100 Investment Limited Partnership*, 355 Fed.3d 759 (4th Cir. 2004) (limited warranty deed). In *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc*., 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000), the insureds gave a deed warranting their own acts only. The title defect was not of their making. Therefore, the court found no possible liability based on their limited warranties: "There is no suggestion that the alleged cloud on title was created by any action or inaction on the part of the Gebhardts while the property was titled in their names. The Gebhardts thus transferred from themselves to the L.L.C. the

In *Stevens v. Dakota Title and Escrow Co.*,[50] the insured gave a full warranty deed to his related entity. The insurer denied the claim based on the termination provision, and the insured argued that the policy should protect him against his warranty liability to the transferee, Aslan Companies. The unusual fact in *Stevens* was that the title defect was discovered when a new policy was issued to Aslan and its lender. The court found no warranty liability:

> ...[T]he flaw in this argument is that Aslan had notice of the "buffer zone" agreement through its own title insurance policy and thus, took title to the subject property with notice of the "buffer zone" agreement. Consequently, Stevens [sic] did not have a duty to defend title to the subject property.

Most courts have found that a policy that has terminated on conveyance by the insured is not revived if the property is conveyed back to the insured.[51] In *Stevens*, the entity controlled by the insured conveyed one of the parcels back to the insured well after the claim was submitted, for the stated reason that there had been a mutual mistake between the insured and the entity. Noting that only one of the two parcels had been reconveyed, the court held that there was no revival of the policy because, in Nebraska, rescission of a contract must be in full:

> Consequently, the attempted rescission was ineffective because it did not return Stevens and Aslan to the status quo as required by Nebraska law, and thus Stevens' coverage under the title insurance policy was not revived.[52]

Also, in *Gray v. First American Title Ins. Co.*,[53] the Grays, the insureds, deeded the full fee simple to a partnership. Later, the partnership conveyed an undivided interest in the property back to the Grays, who again conveyed it to the partnership. The Grays argued that their claim rights should not have been cut off by the first deed because the title defect existed but merely lay dormant before they conveyed the property. The court rejected the argument:

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problem of the cloud on title as to the 4.75 acres. Should the other persons claiming title to the 4.75 acres bring an action to quiet title, the L.L.C, rather than the Gebhardts, would be required to defend and the Gebhardts could not be held personally liable." In *Shotmeyer v. New Jersey Realty Title Ins. Co*., 195 N.J. 72, 948 A.2d 600 (N.J. 2008), the insured conveyed by a limited warranty deed and the title defect was not within the scope of warranties. The court said the warranty coverage was not invoked. The Ninth Circuit made the identical ruling in *Londen Land Company, LLC v. Title Resources Guar. Co*., 2012 WL 313574, 467 Fed.Appx. 708 (Table) (9th Cir. (Ariz.)) (unpublished).

[50] 2004 WL 2381386 (Neb.App.) (unpublished).

[51] In *Fidelity Nat'l Title Ins. Co. v. Butler*, 2017 WL 2774337 (Cal.App. 3 Dist.) (unpublished), the court held that a policy terminated on the insureds' voluntary conveyance to a third party, and was not revived based on the affidavit testimony of the grantee saying that he had reconveyed the property to the insureds by an unrecorded deed.

[52] Id. at *8.

[53] 2003 WL 220606 (Cal.App. 2 Dist.) (unpublished) (reh.den. 3/4/2003).

> Under this title insurance policy, the Grays could not preserve a previous claim they may have had before the conveyance to G-B Partners. And, unlike a comprehensive general liability (CGL) or professional liability policy, a title insurance policy does not cover occurrences; it only provides indemnity for a contingency which actually develops while the insured holds an interest in the land. ... The Grays had transferred the property, and coverage ceased before they tendered the claim. ... When a title insurer issues a title insurance policy, it is providing a contract which only indemnifies against losses actually sustained in the event that a specific contingency, affecting title, actually occurs while the insured retains title.

However, in a 1962 decision construing a 1946 policy that was not an ALTA form, an insured conveyed the property, terminating the policy, but the property was later reconveyed to him. The court held that the policy did not terminate because it did not contain a termination provision, and was revived when the insured regained an insurable interest in the property.[54] The reasoning of that decision would not apply to a modern ALTA owner's policy.

Former insureds sometimes assert that, even if the policy has terminated due to a voluntary transfer, the right to pursue a pending title insurance claim survives the transfer. However, several courts have held that a transfer moots a title insurance claim submitted before the conveyance.[55] The

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[54] *Sandler v. New Jersey Realty Title Ins. Co*., 36 N.J. 471, 178 A.2d 1 (1962), involved an owner's policy issued by New Jersey Title in 1946. The relevant New Jersey Title policy language bears no resemblance to modern ALTA policies. American Land Title Association had not even promulgated an owner's title insurance policy form as of 1946. See §9.1.3.4. An endorsement on the "back" of the Sandler policy said: "Policies are not assignable to grantees (purchasers) but only to mortgagees of insured or assignees of mortgagees as hereinbefore provided. Purchasers should protect themselves by obtaining Policy of title insurance at reduced re-issue rates as provided in this Policy." The court said that no provision of the policy "expressly or impliedly, terminates the liability to the insured upon his conveyance of the fee." The only "limitation upon future liability" was the provision allowing for an assignment of the policy to a lender. The court concluded that "the policy contains no provision, express or implied, which would finally terminate defendant's liability to Sandler upon a conveyance by and a subsequent reconveyance to him, where the claim is made for defects of title which existed at the time of his original acquisition of title and the issuance of the policy." 178 A.2d at 6. The court then made the further leap to find that the policy, which had never terminated, was revived when the named insured came back into title, which it based on New Jersey law not specific to title insurance policies. It said: "There appears, therefore, no reason why, under the circumstances here present, the conveyance by Sandler to Sandler Realty Co. should finally terminate defendant's liability. As above noted, the policy contains no such provision. The conveyance did not increase defendant's risk nor change the nature of its liability. The reconveyance to him served merely to re-establish the status which existed at the inception of the insurance contract. The policy was, at most, only suspended during the time that Sandler Realty Co. held title and was revived upon the reconveyance to him. Thereafter, under its terms, the indemnification inured to the benefit of the plaintiffs as devisees of a one-third interest in the tract." 178 A.2d at 7. One commentator has pointed to the holding in *Sandler* to support for the assertion that "an insured does not lose its claim despite filing the claim against the title insurer after selling the property interest." Palomar, *Limited Liability Companies, Corporations, General Partnerships, Limited Partnerships, Joint Ventures, Trusts--Who Does the Title Insurance Cover?*, 31 Real Property, Probate and Trust J. 605, 609 (Winter 1997). The result in *Sandler*, however, was dictated by the terms of the New Jersey Title policy, and its conclusion was based entirely on the wording of that policy.

[55] *Gumapac v. Deutsche Bank Nat'l Trust Co.*, 2012 WL 3150657 (C.D.Cal.) (unpublished) (owner's policy and right to pursue title claim terminated when insured owner's title was extinguished by foreclosure); *Feldman v. Fidelity Nat'l*

leading case is *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc.*,[56] in which the insureds asserted that their claim survived the termination of the policy on a transfer to a limited liability company of which they were the members. They based their argument on a quote from a treatise that "a transfer of title terminates future coverage, so long as the insured held title at the time of its loss, the insured's subsequent transfer of title does not terminate its pre-existing claim."[57] The court disagreed, ruling that, when the insureds transferred the property, their potential loss was extinguished. The Gebhardts had admitted that they had not yet suffered a monetary loss. By transferring the property to an uninsured party, they had assured that they never would:

> Assuming arguendo that there is a "known overlap"--and the record is unclear in that regard--the fatal flaw in this reasoning is that the Gebhardts successfully conveyed the entire property, including the 4.75 acres in question, to the L.L.C. by way of a special warranty deed. As we have explained, the L.L.C. is a separate entity. The problem of the cloud on title is now the problem of the L.L.C. and not the Gebhardts. If any loss is suffered because of the cloud on title, it will be suffered by the L.L.C., which was not an insured under the policy either before or after the conveyance.

After the property is transferred, the named insured has no right to pursue a claim under the policy for the additional reason that he or she no longer has an insurable interest in the property.[58] However, other courts have held that a voluntary transfer does not cut off the right to pursue a claim pending on the date of transfer, or have found sufficient a question of fact as to whether or not the transfer terminated the pending claim.[59] One court found that an insured who was sued for trespass after it

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Title Ins. Co., 2013 WL 620878 (Cal.App. 2 Dist.) (unpublished) (both policy and claim terminated on voluntary conveyance); *Fidelity Nat'l Title Ins. Co. v. Ruggiri*, 2013 WL 812502 (Conn.Super.) (unpublished) (deed from insured to her husband, in anticipation of her death and while policy coverage litigation was pending, terminated both the policy and the claim, the court finding the policy language to be "clear and unambiguous").

[56] 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000).

[57] Joyce D. Palomar, *Title Insurance Law*, §4.04[1][a]. In the current version of that text, Joyce D. Palomar, *Title Insurance Law*, 2014-2015 Edition, West/Thomson Reuters, a similar statement may be found at § 8:22, and the author continues to assert that a pending claim should survive a transfer of the property.

[58] In *Covalt v. First American Title Ins. Co*., 105 F.3d 669 (Table), 1997 WL 4273 (10th Cir. (Wyo.) 1997) (unpublished), the insured, Mr. Maytag, died after transferring to a trust. Therefore, the court found, he "had no insurable interest in the ranch" and was not entitled to make a claim. Another recent case also acknowledged that a transfer of the property after a defect was discovered may terminate policy coverage. In *New England Federal Credit Union v. Stewart Title Guar. Co*., 171 Vt. 326, 765 A.2d 450 (Vt. 2000), an insured lender learned of a problem with the property while attempting to sell it after foreclosure. The lender conveyed the property, with a claimed reduction in sale price as a result of the title issue. It apparently did not submit the claim until after closing, however. The Vermont Supreme Court sent the case back to the trial court "for a determination of whether NEFCU had an insurable interest in the land as of the date of its claim." If not, the high court's implied instruction to the trial court was to find that the policy had terminated.

[59] In *Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co*., 143 Idaho 411, 146 P.3d 677 (Idaho 2006), the insureds "cite authorities holding that a conveyance of the property after discovery of a claim under a title policy should not prevent recovery under the policy." The court did not address the merits of the argument, because in that case the

conveyed the property was entitled to a defense.[60]

In *Fairway Development Co. v. Title Ins. Co. of Minn.*, [61] one partnership was terminated and

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insureds conveyed before they discovered the title defect. The court also rejected the related argument that the termination provision is an illegal restraint on alienation, because it prevents the insured from transferring the property after discovery of the claim until it is resolved. In *Keys v. Chicago Title Ins. Co*., 2012 WL 4510471 (S.D.Miss.) (unpublished), the court found that an individual continued to have a sufficient interest in the property to give her standing to sue for a policy loss incurred before she conveyed the property to herself as trustee of a revocable trust. The policy at issue in *Keys* was an ALTA 2006 Owner's policy, and the insurer acknowledged that the insured, in her capacity as trustee, was a successor insured under the policy. In *First American Title Ins. Co. v. Two Seventy Three Water Street, LLC*, 2013 WL 811878 (Conn.Super.) (unpublished), the court found that a deed from the named insured (under an ALTA 1992 Owner's policy) to a new entity whose members were the same as the owners of the insured terminated the policy, and the insured did not retain an interest in the property after the conveyance. The fact that such a transfer would not cause the termination of a 2006 ALTA Owner's policy did not change the policy coverage. However, the court said there was a disagreement amongst the jurisdictions about whether or not such a transfer terminates the insured's pending claim. The insured had submitted a claim, and the insurer had made a disputed loss payment, before the transfer. In denying summary judgment to the insurer, the court said that the policy language, "as demonstrated by the parties' arguments as well as the conflicting case law, is susceptible to interpretation that claims arising during the policy period and asserted within the policy period are not defeated by subsequent transfer of the property to a third party." However, the cases that this court found to favor the insured were *Chicago Title Ins. Co. v. 100 Investment Limited Partnership*, 355 Fed.3d 759 (4th Cir. 2004), which found a duty to defend but not to indemnify, and *Keys v. Chicago Title*, which construed a 2006 ALTA policy and merely found that the grantee was a successor insured, which provision was *not* found in the *Two Seventy Three Water Street* policy. In *Centennial Development Group, LLC v. Lawyers Title Ins. Corp*., 233 Ariz. 147, 310 P.3d 23 (Ariz.App. Div. 1 2013), when an insured discovered an easement after buying the property and elected to give most of the land back to the seller in lieu of foreclosure of its purchase money deed of trust, the deed back to the seller did not cut off the insured's right to sue the insurer for the alleged diminution in value. In *Centennial*, the policy did not terminate, because the insured still owned some land. The issue was whether or not the insured's right to make a claim about a defect in title to a portion of the insured land terminated when it conveyed that land. The court said that the policy did not explicitly say that it terminates on conveyance, or that a pending claim terminates with the policy. It also relied on Barlow Burke, *Law of Title Insurance* § 5.02 (3d. Ed. Supp.2012), which says that a "post-coverage claim" may be made on a title insurance policy "so long as the damages were sustained during coverage." Finally, it cited *Chicago Title Ins. Co. v. 100 Investment Ltd. Partnership*, 355 F.3d 759 (4th Cir.2004), although it admitted that *both* sides relied on that case. In *100 Investment*, the court found a duty to defend but no duty to indemnify.

[60] In *Chicago Title Ins. Co. v. 100 Investment Limited Partnership*, 355 Fed.3d 759 (4th Cir. 2004), an insured sued years after conveying the property, for damages caused by alleged trespass onto the plaintiff's land while the insured was in title. The court found that the insurer had a duty to defend the insured, even though it was not required to reimburse the insured for money it paid to clear title. The court asserted that a title insurance policy is not a "claims made" policy, but indemnifies against "any 'loss or damage' during the policy period," and that "the loss or damage alleged in the Kahn litigation occurred during that period." Because the policy was in effect while the alleged trespass occurred, the court ruled that there was a duty to defend the insured in the suit. This reasoning illustrates why it is dangerous to construe policy coverage by analogy rather than by interpreting the policy's own terms. Title insurance is not in effect for a term. Further, policy coverage is limited to matters that occur *before* the insured takes title, not during the insured's "term" of ownership. However, the *100 Investment* court ruled that the insurer was not required to indemnify the insured for money paid to procure title to the land that was the subject of the trespass claim. Relying on *Gebhardt*, the court found that the defect in title was now the responsibility of the grantee and not the insured, and that the duty to *indemnify* terminated on the conveyance.

[61] 621 F.Supp. 120 (N.D. Ohio 1985).

a new one formed. The partnership dissolution was held not to be involuntary, which would have made the second partnership a successor insured. Therefore, the policy was found to have terminated when the partnership dissolved, and the insurer's liability extinguished. The decision has caused enough concern to have generated what is commonly referred to as the *Fairway* endorsement. Although more than one form of the endorsement exists, its essence is usually that the insurer waives the right to assert that a referenced act has caused the policy to be terminated.

7.4 Successor Insureds Under Loan Policy

The loan policy states that the holder of the mortgage debt is the insured. A loan assignee becomes a successor insured when it purchases the debt secured by the insured mortgage.[62] Typically, the mortgage is also assigned to the successor insured. If the mortgage assignment is recited on Schedule A, the policy assures against the invalidity or unenforceability of the assignment, and in that sense the successor insured is a named insured.[63] If the successor's mortgage assignment is not described on Schedule A of the policy, the successor must establish to the insurer that it holds the debt in order to prove its status as an insured.[64]

A governmental entity that was an insurer or guarantor of the debt is an insured under the ALTA policies, whether or not it takes an assignment of the loan.[65] This includes the Veterans' Administration and Federal Housing Administration. The policy does not state that these entities must establish that they have satisfied an insurance or guaranty obligation, or that they have taken an assignment of the loan. If the Federal Deposit Insurance Corporation takes over a bank and takes an assignment of its assets, it becomes an insured as a successor owner of the Indebtedness, not as an

[62] *Stewart Title Guar. Co. v. National Enterprises, Inc.*, 133 F.3d 929 (Table), 1997 WL 800294 (9th Cir. Cal.) (unpublished) (RTC did not retain right to make policy claim under terms of loan sale agreement, because title matter had not yet matured at time of sale; leaves open the question of whether or not such an agreement could be effective if claim were mature); *Fidelity Nat'l Title Ins. Co. v. Matrix Financial Services Corp.*, 255 Ga.App. 874, 567 S.E.2d 96 (Ga.App. 2002) (insured lender that assigned loan became insured again on forced repurchase after borrower's default).

[63] The policy insures the validity If an assignment shown on Schedule A of the policy. In most such cases, then, this risk is transferred to the insurer. Covered Risk 12 of the 2006 ALTA Loan policy protects against "[t]he invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens."

[64] In *Branch Banking & Trust Co. v. Nevada Title Co*., 2011 WL 1399810 (D.Nev.) (unpublished); related decision, 2011 WL 1399833 (D.Nev.) (unpublished), the court dismissed claims against the title agent because the lender had not proven that it bought the loan from the FDIC and became the successor insured. Similarly, in *Federal Deposit Ins. Corp. v. Ticor Title Ins. Co*., 2016 WL 7231455 (W.D.Wash.) (unpublished), the court ruled that the claimed insured was required to prove that it had made the loan, and was not merely a warehouse lender, particularly because the note, mortgage, policy and loan closing instructions all identified a different entity as the lender.

[65] This provision is found in subsection F of Conditions 1 of the 2006 ALTA Loan Policy, which says that the following governmental bodies are also insureds: "any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not… ." The ALTA policies state that the insurer does not have the right to assert policy defenses against a governmental entity that was an insurer or guarantor of the debt.

insurer or guarantor of the loan.[66] The FDIC insures deposits with the financial institution, but does not insure its loans. Likewise, Federal Home Loan Mortgage Corporation and Federal National Mortgage Association are not loan insurers or guarantors. An entity's status as either an assignee of the debt or as its insurer or guarantor alters the loan policy's terms as to coverage defenses that the insurer may assert. See §7.10 for a complete discussion of what policy defenses the insurer may assert against either a governmental insurer or guarantor, or a successor insured.

The policy insures only one party at a time. The insurer is required to defend only the party that is the insured, and that duty also terminates when the party ceases to be the insured under the policy, typically when it assigns the loan to another party.[67] If there are competing claimants to the debt, the party claiming to be the insured must settle that dispute in order to establish coverage in its favor.[68] However, the fact that the definition of insured in the ALTA Loan policy says that it "also includes" successor owners of the loan was interpreted to mean that insureds accumulate as the loan is sold, but do not drop off as they cease to hold interests in the insured mortgage.[69]

A lending institution does not qualify as a successor insured when there is no valid

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[66] See, for example, *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), in which a bank that had been a loan participant took an assignment of the loan from the FDIC after the insured mortgagee went into receivership, and claimed to be an insured based on three different bases—as loan participant, as the holder of the Indebtedness, and as the assignee of the insurance policy under a vague asset purchase agreement with the FDIC. The court rested its determination that the bank was the insured based both on its ownership of the debt and on the assignment of the policy.

[67] *Manufacturers and Traders Trust Co. v. Fidelity Nat'l Title Ins. Co*., 2012 WL 5462887 (D.Or.) (unpublished) (title insurer not required to defend named insured in a lawsuit seeking to set aside the transaction after it assigned the loan and insured deed of trust to another party, which became the successor insured).

[68] For example, see *Mur-Ray Management Corp. v. Founders Title Co*., 169 Ariz. 417, 819 P.2d 1003 (Ariz.App. 1991), in which parties disputed ownership of a note which had been partially assigned and pledged, and was being held by an escrowee. In *Wells Fargo Bank, N.A. v. MLD Mortg., Inc*., 2012 WL 6139366 (D.Minn.) (unpublished), an originating lender was permitted to add the title insurer to the loan assignee's lawsuit demanding repurchase of the loan due to its lack of access, despite the insurer's protest that the originator would not become the insured again unless and until it buys back the loan. The court reasoned that one or the other of the two lenders was the insured. Similarly, in *Sher v. Luxury Mortg. Corp*., 2012 WL 5869303 (D.Md.) (unpublished), the court refused to dismiss the complaint against the insurer based on the insurer's argument that the plaintiff had not yet bought back the loan, although it had been asked to do so.

[69] In *Colonial Mortgage Service Co. v. Commonwealth Land Title Ins. Co*., 2014 WL 6237852 (E.D.Pa.) (unpublished), the named insured assigned the loan after closing. The policy was issued with the insured's name shown in Schedule A as being "Colonial Mortgage Service Company of America Its Successors and/or Assigns as Their Interests May Appear." Both Colonial and its assignee were sued by a party claiming an equitable lien on the property. The court found that the insurer owed Colonial a defense although it held no interest in the loan or the insured mortgage, based on the phrasing of Schedule A and the definition of insured, which stated that "[t]he term 'Insured' also includes" successor owners of the debt. Thus, the court said, as the loan is assigned, every assignee becomes an insured while none of the assignors cease to be insureds, notwithstanding the fact that they no longer hold the lien or insurable interests, a concept the court called "concurrent coverage." In *Stockton Mortgage, Inc. v. Tope*, 233 Cal.App.4th 437, 183 Cal.Rptr.3d 186 (Cal.App. 3 Dist. 2014), reh.den. (Jan. 13, 2015), rev.den. (March 25, 2015), however, the court held that the lender ceased to be an insured when it assigned the debt, and had no more rights under the policy.

indebtedness, because it is unable to establish that it is a successor holder of the debt. In one case, the originating lender stole all of the loan funds after they were delivered from the funding lender and failed to pay off the loan that was to have been refinanced. The borrowers also claimed that the note secured by the insured deed of trust was forged. The court ruled that the funding lender did not own a valid debt, and was not a successor insured.[70] In a second case involving the same originating lender that diverted loan funds fraudulently, the court affirmed that the funding lender must establish that its money was delivered to the borrowers in order to create a valid debt, not merely that it delivered money to the defrauding intermediate party.[71]

A debt may not be assigned after foreclosure. Thus, the successor insured chain ends when a deed is issued on foreclosure or a trustee's sale. The loan policy terminates if the insured owner of the debt does not take title on foreclosure, as discussed at §7.9.[72] The policy continues in effect after the insured takes title for the benefit of the insured, only to the extent stated in the policy. See §7.9 concerning the termination and continuation of title provisions of the loan policy.

Except as described above, a party who does not own the indebtedness does not qualify as an insured under the loan policy.[73] A loan participant under an unrecorded participation agreement is not an insured.[74] A loan broker or servicer also is not an insured under a loan policy.[75] A lender's

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[70] *First American Title Ins. Co. v. XWarehouse Lending Corp*., 177 Cal.App.4th 106, 98 Cal.Rptr.3d 801, 09 Cal. Daily Op. Serv. 11,201 (Cal.App. 1 Dist. 2009). The title insurer relied on cases that have held that the policy does not protect against the unenforceability of the mortgage due to the fact that it does not support a valid debt. The insured, Access, insisted that the deed of trust was also forged, and coverage against forgery is fundamental to the policy. The court disagreed. "Any losses suffered by Access are not due to defects in the title or mortgage liens, but are entirely due to the failure of an existing indebtedness between the named borrowers and CHL." It said that, even if the deeds of trust had borne genuine signatures, they would still be void because there was no valid debt to support them. The court also found one important fact distinguished the decisions upholding the forgery coverage: "in those cases, and unlike this case, moneys had been actually disbursed or credited to the named borrower by either the lender or its assignee."

[71] "In all of the cases [cited by the lender that found coverage], the lender actually disbursed funds or credit to the borrower or to one purporting to act in the name of the borrower, whether acting fraudulently or not. Consequently, in all of the cases distinguished by *First American* there *was* an indebtedness; none of the cases conclude that the underlying debt was either invalid, never existed, or had been otherwise extinguished, and none addressed the question before us--whether coverage exists under the insurance policies in the absence of an existing indebtedness." *Gateway Bank, FSB v. Ticor Title Ins. Co. of Calif*., 2009 WL 4190455 (Cal.App. 1 Dist.) (unpublished).

[72] See in particular *Property Asset Management, Inc. v. Chicago Title Ins. Co.*, 173 F.3d 84 (2nd Cir. N.Y. 1999), discussed at §7.9.

[73] In *LJC Financial, LLC v. Alliant Nat'l Title Ins. Co*., 2014 WL 7190872 (S.D.Tex.) (unpublished), the court held that a loan broker did not become an owner of the debt or an insured under a loan policy by its payment of outstanding real estate taxes, even though the policy definition of "Indebtedness" includes taxes paid by the insured. However, in *Aries Investments, LLC v. First American Title Ins. Co*., 2015 WL 11237041 (N.J.A.D. 2016) (unpublished), a New Jersey appeals court affirmed a jury verdict in favor of a party claiming to be an insured under a loan policy based solely on the party's self-proclaimed "reasonable expectation" of being an insured under the policy, and despite the lack of any evidence that it had either funded the loan or purchased it. The claimant's lack of bona fides may actually have been aided by the fact that no policy was ever issued.

[74] In *Border City Savings & Loan Ass'n v. First American Title Ins. Co. of Mid-America*, 768 F.2d 89 (6th Cir. 1985), a loan participant under an unrecorded participation agreement was found not to be an insured or a third party beneficiary

collateral assignment of a mortgage does not negate its status as the "owner of the indebtedness."[76]

The holder of the Indebtedness may not sell the loan but carve out the right to pursue a policy claim, or keep the policy. Thus, when the Resolution Trust Company assigned the note and mortgage, but purported to reserve the right to pursue a pending policy claim, the court found that it had ceased to be the insured and thus had lost any right to pursue the policy claim.[77] However, the Federal Deposit Insurance Company has repeatedly asserted that it may retain a claim under a closing protection letter as a carve-out from the assignment of a loan.[78] It is even more disconcerting that the FDIC's assignees have also asserted the converse, that the FDIC form of loan assignment agreement grants to the assignee a specific assignment of the policy, as an agreement that is ancillary to the loan.[79]

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under a policy issued to the mortgagee of record. The participation agreement stated that the lender of record was permitted to deal with the property and the borrower "as though an absolute owner" of the indebtedness. There also was no evidence that the insurer knew or should have known of the participation agreement. In *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), the court found that a bank did not become an insured based on a participation interest in the loan, although it later became a successor insured when it took a full assignment of the loan.

[75] The court held, in *U.S. Bank, N.A. v. Stewart Title Guar. Co*., 2014 WL 1096961 (D.Colo. 2014) (unpublished), that a loan servicer was not an insured and that the ALTA policy did not obligate the insurer to defend it in litigation over the insured deed of trust. The fact that the plaintiff in the action incorrectly asserted that the servicer owned the loan did not make the allegation true or cause the servicer to become an insured. Also, a loan broker was not an insured, and had no right under the policy based on the claim that it had "advanced" money on behalf of the insured lenders to pay off outstanding real estate taxes that were not excepted in the policy. *LJC Financial, LLC v. Alliant Nat'l Title Ins. Co.,* 2014 WL 7190872 (S.D.Tex.) (unpublished).

[76] *Personal Finance Co. v. Commonwealth Land Title Ins. Co*., 678 So.2d 463 (Fla.App. 3 Dist. 1996).

[77] *Resolution Trust Corp. v. American Title Ins. Co*., 901 F.Supp. 1122 (M.D.La. 1995). *Stewart Title Guar. Co. v. National Enterprises, Inc*., 133 F.3d 929 (Table), 1997 WL 800294 (9th Cir. (Cal.)) (unpublished), involved a similar loan sale agreement under which the RTC retained title insurance claims rather than transfer them to the loan purchaser. In that case, however, the retention provision was found not to apply, because the title claim had not yet matured at time of sale. The court did not decide the issue of whether or not such a retention of claim provision could be effective as to the insurer. The *RTC v. American Title* and related cases are further discussed in Comment, *The Title Insurance Law Newsletter*, October-November 1995, p. 5.

[78] See *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co*., 795 F.Supp.2d 624 (E.D.Mich. 2011), in which the court accepted the FDIC's claim that it had assigned the loan but not the right to make a claim under the closing protection letter for a portion of the claimed loan loss.

[79] See, for example, *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), in which a bank that had been a loan participant took an assignment of the loan from the FDIC after the insured mortgagee went into receivership, and claimed to be an insured based on three different bases—as loan participant, as the holder of the Indebtedness, and as the assignee of the insurance policy under a vague asset purchase agreement with the FDIC. The FDIC assigned certain loans and the "Collateral Documents," which included every "loan agreement or other agreement or document... securing in any manner the performance or payment by any Borrower of its obligations or the obligations of any other Borrower under any Note evidencing a Loan." The bank said that the insurance policy was a "Collateral Document." The insurer was understandably concerned that the FDIC might later assert that its own definition of "Collateral Document" was so vague that its real intent was to retain the policy.

The policy provides that the insurer may assert against any successor insured all coverage defenses it would have had as to the named insured, unless the successor insured proves that it was a purchaser for value without actual knowledge of the defect or lien as to which the insurer would have a coverage defense.[80] That policy provision is fully discussed below, at § 7.10.

7.5 Rights Of Parties Who Hold Interests In Named Insured Entities

A party that holds an interest in or is a member of an insured title-holding entity is not an insured. However, some owners or members have certain rights they may assert under a policy issued to the entity.

When a policy is issued to a corporation that holds title to real estate, the shareholders are not insureds under the policy.[81] This includes a parent company that owns the stock in the named insured corporation.[82] If the stock of the corporation is sold, the policy remains in effect, because the insured corporation is still the owner of the property.[83] However, the stock purchaser does not become an insured.[84] A sole shareholder of an insured corporation has such control over the insured that his or her interest is tantamount to the status of insured in relation to a claim of indemnity under the policy, but the policy does not obligate the insurer to defend the sole shareholder in litigation.[85] If the sole

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[80] The definition of "insured" in the 1992 ALTA Loan Policy reserves, as to a successor owner of the debt, "all rights and defense as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land." Conditions & Stipulations 1(a)(i). The same provision is found in Conditions 1(e)(ii) of the 2006 ALTA Loan Policy.

[81] See *Lyons Holding Corp. v. Home Title Ins. Co.*, 250 App.Div. 640, 295 N.Y.S. 161 (1937); *Hawkins v. Oakland Title Ins. & Guar. Co*., 165 Cal.App.2d 116, 331 P.2d 742 (1958). In *Stull v. First American Title Ins. Co*., 2000 ME 21, 745 A.2d 975 (Me. 2000), a shareholder of the insured corporation was found not to have a cause of action against the insurer for emotional distress allegedly caused by the handling of the corporation's claim. The court found that the emotional distress claim was in tort, not contract, so it was barred not by the policy terms but by the lack of tortious conduct on the insurer's part. In *Geiger v. King*, 158 Ohio App.3d 288, 815 N.E.2d 683, 2004-Ohio-4227 (Ohio App. 10 Dist. 2004), app.den. 104 Ohio St.3d 1410, 818 N.E.2d 711, 2004-Ohio-6364 (Ohio December 1, 2004), the shareholder of a corporation that sold to the insured was found not to have a cause of action for damages as a result of money that the corporation was allegedly shorted at closing.

[82] In *Realty Mortgage Corp. v. First American Title Ins. Co*., 2011 WL 1134461 (Bkcy.S.D.Miss.) (unpublished), the court found that the parent company of the named insured on a loan policy was not a successor owner of the debt, and thus did not become an insured although it had funded the loan, and its mere possession of the original policy also did not give it the right to make a claim.

[83] Also see Weinreich, *Commercial Transactions: Who Does the Title Insurance Cover?*, 6 Probate & Property 42 (1992).

[84] *Hawkins v. Oakland Title Ins. & Guar. Co*., 165 Cal.App.2d 116, 331 P.2d 742 (1958).

[85] A sole shareholder was permitted to sue the insurer for indemnity in its own name, based on proof that the corporation was the shareholder's alter ego, in *Peachtree Management & Inv. Co., Inc. v. Pioneer Nat. Title Ins. Co*., 541 F.Supp. 51 (N.D.Ga. 1981). In *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 498 N.W.2d 905 (Wis.App. 1 Dist. 1993), a sole shareholder's assertion that the corporation was his alter ego was found to give the shareholder an "insurable interest," permitting him to sue the insurer for indemnity in his own name. In *Daca, Inc. v. Commonwealth*

shareholder presents a claim as if he or she were the insured, all policy defenses that may be asserted against the insured are equally applicable to the shareholder.[86] When a party takes title as the nominee of a corporation, and the insurer is aware of the named insured's status as nominee when the policy is issued, the corporation may disregard its title-holding agent and directly assert a claim for indemnity under the policy.[87]

A member of a limited liability company may not sue under a policy issued to the company.[88] The also rejected the member's assertions that, because he was the sole member, he was the "equitable" owner of the real estate and the "effective" owner because the Internal Revenue Service disregards single-member LLCs for income tax purposes.[89]

When a policy is issued to the title-holding trustee of a trust, the coverage runs to the named insured in that fiduciary capacity, and the policy does not create a duty to defend the trustee against claims brought against him or her as an individual.[90] The beneficiaries of the trust are not insureds, but may have the right to submit claims for indemnity to the extent of their beneficial interests in the trust.[91]

When a partnership holds title to real estate and is the named insured, the partners in the

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Land Title Ins. Co., 822 S.W.2d 360 (Tex.App. 1992), a mortgagee policy was issued to Daca, Inc., which had made a loan secured by the property. A lawsuit was filed naming as a defendant Callie Davenport, "d/b/a Daca, Inc." Davenport was the sole shareholder of Daca. The pleading alleged claims based on the actions of Callie Davenport as an individual. The insurer filed an answer for the insured corporation, to avoid having a judgment taken against its insured. The court held that the insurer correctly refused to defend Davenport, the shareholder.

[86] *Peachtree Management & Inv. Co., Inc. v. Pioneer Nat. Title Ins. Co*., 541 F.Supp. 51 (N.D.Ga. 1981).

[87] *Happy Canyon Inv. Co. v. Title Ins. Co. of Minn*., 38 Colo.App. 385, 560 P.2d 839 (1976).

[88] *Eden v. Fidelity Nat'l Title Ins. Co*., 2016 WL 1440185 (Ariz.App. 1 Div.) (unpublished).

[89] The same and similar principles were asserted in *Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co. of New York, Inc*., 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000) and other decisions reported in §7.3, in support of the notion that a conveyance from the insured to his or her limited liability company did not cause the named insured to relinquish equitable ownership of the real estate.

[90] *Mulhearn v. Lawyers Title Ins. Corp*., 2014 WL 213554 (Cal.App. 2 Dist.) (unpublished), rev.den. April 9, 2014.

[91] In *Spellings v. Lawyers Title Ins. Corp.*, 644 S.W.2d 804 (Tex.App. 1982), the holders of beneficial interests in a trust were permitted to make claims on a policy issued to the title-holding trustee. The court justified its holding on the assertion that the insurer was aware of the identities of the beneficiaries at the time the policy was issued. In *Kwok v. Transnation Title Ins. Co*., 170 Cal.App.4th 1562, 89 Cal.Rptr.3d 141 (Cal.App. 2 Dist. 2009), rev.den. April 29, 2009, the court held that the holder of a beneficial interest in a trust is not an owner of real estate held by the trustee, and therefore a policy issued to the individual terminates on a transfer to a trustee. In *Mulhearn v. Lawyers Title Ins. C*orp., 2014 WL 213554 (Cal.App. 2 Dist.) (unpublished), rev.den. April 9, 2014, the policy insured Mr. Mulhearn in his fiduciary capacity as the title-holding trustee of a trust. Mr. Mulhearn was sued both as a trustee and as an individual. The insurer defended the claims brought against him as a trustee, but not in his individual capacity. The court held that Mr. Mulhearn had not proven that he was a beneficiary of the trust as he claimed but that, even if he was, *Kwok* had established that a beneficiary of a trust is not an insured entitled to be defended by the insurer.

partnership are not insureds under a policy.[92] When the partnership terminates, so does the coverage of the policy, except as to distributees.[93]

All or most jurisdictions consider a joint venture not to be a separate legal entity, but a business that operates through its members under the name of the venture. When the title to real estate is held by a joint venture, it is common for the title insurance policy to name the joint venture and its members as insureds, in which case the policy defense and indemnity obligations run to all members. If, however, the named insured in the policy is the joint venture, the members have rights in the policy, to the extent of their interests in the venture as established by the law of the jurisdiction. In a state that recognizes a joint venturer as an owner of the real estate, the insurer will have a duty to defend the joint venturers if they are named in litigation concerning or attacking the title to the insured property.[94] However, the insurer is not obligated to prosecute or defend any of the joint venturers in a lawsuit about a dispute in their respective rights, and in which the members are adverse to each other.[95] If an insured contributes the insured parcel to a joint venture after the date of policy, the policy continues in effect as to the named insured, but the joint venture and its other members do not become insureds or obtain the right to be defended by the insurer if title is attacked.[96]

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[92] *Halfmoon Professional Offices v. American Title Ins. Co.*, 652 N.Y.S.2d 390 (A.D. 3 Dept. 1997). An insurer's agreement to provide a courtesy defense to the partners in the insured partnership was found not to confer the status of insured on the partners, in *Mayer v. Transnation Title Ins. Co.*, 2002 WL 1503080 (Cal.App. 2 Dist.) (unpublished). It is highly unusual for a title insurer to provide a courtesy defense to a party that is not the insured but related to it. The decision to provide a courtesy defense is at the insurer's discretion, as the term implies, and that election is typically made only when the insurer has determined that doing so will advance or protect the interest of the insured in the defense of its title.

[93] *Fairway Devel. Co. v. Title Ins. Co. of Minn.*, 621 F.Supp. 120 (N.D. Ohio 1985).

[94] In *Ticor Title Ins. Co. v. American Resources, Ltd.*, 859 F.2d 772 (9th Cir. Hawaii 1988), the joint venture was the insured. The individual joint venturers were sued in litigation concerning the title to the property. The court held that, because under state law the joint venturers are considered to be owners of property titled in a joint venture name, they are entitled to a defense under a policy naming the joint venture as the insured.

[95] In *Lawyers Title Ins. Corp. v. JDC (America) Corp.* 818 F.Supp. 1543 (S.D.Fla. 1993), aff'd 52 F.3d 1575 (11th Cir. 1995), a loan policy was issued to a lender. The lender was also a member of the owner-borrower joint venture. When the lender foreclosed, the other joint venture members attacked the mortgage on the basis that the lender was foreclosing against itself. The court found that the insurer had no duty to defend the action, because the sole attack on the insured mortgage was based on the lender's other interest in the property, which it assumed intentionally and by agreement.

[96] In *Van Winkle v. Transamerica Title Ins. Co.*, 697 P. 2d 784 (Colo.App. 1984), a policy was issued to an individual when he took title. He later conveyed the property to a joint venture of which he was a member. The insurer was found to have a duty to defend the named insured in a lawsuit that named all of the members of the joint venture, but not to have a defense duty to the other members. The policy did not terminate, because the named insured retained an ownership interest in the property after the conveyance, as is the case on a conveyance by the insured of a part interest to a tenant in common.

7.6 Texas Definition Of Insured

The current version of the T-1 Owner's Policy of Title Insurance promulgated by the State of Texas, effective January 3, 2014, has the same definition of insured as is found in the 2006 ALTA Owner's policy. However, an earlier version of the T-1 owner's policy contained a somewhat expanded definition of successor insureds, similar to the list found in the Homeowner's policy form.[97]

7.7 Third Party Beneficiary Claims

Courts generally do not consider other parties to the transaction to be third party beneficiaries entitled to seek payment from the insurer. Such parties have not negotiated for insurance coverage, and generally have no insurable interest in the property. Even in those cases in which the party has an insurable interest in the property, the fact remains that it has not paid a premium. See §7.1 for further discussion of the issue of insurable interest.

Accordingly, a seller is not an insured or third party beneficiary of the policy, and the insurer does not owe a duty to the seller.[98] The fact that the seller paid the premium is often raised as an

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[97] (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 of 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, and specifically, without limitation, the following: (i) the successors in interest to a corporation resulting from merger or consolidation or the distribution of the assets of the corporation upon partial or complete liquidation; (ii) the partnership successors in interest to a general or limited partnership which dissolves but does not terminate; (iii) the successors in interest to a general or limited partnership resulting from the distribution of the assets of the general or limited partnership upon partial or complete liquidation; (iv) the successors in interest to a joint venture resulting from the distribution of the assets of the joint venture upon partial or complete liquidation; (v) the successor or substitute trustee(s) of a trustee named in a written trust instrument; or (vi) the successors in interest to a trustee or trust resulting from the distribution of all or part of the assets of the trust to the beneficiaries thereof.

[98] *Breuer-Harrison v. Combe*, 799 P.2d 716 (Utah 1990); *Kenny v. Safeco Title Ins. Co*., 113 Cal.App.3d 557, 169 Cal.Rptr. 808 (1980); *Logan v. Gans*, 277 Pa.Super. 282, 419 A.2d 772 (1980); *De Carli v. O'Brien*, 150 Or. 35, 41 P.2d 411 (Or. 1935); *Calamari v. Grace*, 98 A.D.2d 74, 83, 469 N.Y.S.2d 942 (N.Y.A.D. 2 Dept. 1983) ("a title company hired by one party is not, absent evidence of fraud, collusion, or other special circumstances, subject to suit for negligent performance by one other than the party who contracted for its services."); *Zelber v. Lewoc*, 6 A.D.3d 1043, 776 N.Y.S.2d 134, 2004 N.Y. Slip Op. 03211 (A.D. 3 Dept. 2004) (grantor on deed, duped by grantee, not a third party beneficiary under loan policy); *Jimerson v. First American Title Ins. Co*., 989 P.2d 258 (Colo.App. 1 Div. 1999) ("the title company did not assume any obligation to seller by virtue of the title insurance policy itself. Although the policy was not made a part of this record, the terms of the commitment make clear that the buyer and a lender were to be the only insureds under the policy and the only persons to whom any obligation was owed. Contrary to seller's assertion, the mere fact that he paid the policy premium did not make him a party to the policy nor create obligations not expressly provided for in that instrument."); *Camp v. Serrata*, 1998 WL 201454 (Tex.App.-San Antonio), rev.den. (unpublished) (expert testimony on the subject; not a title insurance coverage case). Pennsylvania has held that a seller is a third party beneficiary and may sue the escrowee for paying off the wrong loan at closing, as a result of which the mortgage against the property was not released. *McKeeman v. Corestates Bank, N.A*., 751 A.2d 655, 2000 PA Super 117 (Pa.Super. 2000). The *McKeeman* opinion is couched in terms of the seller's rights under the title insurance policy, but clearly the title insurer's actions were as an escrowee rather than under the policy. Also, a title insurer is not liable to a seller company for claimed negligence in allowing its minority shareholder to sell the company's only asset, an apartment building. *In re Lowbet Realty Corp.*, 956 N.Y.S.2d 400, 2012 N.Y. Slip Op. 22314 (N.Y.Sup. 2012). *Shotmeyer v. N.J. Realty Title Ins.*

argument, but does not change the result. Rather, the reason the seller pays the premium is not to obtain insurance, but because local custom and the purchase agreement require it.[99] An insurer has no fiduciary duty or duty of confidentiality to a seller.[100]

A borrower, likewise, is normally not a third party beneficiary under a loan policy, based merely on the fact that the borrower pays the premium.[101] If the borrower desires insurance

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Co., 195 N.J. 72, 948 A.2d 600 (N.J. 2008), held that individuals who are not named insureds under a policy cannot recover from the insurer. In *Karpontinis v. First American Title Ins. Co*., 2013 N.J. Super.Unpub. LEXIS 641, 2013 WL 1150722 (N.J.Super.A.D. 2013) (unpublished), rev.den. 214 N.J. 119, 67 A.3d 1193 (Table), a New Jersey court rejected the sellers' claim that the title insurer for the buyer, the sellers' son, was responsible to the seller for alleged damages caused by a foreclosure rescue scam, relying in part on *Shotmeyer*. The sellers had sought to extend the holding of *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 634 A.2d 74 (N.J. 1993), which imposed liability based on a closing protection letter.

[99] *Gaines v. American Title Ins. Co*., 136 Ga. App. 162, 220 S.E.2d 469 (1975); *Kenny v. Safeco Title Ins. Co*., 113 Cal.App.3d 557, 169 Cal.Rptr. 808 (1980). Some states are seller-pay and some are buyer-pay. Local custom regarding who pays the premium is not dictated by the insurer. The insurer does not assume special risk because of the seller-pay custom in some states. See *Stewart Title Guar. Co. v. Becker*, 930 S.W.2d 748 (Tex.App.-Corpus Christi 1996), in which the parties claiming a right to a defense were interim joint purchasers who assigned their interest in the purchase contract to the named insured and had paid their "pro rata share" of the premium. However, when a commitment listed the proposed insured as to be determined, the proposed sale fell through, and the seller paid the premium anyway and claimed that he asked for a policy, there was enough of an issue about whether or not the seller could claim to be an insured to prevent entry of an order permitting the insurer to cancel the commitment. *Amerimont, Inc. v. Fidelity Nat'l Title Ins. Co*., 351 Mont. 292, 210 P.3d 691, 2009 MT 212 (Mont. 2009).

[100] *Gildea v. Guardian Title Co. of Utah*, 357 Utah Adv.Rep. 7, 970 P.2d 1265 (1998).

[101] *Capital America, Inc. v. Industrial Discounts, Inc.*, 383 So.2d 936 (Fla.App. 1980); *Trosclair v. Chicago Title Ins. Co*., 374 So.2d 197 (La.App. 1979); *Grable v. Citizens Nat'l Trust & Savings Bank of Riverside*, 164 Cal.App.2d 710, 331 P.2d 103 (Cal.App. 4 Dist. 1958); *Cherry v. People's Trust Co*., 282 Pa. 52, 127 A. 320 (1925); *Ortego v. First American Title Ins. Co*., 569 So.2d 101 (La.App. 1990); *Fox v. Title Guaranty and Abstract Co. of Mobile, Inc*., 337 So.2d 1300 (Ala. 1976); *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (Cal.App. 1 Dist. 1978); *Kimberly Recreation Ass'n v. Butts*, 1997 WL 170293 (Ohio App. 10 Dist.) (unpublished); *Miller v. Wilson Title Co*., 2000 WL 1023755 (Tex.App.-Dallas) (unpublished); *Shearer v. Echelberger*, 2000 WL 1663626 (Ohio App. 5 Dist.) (unpublished) (borrower neither insured nor third party beneficiary under loan policy; payment of premium was contractual duty); *Marine Midland Bank v. Virginia Woods, Ltd*., 151 Misc.2d 915, 574 N.Y.S.2d 485 (Putnam Cty.Sup.Ct. 1991); *Schmidt v. Fidelity Nat'l Title Ins. Co*., 2008 WL 2511773 (D. Hawai'i) (unpublished); *Bourne v. Stewart Title Guar. Co.*, 2011 WL 635304 (D.N.H.), 2011 DNH 29 (unpublished); *East Coast Athletic Club, Inc. v. Chicago Title Ins. Co*., 39 A.D.3d 461, 833 N.Y.S.2d 585, 2007 N.Y. Slip Op. 02878 (N.Y.A.D. 2 Dept. 2007); *Taylor v. JP Morgan Chase Bank, N.A.*, 2017 WL 5969818 (N.D.Ala.) (unpublished) (payment of premium did not make borrower a beneficiary of a loan policy); and *McKenzie v. Columbian Nat'l Title Ins. Co*., 931 S.W.2d 843 (Mo.App.W.D. 1996). The *McKenzie* court found no intent to confer beneficiary status on the borrower. See also *Shine v. Commonwealth Land Title Ins. Co. of Houston*, 1996 WL 134962 (Tex.App.-San Antonio) (unpublished), in which the court noted: "The Settlement Statement signed by plaintiff and her husband clearly shows that she instructed Commonwealth not to disburse funds for an owner's policy but only for the lender Citicorp's coverage." Id. at *4. Similarly, in *Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089 (10th Cir. (Okla.) 1999), the court found that borrowers had no right to assume that they would get title insurance in connection with refinance loans. In one case, a court held that the borrowers' claim of third party beneficiary status was a question of fact. *Fox v. Title Guaranty and Abstract Co. of Mobile, Inc*., 337 So.2d 1300 (Ala. 1976). In that case, the insurer missed an IRS lien against the borrower. The insurer bought the property at the tax sale. The borrower argued that the insurer's search negligence had

coverage, it is that party's obligation to request and pay for it, a California court ruled:

> In short, a title insurer prepares a preliminary report to limit its own risk--by locating and excluding items from coverage--and not on behalf of any party to a real estate transaction. A party who does not purchase title insurance may not rely on the title insurer to protect his or her interests or to disclose all detrimental information contained in the recorded files. Parties who desire protection against the possibility that negative information exists that was not revealed in the title insurer's search of the records must obtain title insurance. Sections 12340.10 and 12340.11 leave no room for the existence of a duty of care based on the title company's search of records and issuance of a preliminary report and title insurance policy [to the lender].[102]

Similarly, a Texas decision (involving a claim under the state deceptive claim handling practices act) rejected the argument that the borrower's payment of premium made him an insured, because otherwise the borrower "would enjoy the fruits of the contractual relationship he seeks with First American without buying the coverage."[103]

When the borrower signs a form at closing disclosing that the loan policy is not for his benefit, and that the borrower may pay a premium to obtain an owner's policy, this waiver of insurance is good evidence that the borrower had no right to rely on the loan policy.[104] However, the

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induced him to give the warranty on which the insurer sought recovery. In *Jaisinghani v. U.S. Bank N.A.*, 2018 WL 3723588 (Cal.App. 2 Dist.) (unpublished), a title insurer that issued a loan policy only was found not to owe a duty to the borrower to remove a lien from his property that had been recorded well before the loan policy date. In *Watson v. State of Nebraska*, 749 Fed.Appx. 485 (Mem) (8th Cir. (Neb.) 2019) (unpublished), the court dismissed a borrower's claim that the title insurer should have paid a claim made by his lender. In *Dillon v. Bayview Loan Servicing*, ___ F.Supp.3d ___, 2019 WL 4781847 (D.Nev.) (not yet released for publication), the court dismissed the borrower's claims against the title insurer because they were premised on a policy issued to her lender and she was not an insured or a third party beneficiary of that policy.

[102] *Siegel v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 1181, 54 Cal.Rptr.2d 84, 90 (Cal.App. 2 Dist. 1996). Likewise, in *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (Cal.App. 1 Dist. 1978), the owner sought the benefit of the insurer's removal of the survey exception from the loan policy only. The court rejected that claim, saying: "Assuming arguendo that the ALTA lenders policy is a representation that the contingencies insured against will not occur, a purchaser insured by a CLTA standard coverage may not recover for damages sustained as a result of his reliance upon them. Thus, even if Transamerica had represented to Columbus and Wells Fargo that the house was located entirely on parcel 4, and did not encroach onto parcel 1, Transamerica would be liable for negligent misrepresentation only to Columbus and Wells Fargo. There would be no liability to Walters if he relied upon such representations to his detriment, even if such reliance was reasonably foreseeable. To hold otherwise would give the purchaser the benefit of extended coverage without having paid the additional premium therefor. (*Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536 at pp. 543-544, 115 Cal.Rptr. 257.)" 147 Cal.Rptr. at 666."

[103] *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997).

[104] *Shearer v. Echelberger*, 2000 WL 1663626 (Ohio App. 5 Dist.) (unpublished).

insurer is not obligated to instruct the borrower of his right to purchase insurance.[105]

A party to an escrow, or who makes a deposit into escrow, does not thereby become an insured under a policy issued in relation to the transaction.[106] The policy also does not cover a person who buys from the insured[107] or the holder of a lien against the insured parcel.[108] A party who took a collateral assignment of a deed of trust was not a proposed insured on a commitment prepared for the original lender.[109] The assignee of an existing mortgage on the property is not a beneficiary of the policy entitled to sue the insurer-escrowee for having paid off the loan to the wrong party.[110] A builder who reviewed a title commitment prepared for the construction lender had no right to rely on the commitment in determining what setback lines affected the location of the house.[111] A loan broker or servicer is not an insured under a loan policy.[112]

A potential purchaser from the insured is not a beneficiary of the policy.[113] Several courts

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[105] In *Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc*., 194 F.3d 1089 (10th Cir. (Okla.) 1999), the court found that borrowers had no right to assume that they would get title insurance in connection with refinance loans. To the contrary, the court found that the lender gave "a HUD booklet entitled, 'Your Guide to Settlement Costs' to the homeowners. ... The information provided in this booklet advised the homeowners that a title insurance policy issued only to the lender would not protect them. ... It further advised that if the homeowners wanted to protect themselves, they would need to purchase an owner's policy." The affidavits of title provided to the title insurer from closing did not promise insurance. Finally, "'insurance agents in Missouri have no general duty to advise potential customers of optional coverages that may be available.' Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 86 (Mo.App. 1994). Thus, the Title Companies had no obligation to inform the homeowners about a title insurance policy that would protect their interests."

[106] *Hobaica v. Seypet Resorts, LLC*, 2012 WL 6675129 (C.D.Cal.) (unpublished).

[107] *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734 (Tex.App. 1977); *Sylvania v. Stein*, 177 N.J.Super. 117, 425 A.2d 701 (Ch. 1980); *Wilson v. Palmer*, 452 N.E.2d 426 (Ind.App. 1983).

[108] *United American Bank of Memphis v. Gardner*, 706 S.W.2d 639 (Tenn.App. 1985); *Cape Cod Bank & Trust Co. v. Avram*, 697 F.Supp. 8 (D.D.C. 1988); *Port Village HOA, Inc. v. Summit Associates*, 33 Misc.3d 39, 932 N.Y.S.2d 666, 2011 N.Y. Slip Op, 21289 (N.Y.Sup.App. Term 2011).

[109] *White v. West*, 1996 WL 585267 (Wash.App.Div. 2) (unpublished).

[110] *Mansur v. Security Search & Abst. Co. of Phila., Inc*., 1995 WL 365401 (E.D.Pa.) (unpublished).

[111] *Womer v. Melody Woods Homes Corp*., 165 Or.App. 554, 997 P.2d 873 (Or.App. 2000).

[112] The court held, in *U.S. Bank, N.A. v. Stewart Title Guar. Co*., 2014 WL 1096961 (D.Colo. 2014) (unpublished), that a loan servicer was not an insured and that the ALTA policy did not obligate the insurer to defend it in litigation over the insured deed of trust. A loan broker was not an insured, and had no right under the policy based on its claim that it had "advanced" money on behalf of the insured lenders to pay off outstanding real estate taxes that were not excepted in the policy. *LJC Financial, LLC v. Alliant Nat'l Title Ins. Co.*, 2014 WL 7190872 (S.D.Tex.) (unpublished). A loan participant is not an insured, as further discussed at §7.4.

[113] In *McRae v. Westcor Land Title Ins. Co.*, 2017 WL 1239682 (D.Md.) (unpublished), the court held that people who signed a contract to lease a house from the insured owner were not beneficiaries of the policy and had no standing to sue the insurer for a claimed defect in title.

have addressed the issue of whether or not a purchaser at sheriff's sale is a third party beneficiary of a title report prepared for the foreclosing lender. It is a common practice for a title insurer to issue commitments for foreclosure actions showing a proposed insured to be named. Such a commitment is prepared for use by the foreclosing lien holder or trustee. A New Jersey case found that a purchaser at sheriff's sale is not a third party beneficiary of an inaccurate title report prepared for the foreclosing lender.

> Because the purpose of the title report was to ascertain the proper parties defendant and to give the appropriate information to the sheriff for the advertisement and the announcements at sale, plaintiff here was at best an incidental beneficiary and without contractual rights against Chicago.[114]

An Illinois court also found that the bidder at sale is not a beneficiary of the foreclosure title report, having elected not to purchase title insurance of his own.[115] However, a federal court sitting in Virginia held that a purchaser at sale had a right to a policy protecting against liens not disclosed in the foreclosure commitment. In *MacDonald v. Lawyers Title Ins. Corp.,*[116] the commitment failed to show six mechanics' liens. The insurer was notified of the error before the sale was conducted, but failed to revise its commitment. A third party was the successful bidder at sale. The insurer added the liens to the commitment after the sale. The purchaser sued to require the insurer to issue a policy protecting against them. The insurer argued that it had no duty to issue a policy because the proposed insured was never identified. The court disagreed, pinning its ruling on the insurer's stipulation to the following fact:

> It is the customary practice in Virginia that when a foreclosing trustee obtains a commitment for title insurance prior to foreclosure, the named insured and amount of the policy are left open to be determined by the high bid at the foreclosure sale.[117]

The court thus found that, by using the phrase "To Be Determined,"

> …the parties to the Commitment indicated that they had reached some sort of agreement as to the identity of the proposed insured. ... The identity of the proposed insured and the amount of the policy are determined by the high bid at the

[114] *Smith v. Boyd*, 639 A.2d 413, 420 (N.J.Super. L. 1993).

[115] In *Midfirst Bank v. Abney*, 365 Ill.App.3d 636, 850 N.E.2d 373, 302 Ill.Dec. 936 (Ill.App. 2 Dist. 2006), the title insurer failed to except and disclose a prior mortgage on both the foreclosure report and the policy it issued to a person who bought the property from the bidder. The insurer was entitled to pursue the bidder on his covenants of warranty, although he claimed that he made those warranties in reliance on the defective foreclosure title commitment.

[116] 1996 WL 114719, 79 F.3d 1141 (Table) (4th Cir. (Va.)) (unpublished).

[117] 1996 WL 114719 at p. 5.

foreclosure sale.[118]

The *Smith* decision from New Jersey accurately reflects that the only intended beneficiary of a foreclosure commitment is the foreclosing lender, to whom it is issued and from whom payment is received. The Virginia *MacDonald* opinion was influenced both by the insurer's failure to amend the title commitment before sale, and its stipulation that the proposed insured was the purchaser at sale. In most jurisdictions, the facts stipulated to in *MacDonald* would not be accurate.

Also, a party whose rights are adverse to the insured is not a beneficiary of the policy entitled to sue for damages resulting from an error in the policy or due to a covered risk. Thus, when the policy insured an access easement that was determined not to be valid, the party over whose property the easement was claimed was not within the class of those who foreseeably could be injured by defendants' negligent conduct.[119] Therefore, the claimant was not entitled to pursue the insurer for expenses incurred in the lawsuit (in which the insurer had paid to defend the insured against the claimant).

The true owner of property has no standing to sue the title insurer that issued a policy to the grantee, when the insured deed or mortgage was forged or the product of fraud.[120]

Similarly, a party has no rights against the insurer for a claimed interference with, failure to acknowledge, or insurance over the party's rights in the insured property.[121] Similarly, a lender that

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[118] Id.

[119] *Bonner v. Chicago Title Ins. Co*., 487 N.W.2d 807 (Mich.App. 1992).

[120] In *Fey Family Limited Partnership v. Commonwealth Land Title Ins. Co.*, 2012 WL 662519 (Cal.App. 2 Dist.) (unpublished), in which a son falsely claimed to be the general partner of a partnership in a fraudulent sale of property, the escrowee and title insurer had no duty to the father, who was the real general partner, to detect or prevent the fraud. In *Anthony v. Chicago Title Ins. Co.*, 2007 WL 1144802 (S.D. Ohio) (unpublished), a record owner who claimed that her signature on a deed was forged had no standing to the insurer that issued a policy issued to the grantee. The court said the party was not an insured and the insurer owed her no duty. Similarly, in *Hicks v. Saboe*, 555 A.2d 1241 (Pa. 1989), an owner whose signature was forged on the prior deed in the chain of title was found not to be an insured or an intended beneficiary of the insurance contract. In *In re Woodson*, 136 A.D.3d 691, 24 N.Y.S.3d 706, 2016 N.Y. Slip Op. 00698 (N.Y.A.D. 2 Dept. 2016), the court held that a property owner may not sue a title insurer for fraud based on the fact that it insured title the owner said had been fraudulently conveyed. In *Celestin v. Simpson*, 153 A.D.3d 656, 59 N.Y.S.3d 773, 2017 N.Y. Slip Op. 06153 (N.Y.A.D. 2 Dept. 2017), the owner of property sued the insurer when someone forged a deed to his property. The court did not address the substance of the claim because the court dismissed the lawsuit as being time-barred. In *Sanchez v. Lawyers Title Ins. Corp.*, 2018 WL 2041999 (Cal.App. 2 Dist.) (unpublished), the court held that the act of rerecording a forged deed of trust did not make the title company liable to the property owner, whose harm was caused by the person who committed the forgery. In *Gutierrez v. Stewart Title Co.*, 550 S.W.3d 304 (Tex.App.-Houston 2018), the court dismissed a lawsuit brought by an estate against a title insurer in which the estate representative alleged that the insurer had a duty to prevent heirs from selling the property in violation of the terms of the will. However, the court tossed the suit based on the statute of limitations without reaching the question of whether or not the estate had standing to sue the insurer.

[121] A title insurer did not tortiously interfere with a right of first refusal by insuring over that right by the taking of an indemnity, in *CS-Lakeview at Gwinnett, Inc. v. Simon Property Group*, 283 Ga.App. 686, 642 S.E.2d 393 (Ga.App. 2007). The court also noted that the seller had already decided not to offer the property to the holder of the right before the title commitment was issued. In *Walker v. Anderson-Oliver Title Ins. Agency, Inc*., 309 P.3d 267, 741 Utah Adv.Rep.

did not get paid off at a closing had no right to sue the title insurer that insured the new loan, because the insurer owed no duty to the old lender. Further, the old lender held an agreement by the borrowers not to sell or mortgage the property, but not a lien. The court held that the title insurer did not participate in a conspiracy to violate that agreement by the transfer of the property to a bankruptcy-remote entity as part of the new loan.[122] Similarly, a borrower is not a third party beneficiary of a loan policy commitment. When the commitment called for the delivery of the borrower's paid promissory note from a loan to be paid off, the borrower had no cause of action against the insurer when the insurer waived its own requirement and did not collect the cancelled note.[123]

7.8 Assignment Of Policy Or Claim

The ALTA policies do not provide for assignment of the policy, or a claim under the policy, from the insured to a purchaser. To the contrary, the 2006 ALTA policies state, in Conditions 2:

> This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

In most states, therefore, an owner-insured may not assign its claim under the policy to a purchaser of the property, or retain the claim on sale. A Michigan decision held that the assignment of a policy and claim by the insured to his purchaser was void. The purchaser was not an insured under the policy, and the coverage of the policy terminated as to the named insured when the insured ceased to have an insurable interest in the land. There was no "warranty liability" because the insured conveyed without warranty.[124] When the insurer owes money to an insured owner in payment of a claim, a lender may establish that it is entitled to receive the money after the insured owner borrower has defaulted on the loan, based on the terms of the loan agreement or the security interest granted to the lender, analogous to the lender's right to insurance proceeds payable on a casualty loss.[125] The provision allowing the insurer to pay a lender and receive credit for that payment toward the owner's loss is discussed at §3.2.2.

37, 2013 UT App 202 (Utah App. 2013), a title insurer that did not make exception for two purported easements was found not to be liable to the easement holder for claimed interference with his property rights.

[122] *Titan Management, L.P. v. First American Title Ins. Co*., 2006 WL 3732995 (N.J.Super.A.D.) (unpublished).

[123] *Sherrill v. Louisville Title Ins. Co.*, 134 Ga.App. 322, 214 S.E.2d 410 (1975).

[124] *Second Benton Harbor v. St. Paul Title Ins. Corp*., 126 Mich.App. 580, 337 N.W.2d 585 (1983).

[125] In *Van Buren Estates Lenders, LLC v. Fiegl*, 2015 WL 4931502 (Cal.App. 4 Dist.) (unpublished), the court found that a provision in a deed of trust stating that the lien also encumbered insurance proceeds was broad enough to include money paid by a title insurer into escrow in settlement of a policy claim made by the owner, which had defaulted on the loan. The lender thus had a claim to the money that was superior to that of a junior lien holder, who had obtained a court-ordered lien on the money.

Several early decisions concerned older policy language that permitted assignment of the policy.[126] Those decisions interpreted policy terms that do not appear in modern ALTA policy forms, making their reasoning inapplicable to the construction of an ALTA policy.[127]

The ALTA Homeowner's Policy unequivocally states that the policy may not be assigned. Conditions 1.h of that policy says that "You cannot assign this Policy to anyone else." Other ALTA policies do not contain an explicit prohibition on the assignment of the policy. On the other hand, the Homeowner's policy does not contain the statement found in other ALTA policies that a purchaser does not become an insured. The non-assignability provision thus serves the purpose of making it clear that a purchaser from the insured does not become an insured. The purchaser statement is not necessary in the Homeowner's policy, because it does not define successor insureds as those persons "who succeed to the interest of such insured by operation of law as distinguished from purchase." With no reference to purchase in the policy, there is no need to explain that purchasers are not insureds.

A particular state's general law regarding insurance contracts may be that a claim is assignable, once discovered and tendered to the insurer. Such cases involving other lines of insurance should not be precedential as to the title insurance contract, which is different in its nature from other lines of insurance.[128] An assignment of the proceeds from a claim under the policy is different from a purported assignment of the policy itself. If state law recognizes a policy holder's right to assign the proceeds of an insurance claim to a third party, such an assignment of a title insurance claim may be enforceable.[129] However, the assignment of the proceeds of a claim does not

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[126] *Real Estate-Land Title & Tr. Co. v. Real Estate-Land Title & Tr. Co.*, 15 Pa.D.&C. 409 (1931); *Schoeneman v. Bloom*, 106 N.J.Eq. 421, 151 A. 272 (1930); *Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471, 178 A.2d 1 (1962).

[127] In *Hovannisian v. First American Title Ins. Co*., 2017 WL 3141099, 2017 WL 3477122 (Cal.App. 5 Dist.) (unpublished), the court held that a loan policy terminated when the insured lender conducted a trustee's sale and a third party made the successful bid. The lender assigned its policy claim to the bidder, but the court said this did not prevent the policy from terminating. The court did not directly rule that the assignment was ineffective, however. In *Property Asset Management, Inc. v. Chicago Title Ins. Co.*, 173 F.3d 84 (2nd Cir. N.Y. 1999), the court held that, once the policy terminated due to a conveyance to a party who was not an insured, the insured had no power to assign a policy claim to the grantee.

[128] See Annotation, *Assignment by Assured of Policy of Indemnity or Liability Insurance, or of Rights Thereunder*, 122 A.L.R. 144; 39 Cal.Jur.3d §§135-44.

[129] In *Young v. Chicago Fed. Savings and Loan Ass'n*, 180 Ill.App.3d 280, 129 Ill. Dec. 212, 535 N.E.2d 977 (1989), the lender assigned not the policy but the proceeds of the pending title insurance claim to the purchaser of the loan. The assignee sued to enforce its right to the claim proceeds, after the insurer paid the assignor. In *In re Longview Power, LLC*, 516 B.R. 282 (D.Del. 2014), the insured lenders assigned to two lien claimants the right to money paid by the title insurer to extinguish those lien claimants' liens, reserving to the insureds all of their other policy rights. This assignment was made as a deal to compromise claims in the bankruptcy estate of the borrower-owner. The court held that the partial assignment of proceeds only was enforceable, holding that: "Nothing in *Shamrock* or in the Policy provides that all rights must be assigned before a party can assert any rights. There is no reason a partial assignment must fail. Because the claims at issue relate to Policy proceeds in which the Debtors have a stake, the Debtors have standing to assert these claims." The assignment did not make the assignee the insured, but gave it the authority to pursue the claim as well as to receive any claim payment. The court referred to *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), which held that an assignment of both the loan and the policy (in full) gave the

confer on the assignee the status of an insured.

7.9 Loan Policy Continuation And Termination

If the lender takes title to the property, Condition 2 states that the policy remains in effect while the lender is the owner.[130] Once the insured lender becomes the owner of the insured property, all three predicate conditions to the insured's entitlement to make a claim for a title defect are considered to have been fulfilled. For example, whereas an insurer might respond to a lender's claim based on an easement with watchful waiting when the insured holds a mortgage, the insurer will take action to resolve the easement claim once the lender owns the insured parcel. See §§3.2.4 and 3.2.4.1 for a complete discussion of the predicate conditions for a loan policy claim and the method used to determine the amount of the insured's loss due to a covered lien.

However, the loan policy terminates if the insured conducts a foreclosure sale for the insured mortgage but does not take title through that sale.[131]

If the lender takes title to the property, invoking the continuation provision, the policy terminates when the lender voluntarily conveys the property, with two exceptions. The policy continues further to the extent of the insured's liability for warranties of title it made in conveying

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assignee standing as an insured.

[130] Condition 2 states: "The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured." See *Preservation Capital Consultants, LLC v. First American Title Ins. Co*., 406 S.C. 309, 751 S.E.2d 256 (S.C. 2013), which acknowledged that the loan policy continues after the lender takes title.

[131] In *Hovannisian v. First American Title Ins. Co*., 2017 WL 3141099, 2017 WL 3477122 (Cal.App. 5 Dist.) (unpublished), the court held that a loan policy terminated when the insured lender conducted a trustee's sale and a third party made the successful bid. The court said that the lender's assignment of its policy claim to the bidder did not alter the result. In *Property Asset Management, Inc. v. Chicago Title Ins. Co.*, 173 F.3d 84 (2nd Cir. N.Y. 1999), Midlantic Bank made a mortgage loan on New York property and obtained a title policy from Chicago Title. Midlantic foreclosed. Midlantic was the successful bidder. The next day, Midlantic assigned the loan to ALI, Inc., a subsidiary of Lehman Brothers. A different subsidiary of Lehman Brothers, Property Asset Management, Inc. (PAMI), was substituted as plaintiff in the foreclosure action. PAMI obtained a deficiency judgment. More than a year later, ALI assigned the mortgage to PAMI, but backdated the assignment to the date on which Midlantic had assigned to ALI. Apparently, the reason for the late assignment was to help PAMI assert a claim against the title insurance policy, which PAMI did shortly thereafter. PAMI never took title to the real estate. Chicago Title denied the claim because PAMI was not the successor insured under the policy. As the court explained, "PAMI cannot assert a claim on the insurance policy as the assignee of ALI and Midlantic unless an assignment was validly made prior to the entry of the deficiency judgment... . Entry of the deficiency judgment terminated the mortgage loan, and it was on that loan that the title insurance policy was issued. Once the mortgage loan went out of existence, the holder of that loan--whoever that might be--no longer had an interest in the policy to assign. …The district court concluded that the evidence did not support a finding that PAMI had been in exclusive control of the loan between June 8 and August 7, 1995. We agree. Without such a showing, PAMI cannot maintain that it came into possession of the loan before that loan was extinguished on June 23. And if it did not own the loan, it has no claim under the insurance policy issued on that loan."

the property,[132] and also continues in effect as to any mortgage taken back by the insured from a subsequent purchaser. Most cases interpreting the continuation provision have been decided under owner's policies. Those cases are collected at §7.3. See also §7.4, concerning successor insureds under a loan policy.

If the lender does not come into title to the insured property, the loan policy terminates when the indebtedness secured by the insured mortgage is fully paid.[133] The full credit bid or one-recovery

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[132] In *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 181292 (D.Ariz.) (unpublished), the court refused to find the policy terminated because the lender had resold the property, because it had made a claim before selling the property. The court said "coverage may still exist for damages sustained during the coverage period, even if a claim is submitted after the coverage period." It cited *Chicago Title Ins. Co. v. 100 Investment Ltd. Partnership,* 355 F.3d 759, 765-66 (4th Cir. 2004). In *Hovannisian v. First American Title Ins. Co*., 2017 WL 3141099, 2017 WL 3477122 (Cal.App. 5 Dist.) (unpublished), the court held that the insured lender conveyed the property without warranty and did not take back a mortgage, so that the continuation of coverage provision was not invoked. The *Hovannisian* court also cited *100 Investment*, but for its statement that "[i]f a preexisting defect in title were to remain after the insured conveyed the land, the risk inherent in that defect would pass to the purchaser and the insured would no longer have risk, nor coverage." The *Hovannisian* court thus rejected the notion that the insured could continue to make a claim after conducting a sale at which a third party took title. Most decisions concerning warranty coverage and the continuation provision concern owner's policies. Those decisions are reviewed in §7.3.

[133] Conditions & Stipulations 9(c) of the 1992 ALTA Loan policy states that full payment of the debt terminates all liability under the policy. Note that this provision is not found in the 2006 ALTA Loan policy, which states at Conditions 9(b) that "[t]he voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions." However, Conditions 8(a)(ii) of the 2006 policy states that the amount of loss is the least of policy limits, the property's value, the amount paid by a governmental entity on a guaranty or "the Indebtedness," which is a defined term in the 2006 policy. The 1992 ALTA Loan policy also contains the pro tanto payment provision, Conditions & Stipulations 9(a), which says that all payments "by any person of the principal of the indebtedness ... shall reduce the amount of insurance pro tanto." The termination provision was enforced in *Hodas v. First American Title Ins. Co.*, 696 A.2d 1095 (Maine 1997), which stated: "After an insured mortgagee purchases the mortgaged premises at foreclosure, coverage continues provided there remains unpaid principal indebtedness. Coverage is limited, however, to the lesser of the outstanding indebtedness or the stated policy limit." The *Hodas* court found the policy to remain in effect after the lender's purchase at foreclosure sale up to the amount of the loan deficiency amount. See also *First Midwest Bank, N.A. v. Stewart Title Guar. Co*., 355 Ill.App.3d 546, 823 N.E.2d 168 (Ill.App. 1 Dist. 2005), which held that a loan policy was terminated on the payoff of the insured loan following a refinance by the same lender. The lender had argued that the new loan was not intended to satisfy the debt secured by the insured mortgage, but was really a wraparound loan. The court rejected the argument, noting that the original note had been cancelled and the mortgage released. In *Morrison v. Wells Fargo Bank, N.A.*, 711 F.Supp.2d 369 (M.D.Pa. 2010), the court found that an insurer's duty to defend a lender insured ceased when the loan was paid off, and that the insurer was permitted to retender defense to the insured while the lawsuit was still pending. Also, in *Joglor, LLC v. First American Title Ins. Co*., 261 F.Supp.3d 224 (D.P.R. 2016), the insured lender's acceptance of cash in a settlement under which it released the borrower from all liability under two notes extinguished the debt and the mortgages, and terminated the loan policies. The court also held that a purported assignment of the mortgages to the borrower in the settlement agreement did not make the borrower a successor insured under the policies. However, in *Branch Banking & Trust Co. v. Chicago Title Ins. Co.,* 714 S.E.2d 514 (N.C.App. 2011), the borrower signed a renewal note two years after the insured deed of trust was recorded, and the lender recorded a new deed of trust and released the old. The policy insured the first deed of trust. The court held that the policy was not terminated because the debt had not been satisfied; effectively, the policy was deemed to insure the later deed of trust. Essentially the opposite result from *Branch Banking* was obtained in *Pekkola v. Fidelity Nat'l Title Ins. Co*., 2013 WL 3873233 (D.Or.) (unpublished), the court held that a loan policy terminated when the insured lender replaced the promissory note with a new debt instrument after the policy date. The court noted that, although the policy insured the deeds of trust and not the debt, the references in Conditions 8(d)(i) to subsequent

rule adopted in some states treats a full credit bid at foreclosure as a satisfaction of the debt. Having bid in the full amount of the debt at a foreclosure sale, the lender cannot seek to collect the debt from the borrower or third parties:

> The lender's full credit bid establishes the value of the security as being equal to the amount of the indebtedness. Hence, the lender cannot establish any impairment of security and cannot recover any damages [against the borrower] for waste.[134]

The full credit bid rule corresponds to the 1992 ALTA Loan policy term stating that payment of the debt in full by any person extinguishes the policy. Some courts have held that this rule precludes a lender from recovering from a title insurer any amount that the lender made as a credit bid at sale.[135] However, some courts have held that a full credit bid is not a "payment" of the debt that terminates the policy.[136] One issue those courts have raised is that Condition 2 of the ALTA Loan policy states

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indebtedness made it "clear … that the parties intended the policy to be connected to the original note between Plaintiffs and Bundy." When the parties signed a new note and a new security agreement, that tie was severed, and insurance coverage forfeited: The court said it did not have sufficient facts to decide the case based on the insurer's claim that the policy had been extinguished on repayment of all of the debt that existed as of the date of policy. Condition and Stipulation 8(d)(i) of the 1992 ALTA policy says that there is no coverage for post-policy advances. The parties disagreed on how repayments should be applied, with Fidelity arguing that all repayments should be applied first to the original loan. The Pekkolas argued that the policy did not say how advances were to be applied, and the borrower and lender had not established their agreement on the subject either. The court said it was impossible to determine that issue on summary judgment.

[134] *Cornelison v. Kornbluth*, 15 Cal.App.3d 590, 605-6, 125 Cal.Rptr. 557, 542 P.2d 981 (1975), quoted in *Romo v. Stewart Title of California*, 35 Cal.App.4th 1613, 1615, 42 Cal.Rptr.2d 414 (Cal.App. 1 Dist. 1995).

[135] In *Freedom Mortgage Corp. v. Burnham Mortgage, Inc*., 2006 WL 695467 (N.D.Ill., March 13, 2006) (No. 03 C 6508) (unpublished), the lender sought to recoup losses caused by loan fraud from various parties, including title insurers, after having made full credit bids at its foreclosure sales. Relying on the California decisions in *Cornelison* and *Romo* cited above, the court held that the lender was precluded from recovering from any of the third parties, because otherwise the lender could in effect obtain double recovery: "These cases instruct that, absent proof that a lender's credit bid was the proximate result of fraud, the bid stands as against third parties (not, as Plaintiff contends, only against borrowers or junior creditors). … In this case, Freedom was not stuck with appraisals potentially tainted by fraud. … There simply has not been, nor could there be on the record before the Court, any allegations that the credit bids were proximately caused by any of the Defendants' fraudulent misrepresentations. … In other words, Freedom knew the actual values of the Properties, and had the power to bid the way it wanted to protect its interests." In *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., 2015 WL 5276346 (N.D.Ill. 2015) (unpublished), the court applied *Freedom Mortgage* in a suit against a loan closer, not under a title insurance policy claim, to hold that the maximum amount that the FDIC could recover against a loan closer for its alleged failure to inform the defunct lender about double escrows was the amounts of the deficiency judgments taken by the FDIC after its credit bids on foreclosure. The FDIC made numerous arguments seeking to distinguish *Freedom Mortgage*, all of which the court rejected. In *Lawyers Title Ins. Corp. v. Dedmore*, 2014 WL 4354663 (Cal.App. 1 Dist.) (unpublished), California's one-action or anti-deficiency law was applied to preclude a *title insurer* from collecting from the owners on the note after the insurer bought the loan and reconveyed the property in order to resolve the claim under the loan policy. In *Dedmore*, the insurer did not make a credit bid and did not assert in the reconveyance that the debt had been paid or discharged, so that the anti-deficiency law was not invoked.

[136] In *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 181292 (D.Ariz.) (unpublished), a federal court sitting in

that it continues in effect if the insured comes into title and, typically, the insured lender comes into title through the sale at which it makes its full credit bid. Also, the 2006 ALTA Loan policy does not say that the policy terminates on full payment of the debt secured by the mortgage.

The loan policy also terminates if the lien of the mortgage is released, unless the insured lender comes into title contemporaneously with the mortgage release.[137] Under the 2006 ALTA Loan policy, voluntary satisfaction or release of the insured mortgage is the only stated event under which the policy terminates.

The loan policy also terminates when the insured mortgage is extinguished by the foreclosure of a superior lien that is excepted in the policy. This event is not listed in the policy termination provision. However, Condition 2 states that the policy remains in effect "only so long as the insured retains an estate or interest in the land... ."[138]

Arizona refused to apply the full credit bid rule to a title insurance claim even though the rule has been applied by a state court to a casualty insurance claim, saying: "… casualty insurance and the title insurance policy at issue here are not the same. One is related to problems with the property itself, while another specifically addresses the mortgagee's lien. … While it may make sense that a full credit bid should extinguish any right to demand further compensation related to the value of the property, losses arising from the unenforceability of the lien are separate, and may be resolved independently." In *Bank of Idaho v. First American Title Ins. Co*., 156 Idaho 618, 329 P.3d 1066 (Idaho 2014), the court held that the lender's full credit bid at its foreclosure sale did not reduce the policy amount, pursuant to Conditions & Stipulations 9(c), which provides that "[p]ayment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations." The court said the reference to Conditions 2(a), the continuation provision, was the flaw in the insurer's analysis that the bid was a payment. The court said that the bid was the act that permitted the lender to come into title. If that same bid extinguished the policy, coverage would not continue after the lender took title. The 2006 ALTA Loan policy does not state that the policy is terminated on payment in full of the debt. Conditions 10(b) of the 2006 policy limits policy termination to the event of the "voluntary satisfaction or release of the Insured Mortgage," and states "except as provided in Section 2 of these Conditions." Similarly, in *Preservation Capital Consultants, LLC v. First American Title Ins. Co*., 406 S.C. 309, 751 S.E.2d 256 (S.C. 2013), the loan policy amount was $3,075,000. The loan was secured by three parcels, including a defective lien on a small parcel that the lender knew would be in second position. The lender foreclosed on the main parcel, making a credit bid of $3,250,000. By the time of that sale, the debt with interest was $3,641,190. After subtracting the bid amount, the loan balance was $391,190, just over the amount of the lost equity in the second-lien parcel. The court held that the credit bid did not extinguish the policy, saying simply that it was unfair to reduce the policy amount dollar-for-dollar based on the credit bid amount. In *Equity Income Partners LP v. Chicago Title Ins. Co.*, 241 Ariz. 334, 387 P.3d 1263 (Ariz. 2017), the Arizona Supreme Court held that a lender's credit bid did not constitute a "payment" under Condition 9(b), basing its decision largely on the *Bank of Idaho* decision and supporting the *M & I* Arizona federal court ruling from six years earlier.

[137] Condition 10(b) of the 2006 ALTA Loan policy states: "The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions." Condition 2 is the continuation of coverage provision. In *RNT Holdings, LLC v. United General Title Ins. Co*., 230 Cal.App.4th 1289, 179 Cal.Rptr.3d 175 (Cal.App. 2 Dist. 2014), the first California decision on the issue, the court held that a lender's reconveyance of the insured deed of trust terminated a loan policy. In *Wells Fargo Bank, N.A. v. Stewart Title Guar. Co*., 2016 WL 4455070 (D.S.C. 2016) (unpublished), the insured lender released its lien on payment of less than the full amount owed, after the insurer denied its claim as premature. The court held that the release was not an adequate basis on which to dismiss the lender's suit for breach of policy. However, the insurer also argued in the alternative that the release was a voluntary settlement. The latter was the only policy provision analyzed in the decision.

[138] In *First Midwest Bank, N.A. v. Stewart Title Guar. Co*., 355 Ill.App.3d 546, 291 Ill.Dec. 158, 823 N.E.2d 168 (2005), the court held that the full release of the insured mortgage terminated the policy. In *Countrywide Home Loans,*

The purchase of a loan by an assignee is not a payment that terminates the policy. Rather, the new owner of the debt becomes a successor insured.[139] The loan assignee's status as a successor insured is discussed at §7.4.

Several courts have held that an insured lender is entitled to be defended in an action in which the borrower seeks to rescind the payoff of the insured's loan, when a revival of the insured lien would also resuscitate the insured's claim for a covered defect in the title.[140] However, the mere fact that the borrower seeks to rescind the loan payoff has been held not to trigger a duty to defend; the action must also make claims against the insured that invoke the potential for policy coverage.[141]

Inc. v. United General Title Ins. Co., 109 A.D.3d 950, 971 N.Y.S.2d 353 (N.Y.A.D. 2 Dept. 2013), 2013 N.Y. Slip Op. 05981, when an insured lender voluntarily released the insured mortgage after learning from the true owner that it had been signed by an impersonator, and the release was issued before the policy claim was made, the release did not terminate policy coverage. The case of *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co*., 950 F. 2d 139 (4th Cir. 1991), presents an unusual situation in which the court found that the policy remained in effect after the lien was wiped out in the foreclosure of a senior lien. The insured lender, William L. Walde, held a second mortgage. He discovered a judgment lien affecting the property. Then the first mortgagee foreclosed. Walde submitted a claim after he became the successful bidder at sale. The insurer stipulated that the assignment of Walde's rights to a partnership he would form would not terminate policy coverage, but the insurer insisted at the same time that the policy had been terminated because the completed foreclosure extinguished the lien of the second mortgage. Walde completed the bid anyway, got rid of the judgment and sued the insurer. The court never directly addressed or ruled on the issue of policy termination, because the issue was not raised by the insurer on appeal. The court did hold that there was a policy and that the insurer had a duty to pay damages to the assignee partnership. There are two factors in Bluff Ventures that distinguish it from the usual case in which an insured lien is extinguished by foreclosure. First, the claim was made before the sale was confirmed, and the insurer specifically agreed that whatever rights Walde had could be assigned to the partnership. Second, although Walde lost his lien on the property, he became the fee owner. He therefore continued to have "an interest" in the property. Nonetheless, the insurer was correct in its first assessment that the policy terminated when the insured mortgage was foreclosed.

[139] In *C.A.M. Affiliates, Inc. v. First American Title Ins. Co*., 306 Ill.App.3d 1015, 715 N.E.2d 778, 240 Ill.Dec. 91 (Ill.App. 1 Dist. 1999), the named insured sold the loan while its suit against the insurer for a claimed policy loss was pending. The insurer argued that the money paid for the loan was a full payment of the debt that terminated the policy under Conditions & Stipulations 9(c) of the 1992 ALTA Loan policy. The court disagreed, saying: "C.A.M.'s payment was not a repayment of the principal of the indebtedness. Rather, it was simply a transfer of the indebtedness from one entity to another for a premium. Consequently, this section of the insurance policy does not apply, and First American is responsible for the claims made by plaintiffs against their policies."

[140] In *Paramount Properties Co. v. Transamerica Title Ins. Co.*, 1 Cal.3d 562, 83 Cal.Rptr. 394, 463 P.2d 746 (Cal. 1970), the insured lender and others were sued on the grounds that the borrower had obtained title by fraud. The insurer defended the lender. In the settlement of the case, the lender was paid off. Shortly thereafter, however, the lender was sued again, on the assertion that the payoff was made under duress in order to make a sale of the property go through. The insurer refused a tender of defense. The court found that there was a duty to defend, however, because the policy terminates on "payment in full." The borrower's second action contested the legal effectiveness of the payment. Similarly, in *Davis v. Elite Mortgage Services, Inc*., 2009 WL 1514548 (N.D.Ill.) (unpublished), the insured lender was paid off through a later loan, but the former owner sued to rescind the sale and also the payoff to the lender. The court found that the policy was not terminated, and the title insurer had a duty to defend the lender.

[141] In *Deutsche Bank Nat'l Ass'n v. First American Title Ins. Co*., 465 Mass. 741, 991 N.E.2d 638 (Mass. 2013), the Massachusetts Supreme Judicial Court held that a title insurer had no duty to defend claims by the borrower against the insured lender to rescind the loan and for tortious conduct in the making of the loan, even though one remedy the

7.10 Imputation Of Named Insured's Knowledge To Successor

As described above, a successor in interest or party related to the insured may become an insured. The knowledge and actions of the predecessor insured are imputed to the successor. For example, when a sole shareholder was found to be an insured under a policy naming the corporation as insured, all defenses that the insurer might have against the corporation could be imputed against the shareholder.[142] In commercial transactions involving partnerships or corporate stock acquisitions, the new owner often obtains a non-imputation endorsement. Most forms of the endorsement are written as a waiver of the insurer's right to impute knowledge of the named officers or directors to the insured as a defense to coverage under knowledge-of-the-insured exclusion, which is Exclusion 3(b) in most ALTA policy forms.

The ALTA loan policy provides that the insurer may assert against a successor insured owner of the debt all defenses that would be available against the named insured unless the successor acquired the debt as a purchaser for value without knowledge of the title defect.[143] This provision closely tracks the Uniform Commercial Code concept of a holder in due course of an indebtedness. An insured with knowledge of a title defect may not assign the loan to a nominee, for no consideration, in order to avoid the invocation of a policy defense.

However, when a court reforms the policy to alter its terms, such as to add exceptions, based on the acts and knowledge of the named insured, the policy as reformed is binding on the successor insured also.[144]

In order to assert policy defenses against a loan assignee insured, the insurer must establish that the defense existed as to the named insured, and that the assignee purchased the loan with actual knowledge of the defect, lien, encumbrance or other matter insured against by the policy.[145] Title

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borrower sought was to rescind the insured mortgage. Deutsche tendered its defense to its title insurer, First American, because Brown sought to rescind both the loan and the insured mortgage. The court held that First American correctly declined to defend because, as the insurer put it, "Brown does not challenge that she granted the mortgage, rather she claims that she was misinformed as to the terms of the note." This did not invoke a Covered Risk, and several exclusions applied.

[142] *Peachtree Management & Inv. Co., Inc. v. Pioneer Nat'l Title Ins. Co.*, 541 F.Supp. 51 (N.D.Ga. 1981).

[143] The definition of insured in the 2006 ALTA Loan Policy states at (ii): "[w]ith regard to (A), (B), (C), (D), and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy." The successor insureds described in A through E of the definition includes all such successors other than " any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not… ."

[144] In *BAPCO LLC v. Fidelity Nat'l Title Ins. Co.*, 2019 WL 5576863 (Ariz.App. 1 Div.) (unpublished), the court reformed a policy to add exceptions for the two senior deeds of trust that the lender knew to exist. The insurer was not barred from enforcing the policy as reformed against the successor holder of the loan, because reformation alters the policy as originally written.

[145] In *Northern California Community Development Corp. v. First American Title Ins. Co.*, 2019 WL 1397040

insurers routinely request from loan assignee insureds the information disclosed to them before the purchase of the loan. One source of information about a title defect can be a later title report that discloses the issue. Another source of information can be the credit report, if it discloses the debt or lien that is at issue. When loans are sold at auction, there is typically a disclosure package delivered to potential bidders. That package is often the means by which the title defect is disclosed to the bidder.

A governmental entity that was an insurer or guarantor of the debt is an insured under the ALTA policies, as discussed in full at §7.4. The ALTA Loan policy states that the insurer does not have the right to assert against a governmental insurer or guarantor those policy defenses that were available against a predecessor owner of the debt. As a result, if the Veterans' Administration,

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(Cal.App. 3 Dist.) (unpublished), the court held that a community development corporation that bought two old loans for one dollar each, in an assignment that disclosed that the subdivision project had flopped, had no title insurance coverage against a court order for a partition sale of the development as the only way for people to get back their investments. In *GreenPoint Mortgage Funding Inc. v. Stewart Title Ins. Co.*, 12 Misc.3d 1194(A), 2006 WL 2337967, 2006 N.Y. Slip Op. 51568 (N.Y.Sup. 2006) (unpublished), the named insured was Royal Mortgage Bankers, which made a loan to its owner, Louis Crispino. After Crispino died, his wife sued to set aside the mortgage because Crispino had forged her signature. Royal had sold the loan to GreenPoint Mortgage. The insurer accused Royal of sloppy lending practices and sought to impute Crispino's acts to it, then assert Royal's negligence as a defense to GreenPoint under the successor provision. The court refused to employ the provision to negate coverage because, it found, there was no evidence that either Royal or GreenPoint actually knew about the forgery, despite the lax lending practices. In *Fidelity Nat'l Title Ins. Co. v. Matrix Financial Services Corp.*, 255 Ga.App. 874, 567 S.E.2d 96 (Ga.App. 2002), the loan was assigned back to the original lender after discovery of a title defect. The insurer asserted that the lender had been careless, but was unable to prove that it had actual knowledge of the title defect. The court acknowledged that the lender would be subject to title defects of which it had actual knowledge, but found that the provision did not come into play because the lender had no such actual knowledge. In *Johnsen and Allphin Properties v. First American Title Ins. Co*., 2013 WL 6230344 (D. Utah) (unpublished), on a motion to dismiss, the court ruled only that a successor holder of the loan must be shown to have had actual knowledge of the lien in dispute at the time it bought the loan, which may or may not be evidenced by a title report it received that disclosed the lien. The court held that actual knowledge does not encompass inquiry notice. It did note the irony that, had the assignee conducted no due diligence, the insurer would have no possible coverage defense based on knowledge, which appears to reward sloth. In a later decision, the court made few new rulings other than that there was a question of fact about what the insured knew that would require a trial. *Johnsen and Allphin Properties, LLC v. First American Title Ins. Co*., 2016 WL 6459579 (D. Utah 2016) (unpublished). See §11.3 for a complete discussion of Exclusion 3(b). In *Stewart Title Guar. Co. v. National Enterprises, Inc.*, 133 F.3d 929 (Table), 1997 WL 800294 (9th Cir. (Cal.)) (unpublished), the court held that the purchase of the loan by a party that knows of a title defect does not by itself invoke the exclusion. In *Southern Title Ins. Co. v. Crow*, 278 So.2d 294 (Fla.App. 1973), cert den. 284 So.2d 221 (Fla. 1973), the court held that a policy defense against the named insured could not be asserted against an assignee of the loan, because the insurer had offered no proof that the assignee bought the loan with knowledge of the issue. Housing Development Corporation made a loan that was eventually assigned to the Crows. The mortgage was held to be invalid because Housing Development did not comply with Truth-in-Lending Act. The Crows sued under the policy. The court said that the policy "excludes defects 'known to the insured Claimant.' Appellant reads this as if it said 'named insured,' and that is the fallacy in its argument." The court said that there was "no claim that either of the ‘insured Claimants' knew of the defect, and while the defense might be good against the original insured, it is not available against the appellees, who took without notice of the defective title." In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC,* ___ Ga.App. ___, 835 S.E.2d 21 (Ga.App. 2019), the named insured lender had actual knowledge of the existence of a recorded notice of groundwater contamination. It sold the loan. The assignee insisted that the notice was not disclosed to it when it purchased the loan, which prevented the insurer from asserting Exclusion 3(a). The successor insured obtained a large jury verdict against the insurer based on the effect of the notice, which was not excepted in the policy.

Federal Housing Administration or another governmental body insures or guarantees the loan and later takes an assignment of it on payment under its insurance or guaranty contract, that entity is not subject to coverage defenses that would have been available against the named insured, principally Exclusions 3(a) and 3(b).

However, the bar to asserting defenses against government insurers or guarantors does not encompass every governmental entity that may become the owner of the loan. For example, if the Federal Deposit Insurance Corporation takes over a bank and briefly holds its assets, the bar to the assertion of policy defenses does not apply, because the FDIC was not an insurer or guarantor of the Indebtedness. The FDIC insures deposits with the financial institution, but does not insure its loans.[146] Likewise, Federal Home Loan Mortgage Corporation and Federal National Mortgage Association are not loan insurers or guarantors, and the insurer is not barred from asserting policy defenses against them. Further, if a loan is held by the VA and then sold to a private party who buys the loan with knowledge of the title defect, the insurer may assert all policy defenses. The policy does not get scrubbed of policy defenses just because it passed through the hands of a governmental insurer or guarantor.

For a complete discussion of knowledge and notice under Exclusion 3(b), see §11.3.2.

[146] See *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), in which the FDIC took over the institution that made the loan and assigned the loan to one of its loan participant banks. The insurer produced a witness who testified that the named insured lender's president and its board member were both aware of the reverter that was the subject of the claim, and had agreed to allow the borrower to obtain its release after the loan was made. However, the president denied it. The court found that the predecessor's knowledge could be asserted as a defense against the assignee, but held that the evidence of that lender's conduct was too equivocal to invoke Exclusion 3(a).

8 Estate and Land Insured

The first subject of this chapter is the resolution of claims in which there is a dispute over whether or not the insured holds the estate named on Schedule A. The second subject of this chapter is questions over the scope of the policy's coverage as to the parcel and rights in land that the policy insures. The policy defines "Land" as the parcel or parcels described in Schedule A, plus the improvements located thereon that are considered by state law to be affixed to the real estate.[1] The policy does not insure ownership of any appurtenant rights that may exist in adjacent property, including rights in any adjacent public street, unless the policy contains an additional affirmative assurance of such rights.

8.1 The Insured Estate

Schedule A of the policy is in the nature of a declarations page. It recites the policy number, its date, the amount of insurance, the name of the insured, the description of land whose title is insured, and the estate held by the insured (or, in the case of the loan policy, the estate held by the borrower). Schedule A is not a statement of covered risks. Thus, the recital of the insured's estate, and the tenancy in which title is held, is not an assurance in the nature of a covered risk. The policy merely recites the estate and tenancy drawn from the conveyance to the insured.

However, Covered Risk 1 indemnifies the insured in the event that title is not vested in the insured, as described in the policy. When the insured does not hold the full estate as insured, and as described in Schedule A, Covered Risk 1 may be invoked. The covered risk is typically invoked when the insured intended to receive the estate that is described in the policy, but that interest was not conveyed to the insured, whether by mistake or because the seller held a lesser or different estate than as insured.[2] However, if the policy recites an estate that was not created by the conveyance

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[1] Condition 1(g) of the 2006 ALTA policies defines "Land" as: "The land described in Schedule A, and affixed improvements that by law constitute real property. The term 'Land' does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy."

[2] For example, in *Black v. Pioneer Nat'l Title Ins. Co.*, 138 Ga.App. 138, 225 S.E.2d 689 (1976), Schedule A insured

instrument, the policy is a product of a mutual mistake because the insured did not purchase the estate or interest stated in Schedule A; in such cases, the insurer is entitled to reform the policy to correct the error, and no loss is payable to the insured.[3] See §11.4 regarding Exclusion 3(c) ("no loss"), and §11.2.1 for the cases under Exclusion 3(a) for matters agreed to in the purchase contract. The insurer should be prepared to demonstrate from the transaction documents that the policy wording was a mere error, and not a judgment call.[4] Conversely, when the policy correctly recites the estate for which the insured bargained but the conveyance instrument recites the wrong estate, the insurer may have an obligation to the insured, which is typically resolved by seeking to reform the deed.[5] See §3.4 regarding the right to clear title.

Schedule A also sometimes recites the tenancy by which the insureds hold title. Covered Risk 1 may grant coverage if the insured can establish that he or she intended to receive a particular tenancy, such as a joint tenancy with survivorship rights, and that tenancy was insured in the policy but was not conveyed due to an error or deficiency in the conveyance.[6] However, the coverage for such a claim is dubious when the sole title issue is that two or more insureds who took title jointly received undivided interests of a different nature than what is recited in the policy. The conveyance expresses the true mutual intent of the grantees to a deed. If the policy describes the tenancy differently from the true intended tenancy, none of the insureds suffer actual monetary loss or damage as a result. The policy should be reformed, if necessary, in such cases.

The policy does not obligate the insurer to defend an insured in a lawsuit brought by a co-

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the fee simple of an area "[l]ess and except that portion of said property embraced within the bounds of Interstate Highway No. 26 and subject to right-of-way easement of Westvaco Corp. crossing said property... ." Schedule B referred to the Westvaco Corp. interest as a right-of-way. In fact, rather than an easement, Westvaco owned the fee simple of that area. To solve the defect, the insured purchased the land from Westvaco. The court required the insurer to reimburse the insured, because title was not vested as shown. Also, in *Rudolph v. Title & Trust Co. of Fla.*, 402 So.2d 1275 (Fla.App. 1981), a claim was payable when Schedule A erroneously stated that the insured held fee simple, while in fact the interest was a leasehold. In *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990), the court held that the insurer had a duty to defend the insureds when a bankruptcy trustee sought an order declaring that the insureds held not leaseholds, as insured, but "equity" interests in a ski resort. The insurer would be liable to the insured because the policy recited that the insured held the property in a joint tenancy, when it was a tenancy in common, unless the insurer could reform the conveyance, in *Elliott v. Chicago Title Ins. Co.*, 123 Ill.App.3d 226, 78 Ill.Dec. 521, 462 N.E.2d 640 (1984).

[3] For example, in *Armstrong v. Lawyers Title Ins. Corp.*, 138 Ga.App. 727, 227 S.E.2d 409 (1976), the policy stated that the insured held the full fee simple title to the property, but the insured owned only an undivided one-half interest. The court held that the insurer would be entitled to have the policy reformed to correctly recite the estate held by the insured only if the insurer was able to prove that the insured had contracted to buy only the one-half interest. The court made the same ruling in *Foehrenbach v. German-American Title & Trust Co.*, 217 Pa. 331, 66 A. 561 (1907).

[4] See *Armstrong v. Lawyers Title Ins. Corp.* 138 Ga.App. 727, 227 S.E.2d 409 (1976).

[5] *Elliott v. Chicago Title Ins. Co.*, 123 Ill.App.3d 226, 462 N.E.2d 640 (1984).

[6] In *Hall v. San Jose Abstract & Title Ins. Co.*, 172 Cal.App.2d 421, 342 P.2d 362 (Cal.App. 1 Dist. 1959), the insured obtained a judgment against the insurer because the policy stated that she and her late husband owned the property as joint tenants, but they were later found to have been tenants in common, the effect of which was that the insured did not take the entire estate as survivor on the husband's death. The court founded the decision on the couple's intent to create a joint tenancy.

owner to recharacterize their respective interests in the property.[7] This is because the policy is not an assurance as between the named insureds, or the insureds and the non-insured co-owners of the property, as to what their respective rights in the property may be:

> No matter what the respective rights are among the insureds, none of the insureds obtained insurance against title claims by their co-owners. Rather, they, as do all title insurance purchasers, sought to insure that the property they bought had free and clear title.[8]

Thus, when a developer represented that an enclosed courtyard was a limited common element, but the condominium plat did not make it so, the title insurer was not obligated to pay for a lawsuit brought by the other unit owners claiming that the courtyard was a common element.[9] Similarly, in *Burke v. Ramblewood Manor Homes Ass'n*,[10] the court found that the title insurance policy for a condominium unit did not assure title to a carport that had originally been assigned to the unit, but which had been reassigned to another unit before the insured bought. A document evidencing the reassignment had been recorded, but was not excepted in the policy. However, neither did the policy insure Mr. Burke that he owned the carport space. His claim was dependent entirely on his interpretation of the condominium declaration. The court found that the policy excepted the terms of the declaration, and thus there was no coverage for any such dispute:

> This matter arose out of plaintiffs' (as co-owners) claim of ownership of a common element contrary to any other co-owner's right to that same common element. As the policy at issue specifically states that it will not insure against loss or damage arising by reason of a co-owner's rights in common elements, Transnation owes no coverage to plaintiffs on their complaint.[11]

An estate or interest held by a party other than the insured, such as a mineral estate or life estate, is typically recited either to the land described in Schedule A or as an exception in Schedule B. When the policy discloses an outstanding estate or interest in the land, there is no compensable loss. Accordingly, an exception for "[r]eservations contained in patents from the United States of America" fully excepted mineral rights reserved in a patent and later purchased from the U.S. by a private party.[12] Similarly, an exception for a mineral reservation in a deed removed coverage as to

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[7] *Kachel v. Chicago Title Ins. Co.,* 1999 WL 123807 (S.D.N.Y.) (unpublished) *aff'd* 2001 WL 527480 (S.D.N.Y.) (unpublished).

[8] Id. at 1. See the further discussion of this subject at §7.1.

[9] *Anderson v. Commonwealth Land Title Ins. Co.*, 284 Ga.App. 572, 644 S.E.2d 414 (Ga.App. 2007).

[10] 2008 WL 2220587 (Mich.App.) (unpublished).

[11] Id. at *5.

[12] *Devlin v. Bowden*, 97 N.M. 547, 641 P.2d 1094 (1982).

the mineral claim by the current holder of the mineral interest.[13] Also, when mineral interests of record were properly noted on the policy, the insurer was not responsible for giving notice of possible subsidence caused by mining activity.[14] Further, when title was insured subject to a reservation for highway purposes over a portion of the property described, the policy was found not to have insured any interest in the highway land. Thus, the insured suffered no loss by a declaration that the fee simple of the highway parcel was not owned by the insured.[15] The policy did not protect against a flowage easement, even though it was not excepted on Schedule B, when the purchase price was found to have reflected the value of the property subject to the easement, the Schedule A legal description referred to a survey which depicted the easement, and thus the land described in Schedule A implicitly incorporated the easement by reference.[16]

Certain interests related to land are personal in nature and do not create estates in land. A personal right to use the land or to take from it, such as a profit à prendre, does not affect title, and there is no policy coverage against such a right. For example, a recorded timber deed was found to constitute an interest in the land, and thus cause a loss, but the dissent would have found the right to cut timber as not being an estate in the land.[17]

The owner's policy assurance that title is vested as shown is a protection against pre-existing third party claims of ownership as to the property. It is not, however, an assurance that the conveyance to the insured is recorded or properly posted in the public records so as to give constructive notice of the insured's interest.[18] Thus, if the deed is a valid conveyance between buyer and seller, but is not recorded, the policy coverage is not triggered unless a third party asserts a pre-existing claim of title to the land. In *Alford v. Chicago Title Ins. Co.*,[19] the insured's deed was delivered to the title insurer for recording but not recorded. The insureds did not discover this fact for ten years. The insureds argued that they had not been properly vested in title, invoking the "title vesting" insuring provision. The court disagreed, because as between the seller and buyer the conveyance was valid, and no third party contested the insured's title.[20]

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[13] *Eames v. St. Paul Title Ins. Co.*, 654 S.W.2d 560 (Tex.App. 1983).

[14] *Holmes v. Alabama Title Co.*, 507 So.2d 922 (Ala. 1987).

[15] *Pioneer Title Ins. & Trust Co. v. Cantrell*, 71 Nev. 243, 286 P.2d 261 (1955).

[16] *Security Union Title Ins. Co. v. RC Acres, Inc.*, 269 Ga.App. 359, 604 S.E.2d 547 (Ga.App. 2004), reconsid.den. August 31, 2004, cert.den. November 22, 2004.

[17] *Parker v. Ward*, 614 So.2d 975 (Ala. 1992). See §8.7 below for further discussion of the case.

[18] The ALTA Homeowner's Policy contains a specific assurance (Covered Risk 27) against loss if the deed "is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded." This coverage should not be read to be an affirmative assurance that a vesting deed is recorded, but rather a protection against a claim that the lack of recording renders the deed invalid as to third parties. Thus, the result in *Alford* would have been the same if the claim had been made under a Homeowner's Policy, which policy is further discussed at §9.14.2.

[19] 3 S.W.3d 164 (Tex.App.-Eastland 1999).

[20] The court also found that judgments which had been docketed against the seller in the 10-year gap did not attach to the property because, under Texas law, the insured owners had given notice to the world of their ownership by

8.2 The Insured Land

FORM 20, Appendix A
Disputed improvements not on "Land"

FORM 19, Appendix A
Disputed rights or land not insured

The policy insures the title to the land described on Schedule A or C of the policy.[21] The policy does not protect the insured against an attack on the title to land lying beyond the boundaries of the parcel described in the policy, or any rights the insured may have in adjacent lands.[22] When

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possession and recording of a purchase-money deed of trust. Therefore, the judgments were not liens which impaired the insureds' title. Further, before the trial on the coverage case, the judgment liens lapsed as a matter of law.

[21] For example, in *Lawyers Title Guaranty Fund v. Milgo Electronics*, 318 So.2d 416 (Fla.App. 1975), cert.den. 336 So.2d 602 (Fla. 1976), the court found no policy coverage for a claim about the title to a strip of land owned by the insured and adjacent to the insured parcel, but not included in the Schedule A description. In *Schiller v. Fidelity Nat'l Title Ins. Co.*, 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished), the insured, Schiller, was told that his property was on the shore of Lake Tahoe. He later discovered that there was a buffer strip between his platted lots and the shore of the lake, which is man-made. The court held that there was no policy assurance that the parcels touched the lake shore, and that by describing the insured Land by reference to the subdivision plat the policy incorporated by reference the boundaries of those lots as shown on the plat.

[22] See §12.3.6 for a discussion about the lack of coverage for any gap or gore between insured parcels. See §8.9 regarding adjacent streets and so-called abutter's rights. In *Hawkins v. Weichert Title Agency*, 2011 WL 4466883 (N.J.Super.A.D.) (unpublished), a survey was presented at closing and that description was used in the policy. Later, a neighbor claimed some accreted land outside the boundaries of the insured parcel, and the insured sued the insurer claiming the policy insured him as owning that parcel. The court disagreed, saying that the neighbor "sought coverage to quiet title to property that falls outside the parcel of land insured in the title policy. The metes and bounds description in the title policy and the property survey clearly show that the adjoining property line between the Hawkins and their neighbors stops at a maple stump at the 'original high-water mark' of the lake." Likewise, in *Geiger v. Chicago Title Ins. Co.*, 2011 WL 3802724 (Wis.App.) (unpublished), the court ruled that the policy did not include additional land shown on a survey obtained by the insured after closing but not included in the policy description. Therefore, the insurer was not obligated to prosecute the insured's lawsuit to claim the additional land or to indemnify him when he "lost" the land. When neither the insured mortgage nor the policy included a second parcel, the insured properly did not seek compensation from the insurer for the lack of that parcel. *First Nat'l Bank of Northbrook, N.A. v. Stewart Title Guar. Co.*, 279 Ill.App.3d 188, 664 N.E.2d 310, 215 Ill.Dec. 913 (Ill.App. 1 Dist. 1996), rev.den. October 2, 1996 (Table, no. 81240). In *631 North Broad Street, LP v. Commonwealth Land Title Ins. Co*., 2018 WL 4051798 (E.D.Pa. 2018) (unpublished), aff'd 2019 WL 3383878, 778 Fed.Appx. 164 (3rd Cir. (Pa.) 2019) (unpublished), the insurer was not required to defend its insured in a lawsuit about ownership of a portion of a wall located adjacent to the insured parcel, because the policy did not insure the title to the wall or the land on which it rested. The court buttressed its ruling with the survey exception. Further, the insurer was not "estopped" from denying coverage by having agreed to defend the neighboring owner, which was also an insured, because the wall *was* located on that insured's parcel. In *Pandora Distribution, LLC v. Ottawa OH, LLC*, ___ F.Supp.3d ___, 2019 WL 2924995 (N.D. Ohio 2019) (not yet released for publication), reconsid.den. 2019 WL 5729932, the court held that the insured received title to an aging overhead conveyor bridge spanning railroad tracks adjoining the warehouse that it bought, which allegedly reduced the value of the property. The court held that the policy did not insure the title to the conveyor bridge, and therefore the insurer was

the policy insures title to a certain parcel, and the insured later discovers that the parcel insured is not the parcel that the insured expected to receive by deed or mortgage, the policy does not indemnify the insured for its failure to receive the expected parcel.[23] Similarly, an insurer is not liable for any defect in or encumbrance on the title to land conveyed to the insured as an additional parcel, but that was not included in the title insurance policy.[24] As one court explained:

> The title insurance policy expressly covered only the 98 and 28 acre parcels. The policy does not refer to the 14 acre tract. Therefore, Chicago Title could not have breached a contract to handle appellant's claim against Flood [the adverse owner] when there was no coverage for the 14 acres. In light of the plain language of the policy, there is no issue of material fact concerning existence of a contract covering the 14 acres.[25]

The policy does not insure the title to or indemnify against the "loss" of land included in the purchase contract but that was not included in the policy or deed.[26] An insured has no policy claim based on a parcel that was neither conveyed to the insured nor included in the title insurance policy.[27] A title insurer does not contract to procure title on behalf of the insured by committing to

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not required to pay a loss to its insured based on its claimed negative value.

[23] *Kondaur Capital Corp. v. Fidelity Nat'l Title Ins. Co.*, 2013 WL 1908018 (Ariz.App. Div. 1) (unpublished) (insurer not liable under loan policy or trustee's sale guarantee for lender's claim that it got a lien on the wrong parcel, when the deed of trust, policy and guarantee all described the same parcel); *Jiminez v. Chicago Title Ins. Co.*, 712 S.E.2d 531 (Ga.App. 2011) (no loss payable for parcel insureds thought they were buying but which was not included in either their deed or the policy). See §8.3 for more decisions on this issue.

[24] *Christensen v. Mikell*, 476 S.E.2d 692 (S.C. 1996) (no loss payable for problem with parcel not insured in policy); *Canatella v. Davis*, 286 A.2d 122 (Md. 1972) (when three lots were included in seller's deed but not owned by seller and not included in policy, insurer was not liable to insured for those parcels under policy or in fraud); *Batra v. Electronic Land Services, Inc*., 41 Misc.3d 1211(A), 2013 WL 5607243 (N.Y.Sup.), 2013 N.Y. Slip Op. 51644 (U) (unpublished) (insurer not liable to insured for failing to insure parcel not included in deed to insured's seller or insured, but which had been included in earlier deeds in chain of title).

[25] *Christensen v. Mikell*, 476 S.E.2d 692 (S.C. 1996).

[26] *Hoy v. Niemela*, 2013 WL 2926975 (Minn.App.) (unpublished) (although insured contracted to buy a garage condo unit and got possession of it, she had no claim on policy due to fact that deed did not include garage unit, which was not insured in policy); *Parahoo v. Mancini*, 1998 WL 180539 (Ohio App. 10 Dist.) (unpublished), rev.den. 83 Ohio St.3d 1416, 698 N.E.2d 1005 (1998) (involving parcel taken by condemnation after purchase contract was signed but before closing). The *Parahoo* court also found that the insurer had no duty to "provide a survey map that accurately described the size of the property conveyed or [to] explain the metes and bounds descriptions in the closing documents." Id. at 11. A nearly identical claimed duty to inform the insured was also rejected in *Hoy* and in *Kondaur Capital Corp. v. Fidelity Nat'l Title Ins. Co.*, 2013 WL 1908018 (Ariz.App. Div. 1) (unpublished).

[27] *Union Street Tower LLC v. First American Title Ins. Co.*, 42 Misc.3d 1229(A), 2014 WL 763233 (N.Y. Kings Cty. 2014) (unpublished) (insurer that insured building parcel but not air rights on parcel next door, because those rights were not conveyed, was not liable under policy or in tort for alleged failure to procure rights for insured); *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996). However, in *West*, because one of the parcels not conveyed or

insure the title that is conveyed to the insured.[28] The insurer has no duty to defend or indemnify the insured as to a parcel claimed or owned by the insured that was not insured in the policy, including any land claimed or purchased after the policy date.[29]

Sometimes, the facts show that a policy includes a parcel by mutual mistake, particularly when the insured did not bargain for its purchase and/or did not receive it as part of the conveyance, and thus the policy must be reformed to excise the parcel. See §8.4 for a complete discussion of that issue.

8.3 Variance Between Land Insured And Land Possessed Or Claimed

The policy insures the title to whatever land was conveyed to the insured. The insurer does not choose the legal description used in the deed or the policy. Most commonly, the deed to the insured contains the historical legal description. Very often, the same description has been used in many prior conveyances.

The insured's subjective expectation or understanding that he or she was buying land not included in the insured deed does not add to the land the policy assures the insured as owning.[30] The

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insured was to have provided the access to the property, the insurer owed the diminution caused by the lack of access.

[28] See *Union Street Tower LLC v. First American Title Ins. Co.*, 42 Misc.3d 1229(A), 2014 WL 763233 (N.Y. Kings Cty. 2014) (unpublished) (insurer that insured building parcel but not air rights on parcel next door, because those rights were not conveyed, was not liable under policy or in tort for alleged failure to procure rights for insured).

[29] In *Casero v. Chicago Title Ins. Co.,* 2018 WL 830225 (D.Md.) (unpublished), the insureds recorded a deed to themselves, five years after the policy, altering their boundary to include more land. The court found that the insurer had no duty to defend the lawsuit brought by the neighbor to contest title to the land claimed in the post-policy deed.

[30] In *Wei v. Stewart Title Guar. Co*., 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court held that the policy did not insure ownership of neighboring land that was on the insured's side of a fence built inside the neighbor's boundary. The *Wei* court relied on *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr. 771 (Cal.App. 2 Dist. 1994), in which the insureds discovered that they did not own what they thought was their back yard and the structures built on it. The Manneck court pointed out that no one ever attacked the title to the land the insureds did own. Rather, their entire claim was based on the insureds' desire "to obtain a greater amount of land than they purchased..., albeit to satisfy their reasonable expectations at the time of purchase." In *Kreider v. Correia*, 2018 WL 359285 (Pa.Super.) (unpublished), a house was advertised for sale as including a garage, but that garage was built on a separate parcel that was not owned by the seller or included in the deed. The court held that the policy did not insure the title to the garage, and a reference in the policy to the garage's tax parcel did not create that coverage. The subject of encroaching structures is fully discussed at §12.3.10.2, particularly in relation to the survey exception. In *Schiller v. Fidelity Nat'l Title Ins. Co*., 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished), the insured, Schiller, was told that his property was on the shore of Lake Tahoe. He later discovered that there was a buffer strip between his platted lots and the shore of the lake, which is man-made. The court held that there was no policy assurance that the parcels touched the lake shore. The court said that the policy did not assure the correctness of representations made by others to the insured about the property, saying: "Finally, a title insurance policy does not insure against losses due to a seller's misrepresentations or a buyer's failed expectations. See Barlow Burke, Title Insurance Defined, L. Title Ins. § 2.01 (3d ed.) ('For instance, a covenant in an insured's deed may be covered, but representations by a vendor to an insured during the course of a purchase about the covenant are not.'). It was Schiller's duty to confirm that the advertised land was waterfront. See *Land Baron Inv., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 693-97, 356 P.3d 511, 517-19 (2015) (holding that a commercial buyer of real property assumed the risk of mistake as to whether the purchased land was accessible and included water rights)."

policy does not insure title that the seller did not own, or that both buyer and seller (or lender and borrower) did not both agree was to be conveyed (or mortgaged). A title insurance policy could not insure the ownership of a parcel that was not conveyed to the insured and that he or she does not own.

The policy does not insure the title to a parcel that is not described in Schedule A of the policy, based on a reference in the policy to an additional parcel or its tax parcel number or street address.[31] The insurer is not required to obtain title to a parcel that was not included in the deed or mortgage due to an error by the insured or a mutual mistake.[32] Conversely, the insurer is not obligated to "defend" an insured owner against the lender's action to reform the mortgage to include a parcel owned by the insured but on which no mortgage was granted.[33] If the legal description could be read to include more or less land, the policy insures the title to only the land validly conveyed to the insured.[34] However, if a parcel was conveyed to the insured but omitted from the policy by

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[31] In *Deutsche Bank Nat'l Trust Co. v. Fadili*, 2011 WL 4703707 (D.N.H.) (unpublished), the policy correctly recited the legal description for the vacant parcel to which the insured mortgage attached, but Schedule A recited the street address assigned to the adjoining parcel with a home on it that the insured lender expected to mortgage. The court held that the recitation of the address did not cause the policy to assure that the mortgage was also a lien on the house. It relied in part on Exclusion 3(a). In *Love v. Chicago Title Ins. Co.*, 2016 WL 4045400 (Tex.App.-Dallas) (unpublished), the court held that the policy did not implicitly represent or insure that the land described in the policy was associated with a certain postal address, especially given the fact that the policy did not recite any street address. The insured had inserted the address that he claimed to "own," which was not the insured parcel, on a deed that he gave after the policy date. In *Kreider v. Correia*, 2018 WL 359285 (Pa.Super.) (unpublished), the policy did not insure the title to a second parcel based solely on a reference in the policy to the second tax parcel. However, in *Michael v. Stock*, 162 A.3d 465, 2017 PA Super 99 (Pa.Super. 2017), both the deed to the insured and the policy described the land as only one of two parcels owned by the seller. The appeals court held that a reference in the policy to a tax parcel number that *might* have included both parcels might have been enough to give the insured a "reasonable expectation" that the policy insured the title to both parcels, creating a question of fact. It reversed the trial court's grant of summary judgment to the insurer and remanded the case for further proceedings.

[32] In *Krajewski v. Fidelity Nat'l Title Ins. Co.*, 2016 WL 2754435 (Pa.Super.) (unpublished), the insured owners claimed title to a second parcel because of an ancient covenant by a former owner stating that the two parcels would always be conveyed together. The court held that the insurer was not required to obtain title to the second parcel, which was not conveyed to the insureds and to which they had no valid claim.

[33] In *Stewart Title Guar. Co. v. McClain*, 2016 WL 1436613 (Penn.Super. 2016) (unpublished), reargument denied June 16, 2016, 145 A.3d 777 (Table), the court held that a title insurer was not required to pay the cost of "defending" owner insureds in a lawsuit brought by their lender to reform the mortgage to add a second parcel that the lender mistakenly failed to include in its mortgage. The court said: "When Appellants purchased the Property, Wells Fargo lent Appellants sufficient funds to purchase both lots in exchange for a mortgage on both lots. Due to clerical error, the mortgage was only recorded on one lot. The fact that the trial court in the quiet title action ordered that the mortgage be placed on both lots does not mean that Appellants 'lost' a property interest in the quiet title action. Appellants never had the right to own Lot B without a mortgage on it."

[34] In *Walker Rogge, Inc. v. Chelsea Title & Guar. Co*., 222 N.J.Super. 363, 536 A .2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992), the insured claimed that it thought it was receiving more acres than it did. The court determined that the insured received exactly the land owned by the seller and that was conveyed to the insured, and that the policy did not make any representation to the contrary. Therefore, there was no defect in title and no loss payable by the insurer. In *Fischer Sand and Aggregate, LLP v. Old Republic Nat'l Title Ins. Co*., 2017 WL 1316130 (Minn.App.) (unpublished), the court held that the title insurer

mutual mistake of the insurer and insured, the policy may be reformed to add the parcel.[35] Also, if the seller later disputes the size or configuration of the parcel conveyed to the insured, the seller's claim may invoke policy coverage.[36]

A loan policy does not insure that the mortgage encumbers land that is not described in the mortgage.[37] When a borrower owns two or more parcels, it is often less than clear which parcel or parcels the lender intended to take as collateral for its loan.[38] The insured lender does not obtain coverage for an additional parcel not included in the mortgage based on a survey coverage.[39]

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had no duty to pay for a lawsuit over ownership of a parcel that was not included in Schedule A, because the policy contained a survey exception and an exception for the lack of clarity in the insured parcel's legal description. As in *Walker Rogge*, the dispute arose mainly because two adjoining parcels were described based on acreage that was not accurate. The court rejected the insured's argument that she had a "reasonable expectation" that the policy would insure her title to the disputed area. However, in *Lagomarsino v. San Jose Abstract & Title Ins. Co.*, 178 Cal.App.2d 455, 3 Cal.Rptr. 80 (1960), the policy description included both physical monuments and survey calls. The survey calls were inaccurate. The court held that the policy insured the land bounded by the survey calls, not the monuments, and the insurer was liable for the value of the land that was the difference between the two.

[35] See §§8.4, 11.2.3 and 11.4.2 concerning reformation of a policy to remove land that was conveyed to the insured by mutual mistake. In *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 859 P.2d 619 (Wash.App. 1993), the insured's unrecorded lease included a 60 foot strip of land for parking and signage. The recorded memorandum of lease did not include the area, and neither did the Schedule A policy description. However, the insurer deleted the survey exceptions based on an inspection that referred to the area. The insured later lost title to that area. The appeals court held that company practices, the insured's expectations in paying extra premium for extended coverage and other the facts about the inspection and survey all supported reformation of the policy to include the strip of land. Perhaps the key finding was that the insured had an insurable interest in the land and possessed it, which is typically not the case when an insured seeks to add a parcel to Schedule A.

[36] In *Loflin v. BMP Development, LP*, 427 S.C. 580, 832 S.E.2d 294 (S.C.App. 2019), the insureds contracted to buy a vacant lot in a new subdivision before the plat was final. The size of the lot was specified in their contract. The plat was recorded and the policy issued, with the recorded plat depicting the lot with the expected size and configuration. Four years later, however, the developer informed the insureds that, in his opinion, they owned a smaller lot as depicted on an unrecorded amended plat. The court held that the policy might protect the insureds against the developer's claim that the insureds own the lot as revised, because Covered Risk 3 of the Residential policy protects against fraud.

[37] *New South Fed. Sav. Bank v. Commonwealth Land Title Ins. Co*., 940 So.2d 739 (La.App. 3 Cir. 2006) (no coverage was invoked due to the fact that the insured mortgage encumbered vacant parcel next to house but did not include house parcel). In *U.S. Bank, N.A. v. HLC Escrow, Inc.*, 919 F.3d 17 (1st Cir. (Me.) 2019), the policy insured a mortgage that encumbered the vacant parcel next to a house but did not include the house parcel. The insurer denied the claim because the policy insured the title to the same parcel that had been mortgaged. The court dismissed the policy claims based on the statute of limitations, without ruling on the merits of the insured's claim that the policy contained only a unilateral and not a mutual mistake. The sole claim that survived dismissal was based on Maine's Unfair Claims Settlement Practices Act.

[38] See *West RADC Venture 2010-2, LLC v. Indymac Venture, LLC*, 2017 WL 6273838 (Cal.App. 4 Dist.) (unpublished), in which a lender apparently took a deed of trust on the wrong lot, by mistake. However, that lien was in first position. The court would not allow the lender to establish its "priority" over another deed of trust on that lot unless it could first prove that its security instrument was recorded against the correct parcel. *West RADC* did not involve a question of title insurance policy coverage.

[39] In *New South Fed. Sav. Bank v. Commonwealth Land Title Ins. Co*., 940 So.2d 739 (La.App. 3 Cir. 2006), the

The policy also does not protect the insured if the insured takes possession of a parcel that is different from the land conveyed to the insured. The insured's mistaken possession of the wrong parcel, or a mistake that causes the insured to take title to a parcel or condominium unit other than the one that the insured expected to purchase, does not create a defect in the title to the insured land.[40]

In some cases, the insured possesses some but not all of the land conveyed to the insured and described in the policy. The insured often discovers such an issue when the insured obtains a survey after the policy is issued.[41] The policy does not insure that the possessed land is the same as the insured parcel. For example, in *Bothin v. California Title Ins. & Trust Co.*,[42] there was no overlap in the chain of title, but the buildings owned by the insured and his neighbor were all about 14 feet off the record title line. The neighbors sued each other and obtained judgments of adverse possession that had the effect of moving the title lines to the lines of possession. The insured then sued the insurer for his claimed loss. The court held that there was no loss payable for the loss of land adversely possessed by the neighbor, and no coverage for the land the insured obtained by his own adverse possession. The court found that the property that the insured wound up with was the same land he intended to purchase.[43] The court then held that the neighbor's adverse possession did not create a loss, because it depended on possession only, and was not evidenced in the chain of title:

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insured lender took a mortgage on a vacant parcel rather than the borrower's residence. The policy recited the residence address but the legal description of the vacant parcel. The lender urged that the policy should be reformed to insure the title to the residence parcel, because the street address rendered the policy ambiguous. The court rejected the argument, finding that the policy insured the correct parcel. It said that "[a]ny error initially occurred at the time of the mortgage and prior to the contract of insurance." The insured also argued that it got additional coverage through the survey coverage in its short form policy (similar to Covered Risk 2(c) in the 2006 ALTA Loan policy). The court found that the insured did not bootstrap into coverage through the survey Covered Risk because, while the description error would have been discovered through a survey, that error did not affect the title to the land insured.

[40] In *Kessee v. First American Title Co*., 2015 WL 5842957 (Cal.App. 4 Dist.) (unpublished), the court held that policy coverage was not invoked by the fact that the insured was conveyed the lot next door to the one that she allegedly intended to buy. The court noted that the purchase contract, deed, subdivision plat, policy and other documents were remarkably consistent, and that essentially the only evidence that the insured was "mistakenly" conveyed the "wrong" lot was the insured's own oral testimony to that effect. *Kealy v. JP Morgan Chase Bank, N.A*., 2018 WL 3045593 (Cal.App. 4 Dist.) (unpublished), involved a condominium in which the street addresses went in one direction and the unit numbering went in the opposite direction. The insured owner "bounced back and forth" in his claims about which unit he owned, and also took possession of both units at different times. The court reformed his deed and deed of trust based on evidence of intent gleaned from the testimony of others. The court never reached the issue of policy coverage for the dispute.

[41] A related issue is the effect of a determination that the area or distances recited in a recorded description do not match those found in the field or by lines of occupation. See §8.6 for a discussion of the effect of erroneous dimensions in the Schedule A legal description, and §§12.3.7 and 12.3.8 concerning errors in area and distance in relation to the survey exception.

[42] 153 Cal. 718, 96 P. 500 (1908).

[43] "[P]laintiff here, while not obtaining possession of the entire property embraced within lots 71 and 72, obtained the identical property that he had looked at and had in mind when he obtained his deed from the Sharon Estate Company, and substantially of the same dimensions as there called for." 96 P. at 502.

> It is quite clear from the conditions of that instrument that what was insured by the respondent was that the record title to the lot was in appellant. … The only title which Partridge had was a title to a portion of the lot acquired by adverse possession, but this the respondent not only did not insure, but expressly declared it did not, in that provision of Schedule B wherein it is stated that, among other defects of or objections to the title not insured against, was the "tenure of the present occupants."
>
> … Necessarily the record title is all that a title insurance company can safely or judiciously insure. While the title to real property may be disclosed by the record to be in one person, it may, in fact, be in another through adverse possession, or in one in occupation of the property under an unrecorded conveyance. It is the possibility of the existence of these conditions as to the title which an insurance company provides against by insuring the record title, and none other. In the case at bar the policy only insured the record title, and as that is conceded to have been in appellant, and the title of Partridge to the portion of the lot in question resting solely upon adverse possession, against which respondent did not insure, there was no breach of the policy of insurance.[44]

The court's rulings as to adverse possession of the insured property hinge on the parties in possession exception. See §12.2.4 regarding adverse possession and the possession exception. Also, cases holding that the policy insures title to a building owned by the insured but encroaching onto the neighboring property are discussed in §8.2.

8.4 Land Erroneously Included In Policy

When land has been included in the policy description by error or accident, and the insured is found not to own the land, the existence of coverage or a loss depends on the insured's and insurer's intent. If the land was described in the policy due to an error, the court may determine that there is no coverage and that the insured cannot suffer a loss due to the lack of title to the parcel.[45] The court may also reform the policy on the grounds of mutual mistake,[46] or in some circumstances determine that there is no coverage for the parcel due to a survey exception in the policy.[47]

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[44] 96 P. at 502.

[45] In *Fidelity Nat'l Title Ins. Co. v. Wooden*, ___ F.Supp.3d ___, 2019 WL 175134 (N.D.Ala. 2019) (permanent citation not yet available), a bank foreclosed on land that had been unplatted when it took its mortgage. After the mortgage was granted, however, the land had been subdivided. One lot had been sold and the buyers built a house on it. The bank conveyed the land to the insureds after foreclosure, using the metes and bounds description from its mortgage. The court stated that it would need to hear trial testimony to decide if the insureds "agreed to" receive title to the house lot. The title insurer sought, in the same lawsuit, to reform the policy to exclude the house lot, and argued that the insureds could not suffer a loss due to their lack of good title to that parcel.

[46] In *Branch Banking & Trust Co. v. Chicago Title Ins. Co.*, 714 S.E.2d 514 (N.C.App. 2011), the policy included as part of a larger unplatted parcel a subparcel on which existed a prior deed of trust that was not excepted in the policy. Chicago Title sought to reform the policy to remove the parcel. The court found insufficient allegations or evidence that the insured had not intended to include the parcel in its deed of trust, and dismissed the reformation claim. The court said

Reformation is typically the most appropriate remedy when the policy insures ownership of a parcel conveyed by accident or mutual mistake.[48] The insurer must establish that the mistake was mutual and not unilateral. If the insured intended to purchase the parcel included in the policy, the insurer must show that the seller did not own the parcel or did not intend to sell it, or that the purchaser price did not include consideration for the additional parcel.[49] When the insurer is asked to defend an insured purchaser in an action by the seller to reform the deed, the duty to defend will depend on what the seller alleges and what the insured purchaser alleges in response as to whether or not there was a mutual mistake.[50]

The subject of reformation of the policy to exclude a parcel conveyed to the insured by mutual mistake is further discussed at §11.2.3, which discusses reformation and Exclusion 3(a), and at §11.4.2, which discusses reformation and the "no loss" exclusion.

8.5 Deficiencies In Legal Descriptions

The policy insures the title to whatever land was conveyed to the insured. The insurer does not choose the legal description used in the deed or the policy. Most commonly, the deed to the

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that the evidence suggested a unilateral mistake by the insurer in overlooking the deed of trust. In *Cantrell v. Lawyers Title Ins. Corp*., 787 F.2d 1258 (8th Cir. 1986), the policy description included two acres of land that were not owned by the insured and which were part of a neighboring national forest. The court reformed the policy and held that the insurer was not liable for the "loss" of Forest Service land. The appeals court found that the only testimony suggesting that the policy was intended to include the land was from the insured's surveyor. The evidence showed that the seller did not intend to sell the land, the buyer did not intend to buy it, and the insurer had not intended to insure the parcel. In *Demetrio v. Stewart Title Ins. Co*., 124 A.D.3d 824, 3 N.Y.S.3d 75 (N.Y.A.D. 2 Dept. 2015), app.den. 25 N.Y.3d 906 (May 12, 2015), the court reformed a policy that described the insured property as one lot, but also incorporated by reference a metes and bounds description that encompassed seven lots, so that it insured the title to only the one lot that the insured purchased and for which it paid.

[47] See §12.3.6 regarding the survey exception.

[48] In *Lawyers Title Ins. Corp. v. Golf Links Development Corp.*, 87 F.Supp.2d 505 (W.D.N.C. 1999), a legal description prepared by the seller accidentally included a platted lot previously conveyed by the seller. The lot was included in the commitment, and the approved attorney admitted that he "wasn't careful enough" in reviewing the legal description. The insured claimed to have intended to purchase, the lot and sued the insurer for its value. The insurer was granted summary judgment reforming the policy. The insured argued that the insurer's mistake precluded the use of the equitable remedy of reformation. However, the court noted that the purchase contract gave the insured's attorney a due diligence period in which to confirm the legal description, and he did not correct it in that time. The court therefore ruled: "[N]egligence on the part of one party [which induces the mistake] does not preclude a finding of mutual mistake. In other words, the fact that the mistake arises because the party who is seeking reformation supplied the incorrect information does not make the mistake unilateral. … [The insured's] attorney readily admitted he mistakenly allowed the description to remain in the contract and the deed."

[49] See *Hilliard Properties, Inc. v. Commonwealth Land Title Ins. Co.*, 1997 WL 781727 (Ohio App. 8 Dist.) (unpublished), rev.den. 81 Ohio St.3d 1503, 691 N.E.2d 1062 (Table). In *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (Ky.App. 1927), the court found the insurer liable for the "loss" of land which the seller never owned and that the purchaser insured probably did not think he was purchasing. The court noted, however, that the insurer's title exam disclosed that the seller did not own the parcel, suggesting a unilateral mistake by the insurer.

[50] See *Penney v. Capitol City Transfer, Inc.*, 707 A.2d 387 (Me. 1998) and the other cases cited at §11.2.3.

insured contains the historical legal description. Very often, the same description has been used in many prior conveyances. The insurer is not at liberty to modify the legal description of the parcel to be insured. The recitation of the legal description in Schedule A of the policy is not itself an assurance of any kind, but rather is merely the identification of the parcel whose title is insured.

On very rare occasion, the legal description in the insured's deed is so vague or defective that a surveyor is unable to locate the parcel on the ground.[51] The insurer may elect to take some step to clarify the boundaries of the land insured and conveyed, although such action is very rare and the policy does not impose on the insurer a positive duty to reform the insured parcel's legal description. In some cases, the insurer will elect to obtain a survey that provides a more accurate description of the land, such as by adding a tie to a government section corner or other reliable tie line or monument, or by providing more accurate calls and distances.[52]

The description of the insured land is not ambiguous due to the insured's assertion that there is a difference between the land the insured intended to receive and the land actually conveyed to him or her. In such cases, the insured often asserts that the claimed ambiguity in the policy should be construed in favor of the insured so as to find that the policy insures title to land not conveyed to the insured. Such claims are discussed at §§8.3, 8.4 and §11.2.3.

On occasion, the insured or another party asserts that a particular legal description is vague, ambiguous or uncertain. In extreme cases, the party asserts that title is rendered unmarketable by the alleged vagueness or ambiguity in the legal description.[53] In almost all such cases, the seemingly

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[51] In *Lennen v. Marriott Ownership Resorts, Inc.*, ___ F.Supp.3d ___, 2019 WL 1440092 (M.D.Fla. 2019) (permanent citation not yet available), appeal filed August 21, 2019, the insureds purchased interests in time share condominiums that were part of a complicated interval ownership regime. The insureds sued both the seller and their title insurer, First American. They asserted that their deeds were void because they lacked adequate legal descriptions. The court let that claim stand, noting that Florida law says that, "[t]o effect a valid conveyance of real property, a deed or other instrument must describe the property such that it is evident that a particular parcel, and not a different or unspecified one, is to be conveyed." *Mendelson v. Great W. Bank, F.S.B.*, 712 So. 2d 1194, 1196 (Fla. 2d DCA 1998). Also, "a description is sufficient if, by relying on the description read in light of all facts and circumstances referred to in the instrument, a surveyor could locate the land." The court said it was "undisputed that the property descriptions contained within the Consumer Deeds, alone, are inadequate." The defendants argued that the descriptions were valid once parol evidence was taken into consideration. The deed referred to the MVC Trust Memorandum, which in turn said that the legal descriptions for the Trust property were recited in other recorded instruments. They said that, by reviewing all of those documents, "a surveyor would be able to locate all of the Trust Property that an MVC Trust Owner has a nonspecific, undivided interest in." However, the court was considering a motion to dismiss, and was not entitled to consider parol evidence, so it refused to dismiss the claim.

[52] In *Miller v. Lawyers Title Ins. Corp.*, 112 F.Supp. 221 (E.D.Va. 1953), the policy described the land by reference to a recorded "plat." In fact, the "plat" was a drawing containing no description, calls or distances, survey monuments or tie-ins to government monuments. The insured obtained a survey to determine what property he had bought, and the court required the insurer to pay for the survey. In *Chicago Title Ins. Co. v. Wetherington*, 127 N.C.App. 457, 490 S.E.2d 593 (N.C.App. 1997), rev.den. 347 N.C. 574, 498 S.E.2d 380 (1998), the insurer purchased the property from the insured for policy limits. The court said that the policy "correctly described a .38-acre tract; however, because the description of the beginning point was incorrect, the tract could not be precisely located on the ground. Despite the problem associated with locating the beginning point, a subsequent survey was conducted in 1988 where the .38-acre residence tract was located within a 16-acre tract which was owned by defendant." After purchasing the land from the insured, the insurer brought suit to quiet title based on adverse possession.

[53] In *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), a call to an unnamed road with a

warring elements within the legal description can and must be reconciled, producing an adequate description of a defined parcel locatable on the ground. The insurer and others should learn and employ the legal principles governing legal descriptions in order to establish that title as insured is marketable and that the described parcel may be found on the ground by a competent surveyor.

A metes and bounds or perimeter legal description contains a number of elements. In some cases, a description does not mathematically close, or one call may be difficult to locate. In conducting field work, "the surveyor is obligated to consider any and all evidence."[54] When one element of the legal description actually or apparently conflicts with another element, those elements are prioritized based on an established hierarchy known as the order of control. The accepted order of control is as stated in *Clark on Surveying and Boundaries*,[55] as follows:

1. Lines actually run in the field;
2. Natural monuments;
3. Artificial monuments;
4. Adjoiners;
5. Courses;
6. Distances;
7. Area or quantity.[56]

Natural monuments are physical objects, such as bodies of water or trees.[57] Artificial

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reference to the land of an adjoiner who owned many years ago was modernized by means of a Torrens action, but the court found the insurer liable not just for the cost of the curative action but for policy limits, based on supposed expert testimony about the devaluing effect of an "ambiguity" in a legal description. In *Hedgecock v. Stewart Title Guaranty Co.*, 676 P.2d 1208 (Colo.App. 1983), the legal description in the policy was the same as had been used in the chain of title for the prior 65 years. However, a surveyor hired after the policy date was unable to determine the point of beginning. The insurer refused to insure the new survey description until quit claim deeds were exchanged with neighbors. The court concluded that the insured property description was so defective that it rendered the title unmarketable. See the discussion of the marketability coverage at §9.8.3.

[54] Walter G. Robillard, *Clark on Surveying and Boundaries*, Eighth Edition, The Michie Company, at §14.21, p. 396.

[55] Written by Walter G. Robillard, now in its eighth edition, and published by The Michie Company (available through LexisNexis).

[56] Walter G. Robillard, *Clark on Surveying and Boundaries, Eighth Edition*, The Michie Company, at §14.21, p. 396. "Lines actually run in the field" means lines between section corners set by government surveyors working for the General Land Office (later the Department of the Interior, Bureau of Land Management). *Clark* also states the priority rule this way: "A recent Maine decision clarified the approach. The court stated, that when using these calls, the boundaries in question were to be located in reference to the elements called for in the deed, in descending order commencing with monuments called for, courses, distances, and, finally, quantity. This opinion states that the surveyor should not select an element called for at will, but rather, he should first look for the evidence of the highest elements and then progress through the other called-for boundary." Walter G. Robillard, *Clark on Surveying and Boundaries*, Eighth Edition, The Michie Company, at §2.04, p. 28. The U.S. Supreme Court gave the same order of priorities in *United States v. Redondo Development Co.*, 254 F. 656 (1918).

[57] See *Bernhard v. Reischman*, 33 Wash.App. 569, 658 P.2d 2 (1983).

monuments are, in most cases, survey stakes, pins, caps and other markers. Such monuments must be referred to specifically in the conveyance, and must either be the original monument or a newer monument with an adequate chain of history: that is, the junior monument must be established by evidence as being in the same location as the original.[58]

Many parcels are described by use of calls to adjoiners. An adjoiner is the current or former owner of abutting land. A reference to an adjoiner typically fixes the end point of a boundary line at a point on the adjoiner's property boundary. For example, in *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*,[59] the court accepted "lands now or formerly of James Grant" as good evidence of a boundary. Such adjoining land must be adequately described in the deed, contiguous, and locatable on the ground.[60]

A call to a monument controls over a recited distance, if the two are in conflict.[61]

The description formulated using the order of control yields only to the clearly-established intent of the parties to the conveyance that produces a contrary result:

> In the case of a description by boundaries, as in other cases, the intention of the grantor, as inferred from the terms of the description, is the controlling consideration, and any rules which the courts may have formulated as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention.[62]

Similarly,

> The general rules as to the greater or lesser degree of weight and control to be given

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[58] Walter G. Robillard, *Clark on Surveying and Boundaries*, Eighth Edition, The Michie Company, at §2.02, pp. 26-7, and §15.08, p. 418, citing *Ricci v. Goodin*, 523 A.2d 589 (Me. 1987).

[59] 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992).

[60] Walter G. Robillard, *Clark on Surveying and Boundaries*, Eighth Edition, The Michie Company, at §15.08, p. 418. A call in a description to a road is a call to an adjoiner, although the courts did not recognize that principle in *Patel v. Lawyers Title Ins. Corp*., 2013 Ark.App. 670, 2013 WL 6002069 (Ark.App.) (unpublished). In *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2013), the court accepted the mistaken notion that a call to a former owner of an adjoining parcel was "ambiguous," when in fact the parties had not bothered to search the chains of title to locate the recorded deed to that person.

[61] See *Bernhard v. Reischman*, 33 Wash.App. 569, 658 P.2d 2 (1983) (distance call yielded to call to shore). In *Lynburn Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 191 Ga.App. 710, 382 S.E. 2d 599 (1989), the insured property was described by courses and distances. The property was bounded by public streets or alleys on all sides. A survey was obtained and the survey exception removed. Later, the insured discovered that the insured property was smaller than as stated in the survey. The court construed the policy as insuring ownership to the monuments of the public streets and alleys, not the stated distances. In doing so, it used the general survey principle that monuments prevail over distances.

[62] Tiffany, 3rd Ed., § 993, pp. 94-95.

to one form of description as compared with another are not absolute but are mere aids to be used in the construction of the deed to discover the real intent of the parties, such intent being the thing which governs where there is latent ambiguity.[63]

A parcel may also be legally described as being a certain number of acres, such as "the west ten acres of" a larger tract, such as a government quarter section. In such cases, there are well-developed surveying and legal principles that determine the boundary of the described parcel. Also, in some cases, a parcel legally described as being a certain number of acres contains more or less than that area as a matter of law and based on the actual acreage of the parent tract versus the acreage assumed at the time the description was prepared. Nonetheless, the legal description remains valid and enforceable, and the parcel can be located on the ground by an accurate survey. A "shortage" in area does not invoke a policy coverage, as discussed in §8.6.

8.6 Distance Or Area Shortage In Legal Description

The policy insures the title to whatever land was conveyed to the insured. The insurer does not choose the legal description used in the deed or the policy. Most commonly, the deed to the insured contains the historical legal description. Very often, the same description has been used in many prior conveyances. The insurer is not at liberty to modify the legal description of the parcel to be insured. The recitation of the legal description in Schedule A of the policy is not itself an assurance of any kind, but rather is merely the identification of the parcel whose title is insured, as is discussed at §8.2.

For these reasons, no policy coverage is invoked if the distances stated in the metes and bounds legal description of the insured parcel are not the same as would be used on an accurate survey of the parcel.[64] The policy also does not protect against a claimed shortage in the number of acres recited in the legal description for the insured parcel. If the dimensions can be reconciled so that the parcel can be located on the ground by a surveyor, title is marketable and no loss exists.[65] Any incorrect dimensions in the legal description are reconciled with other elements of the legal description to establish a description that closes and that is consistent with adjoining parcels.[66]

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[63] *Thompson on Real Property*, § 3021.

[64] *Lynburn Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 191 Ga.App. 710, 382 S.E. 2d 599 (1989); *Kraft v. Estate of Cooper*, 263 Or.App. 420, 330 P.3d 639 (Or.App. 2014) (insureds' belief that parcel's dimensions were greater than they actually were did not change fact that its boundaries were accurately described; the purpose of a description is to identify the parcel's boundaries, not to recite the quantity of land); *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished) (ALTA Homeowner's policy did not insure that parcel had dimensions stated in legal description of policy and deed).

[65] In *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the court held that an overlap of one lot's boundary line in a recorded plat did not make title to other lots in the subdivision unmarketable.

[66] In the leading decision on the issue, *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co*., 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992), the legal description located one boundary line by both a call and distance and a reference to the land of an adjoiner. The distance in the call was incorrect. The court held that the policy insured the land to the adjoiner.

Exclusion 1(a) of the policy removes coverage for any issue about conditions or use limitations imposed on a subdivision map, as discussed in §11.1.3.[67]

The survey exception confirms the lack of policy coverage for any difference between a distance or area shown in the insured's legal description and the actual distance or area as measured on a survey, as is discussed in §§12.3.7 and 12.3.8.

8.7 Improvements And Personal Property

A title insurance policy insures only the title to the rights held by the insured that make up the title to the real property. Certain property rights are related to real estate but are not rights or estates in land. These include options (which in most states are contract rights only) and *profits a prendre*, which give the right to carry off game, fish, timber or other removable items. A title insurance policy does not insure a right that is transferred to the insured but that does not create an interest or estate in the land.[68]

The title insurance policy does not insure the title to personal property that may be located on the insured parcel.[69] The definition of "Land" includes "improvements affixed thereto which by law

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The insured received all of the property owned by the grantor, although the parcel was not as many acres as the grantor had represented it to be. The doctrine of the order of control in legal descriptions is fully discussed at §8.5.

[67] In *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), in which one boundary of a new subdivision plat created an overlap with an adjoining parcel, the court held that setback lines imposed on the lot by the municipality when the plat was amended did not affect title or create losses payable under the policy, and that the loss was limited to the diminution in value to the lot due to the "loss" of the overlap area. Nonetheless, in *Burgess v. Stewart Title Guar. Co*., 65 Va. Cir. 311, 2004 WL 1713732 (Va.Cir.Ct. 2004) (unpublished), when the policy described the property as being two separate lots, but the municipality took the position that there was only one parcel, the trial court refused to dismiss an insured's claim of unmarketable title. It said that "the number of lots to be conveyed is a core issue relating to the legally recognized rights of the parties." The insurer correctly argued on demurrer that it used the existing legal descriptions, the issue of one parcel versus two does not make title unmarketable, and that the policy does not assure the existence of more than one parcel. The court was not willing to dismiss the case at this early stage, however.

[68] However, *Parker v. Ward*, 614 So.2d 975 (Ala. 1992), held that the policy protected against an unexcepted but recorded timber deed, despite the fact that an Alabama statute classifies such rights as being personalty. The dissent argued: "When timber has been conveyed to and is therefore owned by a person other than the owner of the land on which the timber stands, the timber is considered a chattel, *not real property.* [citation omitted] (emphasis in original). ... Based on the foregoing, I conclude that the title insurance policy Commonwealth issued to Parker did not insure the timber on the property, because the policy insured only 'land,' which was defined in the policy as 'real property'... ." Id. at 980.

[69] In *Geo Finance, LLC v. University Square 2751, LLC*, 2014 WL 7369940 (E.D.Mich. 2014) (unpublished), the insured bought an office building at a mortgage foreclosure sale. It later learned that there was a geothermal water supply system with pipes and other equipment hooked up to the building. The court held that, if the system was personal property, it was not insured under the policy. If it was a fixture, the policy still did not provide coverage, because the insured did not obtain title to the system through the sheriff's deed. In *Mattlage v. Dividend Solar Finance, LLC*, ___ F.Supp.3d ___, 2019 WL 6464006 (W.D.Tex. 2019) (not yet released for publication), the court held that a title insurer's listing of a financing statement as an exception in a title insurance commitment was its business decision, not a legal opinion or an assertion that the instrument was a cloud on title. The lender asserted that the financing statement was a lien only on the solar power equipment that it installed, which it considered to be personal property.

constitute real property."[70] If both real and personal property are conveyed to the insured, the policy insures the title only to the land and any fixtures.[71] Such things as telephone systems, washers and dryers, store display cases, and kitchen machinery and appliances do not usually constitute fixtures under state law. When the buyer and seller agree to treat an item as personal property conveyed by bill of sale, the policy did not insure the title to that item, and the policy need not contain any reference to or exception for the personal property.[72]

The policy indemnifies the insured against loss caused by a fixture filing against the property, unless that financing statement is excepted in the policy.[73] A Texas court found that the policy provided an assurance against mechanic's liens that attached only to fixtures that could be removed without injury to the permanent structure.[74]

The survey exception negates any assurance of title to buildings encroaching onto neighboring land.[75] The policy also does not insure title to non-building improvements that encroach,

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[70] See Condition 1(g) of the 2006 ALTA policies, which defines "Land" as "The land described in Schedule A, and affixed improvements that by law constitute real property."

[71] *In re Biloxi Casino Belle Inc.*, 368 F.3d 491 (5th Cir. (Miss.) 2004), which concerned title to a gambling boat. A title insurance policy was issued for the land along the Mississippi at Biloxi at which the craft was to be moored. While the boat was under construction in Gulfport, the project ground to a halt due to cost overruns, and a watercraft lien was filed by the builder. The lender asked the insurer to defend against and remove the lien. The court ruled that the policy did not insure title to the ship, or the lender's lien on it. It found that the ship was not within the definition of "land" under the policy. Further, the insured mortgage did not impose a lien on the boat, even if Schedule A was interpreted as including an accidental reference to personal property financing statements. The court also noted that Louisiana law limits the issuance of title insurance to interests in land; thus, the issuance of a UCC-type policy by a title insurer is not authorized, and is a separate line of insurance. In *Pandora Distribution, LLC v. Ottawa OH, LLC*, ___ F.Supp.3d ___, 2019 WL 2924995 (N.D. Ohio 2019) (not yet released for publication), reconsid.den. 2019 WL 5729932, the court held that the insured received title to an aging overhead conveyor bridge spanning railroad tracks adjoining the warehouse that it bought, which allegedly reduced the value of the property. The court held that the policy did not insure the title to the conveyor bridge, and therefore the insurer was not required to pay a loss to its insured based on its claimed negative value. The insured and other owners had hotly disputed the nature of the conveyor bridge, as either realty or personalty.

[72] *Cunningham v. Security Title Ins. Co.*, 241 Cal.App.2d 626, 50 Cal.Rptr. 724 (Cal.App. 5 Dist. 1966). Cunningham was an action for escrow negligence, and the court found that the argument about policy coverage was beyond the scope of the complaint. To that extent, the court's holding as cited above may be considered dictum.

[73] In *Saul v. Fidelity Nat'l Title Ins. Co.*, 36 Misc.3d 1217(A), 2012 WL 3029672 (N.Y. City Civ.Ct.), 2012 N.Y. Slip Op. 51376(U) (unpublished), the court held that a UCC fixture filing is a lien on a fixture, and fixtures are real estate, so such a lien is covered by the policy: "Here, the title insurance policy at issue provided Saul coverage for loss occasioned by a defect, lien or encumbrance on the title or unmarketability of the title of real estate fee simple interest. Since, as set forth above, a fixture is part of real property, a fixture lien constitutes a lien or encumbrance on a real property's title. Defendant has failed to meet its burden of showing that the title policy expressly excludes fixture liens. Therefore, the title insurance issued by Fidelity encompasses the UCC–1 fixture filing at issue."

[74] *GCI GP, LLC v. Stewart Title Guar. Co.*, 290 S.W.3d 287 (Tex.App.-Houston (1 Dist.) 2009). The court rested its decision primarily on the fact that the policy coverage against mechanic's liens did not limit that coverage to liens on "land."

[75] *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984); *Cook Consultants, Inc. v. Larson*, 677 S.W.2d 718 (Tex.App. 1984), aff'd in part and rev'd in part in *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567 (1986)

absent a special affirmative coverage. In *Transamerica Title Ins. Co. v. Northwest Building Corp.*,[76] the policy was found not to insure title to a parking area and driveway that were depicted on the insured's survey but that were located outside the perimeter of the land described on Schedule A.

However, the removal of the survey exception has been found to provide coverage to the insured against losses resulting from the encroachment of the insured's structure onto adjoining property. The policy does not insure the title to such a structure, or any right of the insured to the land on which it rests. Thus, coverage has been found to exist through the back door of the marketability coverage. An encroaching structure of sufficient size has been deemed an encumbrance on title. It is this encumbrance that, in turn, renders title unmarketable. Thus, in *Rackouski v. Dobson*,[77] a barn and fence encroached onto the neighboring land, and the neighbor sued to have them removed. The survey exception had been removed from the policy. The insurer refused to defend, because the policy did not insure the title to the encroaching structures. The appeals court found coverage through the marketability provision, saying:

> First, construing the definition of the word "land" from the "Definition of Terms" section of the policy to exclude coverage for the encroachment in this case would contradict the apparent intent of the parties demonstrated by the execution of the policy with the standard exclusion deleted. We construe such an ambiguity in favor of the appellant [insured]. [citations omitted] Second, the policy at issue is a "Policy of Title Insurance." The policy insures against defects or clouds in appellants' title to the land, not the land itself. Appellants' amended third-party complaint alleges that the encroachment of the barn onto plaintiff's land caused a defect in title to appellants' land which rendered appellants' title unmarketable. Thus, we believe that the definition of "land" in the policy does not preclude coverage.[78]

The same result was obtained in *First American Title Ins. Co. v. Dahlmann*,[79] which relied in part on *Rackouski*. In *Dahlmann*, the Wisconsin Supreme Court held that the combination of the removal of the survey exception from the policy and the marketability coverage protected the insured against the effect of the encroachment of an underground parking structure into an adjacent street. One factor distinguishing *Dahlmann* from *Rackouski* was that even an accurate survey would not have disclosed the encroachment, as evidenced by the fact that the survey delivered to the insurer at closing did not

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(survey exception removes coverage against effect of house's encroachment onto neighbor's property).

[76] 54 Wash.App. 289, 773 P.2d 431 (Wash.App. 1989), rev.den. 779 P.2d 727 (1989). *Northwest Building Corp.* was specifically overturned by the Washington Appeals Court in *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 859 P.2d 619 (Wash.App.Div. 1 1993), to the extent that the *Denny's* decision is inconsistent with *Northwest Building*. See the discussion of the cases at §8.2.

[77] 634 N.E.2d 1229, 1231 (Ill.App. 3 Dist. 1994).

[78] 634 N.E.2d at 1231.

[79] 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006).

depict it. The court emphasized that, although the survey exception was not a coverage, the payment of additional premium for its removal increased coverage; thus, the same coverage would not have existed if the policy had contained the survey exception:

> We are satisfied that the deletion of exceptions does not, in and of itself, create coverage where none exists. See Barlow Burke, Law of Title Insurance, § 9.03 at 9-10 (3d ed. 2000) ("An exception is not the opposite of coverage and so eliminating it does not automatically provide coverage."). However, the effect of the deletion of the Schedule B standard exceptions supports Dahlmann's position, that the policy covers an encumbrance on title, in at least two ways. First, the deletion of the Survey and Encroachment exceptions has an effect on the plain meaning of the policy, which, along with the additional premium Dahlmann paid, may be properly read as having created an "extended" policy. Second, the elimination of the two exceptions speaks to the reasonable expectations of the parties, especially the insured, to the contract. …
>
> First American argues that it waived the Survey and Encroachment exceptions from Schedule B because the policy was amended to include coverage for the known encroachment of the parking garage wall and the vent into the four-foot right-of-way. First American … contends that its policy does not insure against the risk of unknown encroachments. …
>
> First American's arguments are, ultimately, unconvincing. In its willingness to delete the Survey exception, and rely on the accuracy of the Johnson survey, First American assumed the risk that it would be providing coverage for an encroachment not documented on the land survey. If the policy exceptions were intended to be waived only with respect to the known encroachment, First American certainly was experienced and sophisticated enough to state this limited waiver of the exceptions by so stating in the policy. Its failure to do so leads to the logical conclusion that the parties contracted to cover encroachments through the deletion of the exception.
>
> Under a standard policy in which all Schedule B exceptions are present, no encroachments are covered by the policy, even substantial ones. Under an extended policy, the parties may agree to remove some exceptions to coverage, exposing the title insurer to greater liability under the policy. … The effect of removing much of the substance of Subsection B, along with the additional premium Dahlmann paid, had the effect of providing Dahlmann with "extended coverage." …
>
> … We agree that the definition of "land" is ambiguous, in light of the omission of the Survey and Encroachment exceptions. Therefore, because ambiguous terms in an insurance policy are construed against the drafter, we conclude that the definition of "land" is not controlling on the scope of coverage, and, therefore, that the definition of "land" in Schedule A does not limit coverage.[80]

[80] 291 Wis.2d at 172-3, 715 N.W.2d at 618-9.

The 2006 policies did not modify the definition of "Land." Further, the 2006 policies contain an affirmative survey coverage, unless it is negated by a Schedule B exception or endorsement. See §9.9.1 for a discussion of the 2006 policy survey coverage. However, that coverage does not specifically insure title to structures encroaching onto neighboring land. The Residential policy contains a protection against forced removal of structures that encroach onto neighboring land. See §9.14.1 for a discussion of that policy generally, and §3.2.3.1.7 concerning resolution of claims involving forced removal.

Even when the survey exception is removed, the policy does not insure title to buildings or other structures built after the date of policy.[81] When a house was built entirely on the wrong lot after policy date, the policy did not insure title to the misplaced house.[82]

The policy may insure the title to a building or other structure by describing the improvement in Schedule A. In one case, Schedule A specifically included title to improvements by adding the following phrase:

> And also the building now being erected on said premises known as the "Bowling Green offices"; the lands the title to which is hereby intended to be insured, being that on which said building now stands as shown by the survey of Francis W. Ford, dated February 27, 1897, a duplicate of which survey is hereto annexed.[83]

In addition, the policy had attached to it a copy of a survey showing the building as being entirely within the boundaries of the land. Based on these two assurances, the court held that the policy insured title to that portion of the building that was not located on the insured land.

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[81] Exclusion 3(d) of the 2006 ALTA policies states: "The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of: Defects, liens, encumbrances, adverse claims, or other matters... (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10)… ."

[82] *Stewart Title Guar. Co. v. City Nat'l Bank of Mineral Wells*, 796 S.W. 2d 308 (Tex.App. 1990).

[83] *Broadway Realty Co. v. Lawyers Title Ins. & Trust Co.*, 226 N.Y. 335, 123 N.E. 754, 754 (1919).

8.8 Appurtenant Easements And Rights

FORM 19, Appendix A
Appurtenant easements not insured

The policy may recite an easement or other right in Schedule A, which causes the policy to indemnify the insured in the event the easement or right is invalid or unenforceable by the insured for the benefit of the insured parcel.[84] The insurance of access rights on Schedule A is discussed at §9.7. ALTA policies state that they do not insure any rights in adjacent streets, or any rights beyond the parcel shown in the policy. Most ALTA policies make this statement in the definition of "land." The ALTA Homeowner's Policy, however, makes that statement in Exclusion 6. The Homeowner's Policy is further discussed at §9.14.2. See also §12.3.15, concerning the effect on the survey exception of the attachment of a survey to the policy.

The unambiguous terms of the ALTA policies thus make it clear that they do not insure additional rights by implication. Most but not all courts have refused to add rights by implication. When a policy described the insured land by referring to a recorded deed and the deed included an appurtenant easement, the court concluded that the policy had insured the easement.[85] Similarly, in *Santos v. Sinclair*,[86] Schedule A insured "Tract(s) 3 of short plat no. 702, as recorded... ." The short plat description of Tract 3 was as follows: "[t]he East 250 feet ...TOGETHER with an easement for road and utilities purposes, ...over the existing old road which meanders east and west... ." By referring to the plat, the court found, the policy had implicitly insured the rights specifically granted in the plat description of Tract 3.

However, *Santos* was limited in *Dishman v. Stewart Title Guar. Co.*,[87] in which the insureds argued that the policy assured the public nature of an adjacent street because the policy attached a map that recited the street name. The court said it found no case saying that such a reference gives an assurance of rights "outside the described property," and that there was no incorporation by reference in the title insurance policy:

> [T]he Dishmans … claim the policy, by incorporating the plat, guaranteed the legal status of property not conveyed to them. But there is no reasonable construction of

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[84] *Offenhartz v. Heinsohn*, 30 Misc.2d 693, 150 N.Y.S. 2d 78 (Sup.Ct. 1956); *Desjardins v. Fidelity Nat'l Title Ins. Co.* , 2013 DNH 086, 2013 WL 2949089 (D.N.H.) (unpublished) (concerning adverse possession claim to part of parcel encumbered by an easement insured in Schedule A). In *IDC Properties, Inc. v. Chicago Title Ins. Co*., 974 F.Supp.2d 87 (D.R.I. 2013), the inclusion in Schedule A of the phrase “development and special declarant rights in and to" the insured condominium was found to cause the policy to insure the right to expand the condominium to include units later declared on land that was not described in Schedule A, which units did not exist on the policy date, and which the same insurer later refused to insure.

[85] *Clements v. Stewart Title Guar. Co.*, 537 S.W.2d 126 (Tex.App. 1976).

[86] *Santos v. Sinclair*, 884 P.2d 941 (Wash.App.Div. 2 1994).

[87] 2002 WL 491493 (Wash.App.Div. 1) (unpublished).

> the policy that would lead an average purchaser of insurance to believe that by guaranteeing "a right of access to the land," Stewart Title meant to guarantee "the existence of all streets shown on the incorporated plat map." The Dishmans seek coverage for something that is simply not covered under the policy. We hold that the policy guaranteed only that some right of access to the property existed at the time of sale, and did not guarantee a right of access from Putman Street or any other particular street shown on the referenced plat.[88]

Thus, the policy does not incorporate easements or other right depicted on a plat simply by using the platted description. The platted description is the only correct legal description, and its use in the policy does not denote any special intent to include rights beyond the boundary of the lot and block. As the *Dishman* court said, "this function of the plat map is necessarily limited to describing what it is that has been conveyed."[89]

Other courts have also refused to find that the attachment of or reference to a map with the commitment or policy has the effect of expand the rights or parcels insured by the policy.[90] In *Decker v. First American Title Ins. Co.*,[91] a California case, the insured's deed granted the right to use a private road that was not insured in the policy. The court rejected the insured's argument that he had a reasonable expectation that the policy would insure rights in the private road.[92]

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[88] Id. at *3.

[89] Id. at *3.

[90] In *Forbes v. Chicago Title Ins. Co.*, 2012 WL 541509 (Cal.App. 5 Dist.) (unpublished), the owners intended to transfer two parcels on either side of a road into their trust. The commitment and deed conveyed only one parcel, but the preliminary title report recited the one tax parcel that included both lots and attached a map with arrows pointing to both parcels. The court said that the preliminary title report was an offer to issue a policy, not a representation, and merged into the policy when issued. The map was not part of the policy, and the insured had no cause of action based on it. In *Kloster v. Roberts*, 179 Wash.App. 1025, 2014 WL 470742 (Wash.App. Div. 3) (unpublished), rev.den. 181 Wash.2d 1009 (Wash. Oct. 8, 2014), when the policy did not insure an access easement in Schedule A, the attachment of a map to the policy did not cause it to insure rights in an easement shown thereon, which was later discovered to be defective. However, see *Lee v. Fidelity Nat'l Title Ins. Co.*, 188 Cal.App.4th 583, 115 Cal.Rptr.3d 748 (Cal.App. 1 Dist. 2010), in which the insurer was denied summary judgment when the insureds claimed they thought they had bought a second parcel because the preliminary title report listed two tax parcel numbers, excepted taxes for both parcels, and attached a map with arrows pointing to both parcels. Their contract of sale also included two tax parcels. In *Schiller v. Fidelity Nat'l Title Ins. Co*., 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished), the court found that a policy that insured lots near the shore of Lake Tahoe did not insure that the parcels touched the shore, relying largely on the definition of Land in the policy. The court also held that no such coverage was granted or implied from the fact that a map was attached to the policy that showed nearby Lake Tahoe.

[91] 2001 WL 1508035 (Cal.App. 4 Dist.) (unpublished).

[92] "First, the policy specifically stated, 'The estate or interest in the land described in Schedule C and which is covered by this policy is: A Fee'--i.e., a possessory estate in a tangible area of land, as opposed to a servitude, such as an easement or right of way. [citations omitted] Moreover, Schedule C described only the property conveyed to Decker in parcel 1 of the grant deed; there was no reference to parcel 2 or the easement or right of use described therein. Under these circumstances, as a matter of law, it was not reasonable for Decker to expect coverage under the policy for claims pertaining to parcel 2. (*Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 659-661.)"

Twin Texas decisions hold that an easement is implicitly insured when the policy describes the property by reference to a deed which includes the easement, but there is no incorporation by reference when the policy describes the property by metes and bounds and does not recite the easement in Schedule A. In *Clements v. Stewart Title Guar. Co.*,[93] the court held that a policy insured an easement because Schedule A described the insured land by reference to a deed which included the easement grant. In *Kuper v. Stewart Title Guar. Co.*,[94] the insured's deed included an easement. The policy did not describe the land by reference, but recited the full legal description of the fee simple parcel, and did not include the easement in Schedule A. The appellate court first issued a decision holding that the policy impliedly assured the easement, simply by using the same description as in the deed, based on *Clements*. The court withdrew and reversed that opinion, however, holding that the easement was not incorporated by reference:

> *Clements* is distinguishable, however. ... No metes and bounds description was included [in the *Clements* policy]. Therefore, the deed, which referenced the easement, was necessarily incorporated into the title policy. By contrast, Kuper's title policy described the land by its metes and bounds. We conclude that, because the metes and bounds legal property description was set forth in Kuper's title policy, the deed description was not necessarily incorporated into his policy.

The middle ground factually between *Clements* and *Kuper* is found in *Aubuchon Realty Co. Inc. v. Fidelity Nat'l Title Ins. Co. of New York*.[95] In that case, the policy described the insured parcel as "fee simple vested in [the insured] by means of a deed," the recording information for which was recited. The insured argued incorporation by reference. The insurer urged that the policy referred to the insured estate as fee simple and did not insure the easement because it was not recited. The appeals court did not make a ruling; it found each position "equally plausible and reasonable," and remanded for findings of fact.

California has held that the policy insures the right to water from the land as an appurtenance. In *White v. Western Title Ins. Co.*,[96] the insurer admitted liability for omission of an easement for extraction of water from the property. The Supreme Court held that the policy insured appurtenant water rights, and their loss was a compensable element of damage separate and in addition to the loss caused by the easement. An Arizona case rejected a claim that the insurer was responsible for loss based on the insured's claim of water rights on an adjacent parcel. However, that decision was not based on a determination that the policy does not insured appurtenant water rights, but rather that the insured did not in fact have any water rights in the adjacent land. The case could thus be read to agree with the holding in *White*.[97]

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[93] 537 S.W.2d 126 (Tex.Civ.App.-Austin 1976), writ ref'd n.r.e.

[94] 2002 WL 31429754 (Tex.App.-Houston (1 Dist.)) (unpublished).

[95] 295 A.D.2d 725, 743 N.Y.S.2d 626, 2002 N.Y. Slip Op. 04840 (N.Y.A.D. 3 Dept. 2002).

[96] 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1985).

[97] *Laurence v. Kruckmeyer*, 605 P.2d 466 (Ariz.App. 1979).

8.9 Adjacent Streets And Waterways

FORM 70, Appendix A
Road, waterbody not "Land"

The policy does not insure any rights in adjacent roads or bodies of water. Condition 1(g) of the 2006 ALTA policies (Conditions & Stipulations 1(d) of the 1992 ALTA policies) defines Land as follows:

> "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land” does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

The ALTA Homeowner's policy places this coverage limitation in the Exclusions.

The title insurance policy does not assure ownership of any land taken for public road, or the fee title to land subject to a road right-of-way.[98] A policy may be written to intentionally assure identified rights in an adjacent street or body of water as part of the insured Land. For example, the policy can be written to assure an easement for riparian rights in the water body, such as to build and maintain a pier or dock. However, absent such an affirmative, intentional inclusion of rights beyond the property lines, the policy does not assure any such rights. The mere reference to the street or body of water as being the boundary line does not create any assurance about that adjacent way.

Earlier forms of California Land Title Association policies gave an affirmative assurance that the insured has the "ordinary rights" of an abutting owner in any adjacent public street. The current version of the CLTA standard coverage owner's policy does not give such an assurance. See §9.7 for a discussion of the insuring provision regarding a right of access.

In California, the presumption is that adjacent lot owners hold the fee title to public streets, subject to an easement for the street. Thus, a conveyance of a platted lot impliedly conveys the fee in the roadway. In *Murray v. Title Ins. & Trust Co.*,[99] construing the earlier form of policy, the court held that:

> ... a title insurance policy on property bounded by a street necessarily includes within its coverage insurance of the grantee's title to the center of the bounding street. ...

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[98] In *Hofmann v. Chicago Title Ins. Co.*, 107 Wash.App. 1010, 2001 WL 803756 (Wash.App.Div. 1 2001) (unpublished), the policy was found not to insure title to an adjacent road to which the metes and bounds legal description called, although the description also failed to except a highway deed that gave additional land for highway. The court relied on the survey exception rather than the definition of land in making its analysis, however.

[99] 250 Cal.App.2d 248, 58 Cal.Rptr. 273 (1967).

> [B]y implication it likewise insures the presumed ancillary titles and privileges attached to the property.

The *Murray* holding regarding the insurance of implied rights appurtenant was not followed, although also not specifically overturned, in later California cases involving CLTA standard-coverage policies.[100] However, in *Havstad v. Fidelity Nat'l Title Ins. Co.*,[101] the policy was found not to insure any rights in an area on the recorded plat marked as "not a public street." The court held that the policy definition of land establishes that there is coverage only for the described land, and a reference to a map does not invoke coverage for any appurtenant rights created thereby.

> Thus, the written title insurance contract provisions "clearly and explicitly" insure a fee title in lots 1 and 23; "clearly and explicitly" do not cover "any property beyond the lines of the area described or referred to in schedule A, nor any right, title, interest estate or easement in abutting streets;" and "clearly and explicitly" contain no separate indorsements covering an easement in the nonabutting property known as "not a public street." An ordinary reading of the land's description indicates coverage for two pieces of property--lot 1 and lot 23. Reference to the subdivision maps is included to provide guidance as to where the graphic representation of the property can be located. In our view, the policy is completely unambiguous in its description of the land covered... .[102]

The court also rejected the insureds' argument that they had a "reasonable expectation" of coverage, since the policy was not ambiguous. An exception for an easement in Schedule B is not an assurance that the insured is the beneficiary of the easement.[103] In *Decker v. First American Title Ins. Co.*,[104] the insured argued that the abutter's rights coverage assured him rights in a private road that did not in fact abut his property. The court found that the coverage only applies if the road abuts, and is not an assurance that the road does in fact abut.[105]

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[100] *Havstad v. Fidelity Nat'l Title Ins. Co.*, 58 Cal.App.4th 654, 68 Cal.Rptr.2d 487, 97 Cal. Daily Op.Serv. 8107 (Cal.App. 1 Dist. 1997), mod. Oct. 20, 1997, rev.den. Dec. 10, 1997; *Decker v. First American Title Ins. Co.*, 2001 WL 1508035 (Cal.App. 4 Dist.) (unpublished).

[101] 58 Cal.App.4th 654, 68 Cal.Rptr.2d 487, 97 Cal. Daily Op.Serv. 8107 (Cal.App. 1 Dist. 1997), mod. Oct. 20, 1997, rev.den. Dec. 10, 1997.

[102] 58 Cal.App.4th at 657, 68 Cal.Rptr.2d at 490.

[103] *Pavlina v. First American Title Ins. Co.*, 157 Wash.App. 1022, 2010 WL 3011274 (Wash.App.Div. 2 2010) (unpublished). The *Pavlina* court relied primarily on *Havstad* in finding that a reference in the policy to an instrument is not an affirmative assurance of rights in that instrument.

[104] 2001 WL 1508035 (Cal.App. 4 Dist.) (unpublished).

[105] "Finally, there is no suggestion on appeal that the dirt fire road qualifies as an "open street or highway" abutting Decker's property, and indeed, the record demonstrates that the City of Laguna Beach erected a permanent road block restricting vehicular access over this road. Therefore, as a matter of law, there was no coverage under the abutter's rights

The definition of land also excludes any rights in adjacent "waterways." Under the public trust doctrine, the states assert ownership to the bed of certain water bodies, and the right to regulate the placement of structures on the beds of navigable waters and the use of the surface. See §12.3.12 for a general discussion of water boundaries in legal descriptions. The standard form ALTA policies do not provide an assurance of any rights the insured may have in an adjacent body of water,[106] or that the insured Land abuts the shore of a nearby water body.[107] However, the "other" defects provision in Covered Title Risk 14 of the Residential policy was found by a New Jersey court to protect against the forced removal of a dock in a riparian zone between a bulkhead line and a pierhead line, when the policy legal description included the "land" up to the pierhead line.[108]

The examining practice in many states is to insert one or more exceptions for the rights of the public and the state in the adjacent body of water. Given the policy definition, these exceptions are not strictly necessary, but they do serve to amplify the lack of coverage.[109] A policy containing an

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clause in First American's policy. (See *Lincoln Sav. & Loan Assn. v. Title Ins. & Trust Co.* (1975) 46 Cal.App.3d 493, 496-497.)" 2001 WL 1508035 at *2.

[106] In *R.W. Docks & Slips v. Chicago Title Ins. Co.*, 2001 WL 856431 (Minn.App.) (unpublished), rev.den., the insurer had issued policies on marina condominium units. The policy contained exceptions for rights of the public in submerged lands, and governmental rights to regulate the surface. The court found that the policy did not have a duty to prosecute an appeal from the denial of a dredging permit in which the state DNR had threatened to claim that the condominium regime violated the public trust doctrine. The court found that the insurer was not obligated to defend "Docks's title in or use of Lake Superior's bed against Wisconsin's right to regulate" because the policy did not claim to assure that Docks owned the bed of Lake Superior. Further, Chicago Title could not have warranted that Docks owned title to Lake Superior's bed because Wisconsin law does not allow private citizens to own any part of Lake Superior's bed. Under its public trust doctrine, the state holds the beds of navigable waters, including Lake Superior, in trust for all of its citizens." The right to take water from an adjacent river or lake is a valuable appurtenance in certain states, and is further discussed at §8.8.

[107] In *Schiller v. Fidelity Nat'l Title Ins. Co*., 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished), the court found that a policy that insured lots near the shore of Lake Tahoe did not insure that the parcels abutted the shore, relying largely on the definition of Land in the policy. The court also held that no such coverage was granted or implied from the fact that Schedule B contained a water exception, and a map was attached to the policy that showed nearby Lake Tahoe. The central issue in the case was the fact that Lake Tahoe is a man-made lake whose bed is not owned by the littoral owners. The court observed that the policy insured the title to platted Lots 2 and 3, and that the plat "distinctly depicts a strip of land, designated 18 feet wide, separating lots 2 and 3 (Schiller's land) from the meander line (Lake Tahoe)." The court recited ancient and settled law that establishes that a legal description that calls to a meander line is a call to the shore, whereas a call to a line short of the meander establishes that the parcel does not abut the shore. The court also cited *Christensen v. Mikell,* 476 S.E.2d 692, 694 (S.C. 1996), for its holding that a title insurer owes no policy duty concerning the title to land that is not included in the insured parcel.

[108] *Florio v. Lawyers Title Ins. Corp.*, 2006 WL 1520175 (N.J.Super.A.D.) (unpublished).

[109] In *R.W. Docks & Slips v. Chicago Title Ins. Co.*, 2001 WL 856431 (Minn.App.) (unpublished), rev.den., the policy contained exceptions for rights of the public in submerged lands, and governmental rights to regulate the surface. The court found the state's rights to the bed and waters excepted. It said: "At oral argument, Docks conceded that if it has title to the 71 condominiums, the exclusion applies. Docks argued that Chicago Title nonetheless has a duty to "defend" the perceived challenges to title before it can rely on the exclusions. We disagree. Even if we disregard the requirement in Wisconsin law that the duty to defend can only be triggered by allegations in a complaint, not a defendant's answer to a complaint, and accept the rather dubious assertion that the State of Wisconsin and WDNR's answer challenged title to the

exception for the rights of the public in the adjacent lake bed "excludes assurance of title ... of submerged land ... ."[110]

There is no abutter's rights coverage in the ALTA policy forms. Other states' laws vary as to the lot owner's rights in adjacent streets. In Kansas, for example, the statutory presumption is that dedication of a road conveys the full fee simple. Therefore, a lot owner has no ancillary right or title in the street. Based on this analysis, the court in *J & S Building Co., Inc. v. Columbian Title & Trust Co.* held that the policy does not insure any interest in the street.[111] Similarly, an Ohio court held that a policy had not insured that an adjacent alley was public, which would cause the insured to hold fee title to the alley by implication, simply because the parcel's legal description referenced the alley.[112] Finally, the insured suffered no compensable loss when the adjacent "street" was determined to be an easement rather than a public, open thoroughfare, especially given an exception in Schedule B for "streets not physically opened."[113]

An older form of California Land Title Association policy did not protect against the effect of private restrictions that prohibited the construction of a driveway connecting to the adjacent street, because the policy did not insure any title right in the street.[114] See §9.7 generally for a discussion of the insuring provision regarding a right of access.

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condominiums, Chicago Title is entitled to rely on the unambiguous exclusion in the policy to deny coverage. When there is no coverage, there is no duty to defend."

[110] *Rural Kootenai Organization, Inc. v. Board of Commissioners*, 133 Idaho 833, 993 P.2d 596 (Idaho 1999), reh.den. In *Schiller v. Fidelity Nat'l Title Ins. Co.*, 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished), the court found that a water exception did not imply that the policy assured that the insured lots abutted the nearby water body.

[111] 1 Kan.App.2d 228, 563 P.2d 1086 (1977).

[112] *Schaible v. Louisville Title Ins. Co.*, 118 Ohio App. 328, 194 N.E.2d 588 (1963).

[113] *Rialto Building & Loan Ass'n v. Commonwealth Title Co.*, 327 Pa. 93, 192 A. 635 (1937).

[114] *Lincoln Sav. & Loan Assoc. v. Title Ins. & Trust Co.*, 46 Cal.App.3d 493, 120 Cal.Rptr. 219 (1975).

9 Covered Risks

9.0 Title Insurance Policy Types

The title insurance policies most commonly used in the United States are those promulgated by the American Land Title Association. The standard ALTA policies currently in use are the owner's and loan policies adopted on June 17, 2006.[1] The 2006 policies replaced those adopted in 1992, which were decertified on June 17, 2007. ALTA promulgated owner's and loan policies in 1990, 1987, 1984, 1970 and several earlier versions. See the discussion of the genesis of the standardized ALTA policies in §9.1.3.4. The California Land Title Association has promulgated an owner's policy form. Texas and New Mexico regulators promulgate policy forms, the current versions of which are very similar to ALTA policy forms.[2] The State of Iowa does not authorize the issuance of title insurance policies covering land in that state. However, the Title Guaranty Division of the Iowa Finance Authority issues guarantees that are very similar to title insurance policies, through licensed attorney-agents.[3]

There are two forms of owner's policies promulgated by ALTA other than the 2006 policy, for use with residential real estate—the Residential policy and the Homeowner's policy. The covered risks of those policies are discussed at §§9.14.1 and 9.14.2, respectively, and their other terms are discussed at the appropriate sections of this book. ALTA has also promulgated a Short Form Residential Loan Policy, discussed at §9.14.3, and a Residential Limited Coverage Junior Loan Policy, discussed at §9.14.4. The ALTA has promulgated a United States of America Policy, as discussed at §9.14.5. ALTA adopted a Limited Pre-Foreclosure Policy on December 3, 2012, which

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[1] The policy forms were described in some depth in Clifford L. Morgan, *ALTA Adopts New Policies*, Title News, September/October 2006. Mr. Morgan then served as chair of the ALTA Forms Committee. See also J. Bushnell Nielsen, *2006 Policy Forms Analyzed*, The Title Insurance Law Newsletter, September, 2006, p. 3; and Richard F. Bales, *The ALTA 2006 Title Insurance Policies and the Issuance of Survey Coverage*, The Title Insurance Law Newsletter, November, 2006, p. 5.

[2] The Texas Title Insurance Basic Manual is found at Title 11, Texas Code, Chapter 2501. The New Mexico Title Insurance Act is found at NMSA 1978, Chapter 59A, Article 30, as implemented by Title 13, Chapter 14 of the New Mexico Administrative Code.

[3] The guarantees are issued pursuant to Iowa Code § 16.19 and Iowa Administrative Code 265 IAC 9.

protects a lender seeking to foreclose against certain liens and other matters not described in the policy, as discussed at §9.14.6. Finally, the ALTA Expanded Coverage Residential Loan Policy is discussed at §9.14.7.

This chapter discusses the various defects, liens and adverse claims against title which are covered by the owner's and loan policies, other than construction liens, which are discussed separately in Chapter 10. For the most part, this chapter is organized by the nature of the risk rather than by coverage. Section 9.9 discusses coverages added in the 2006 ALTA policy forms. Section 9.10 discusses loan policy coverages. Section 9.11 discusses coverages added by endorsement.

9.1 Nature And Scope Of Title Insurance Policy; Rules Of Construction

Title insurance is unlike any other line of insurance, in a number of respects. The history of this American form of insurance is recounted in §9.1.3.4. The title insurance policy provides coverage only for matters that occurred prior to the policy date. It does not protect against future perils or risks, and is built on a model of risk elimination rather than risk assumption.[4] The insured pays a one-time premium,[5] and yet the policy does not have a stated or definite policy term.[6] One court labeled title insurance as being unique in the insurance world, for all of the above reasons.[7]

As a result, one commentator noted that:

> Title insurance has been regarded as a separate type of contract not falling within any of the three basic classes of insurance.[8]

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[4] In *Crossman v. Yacubovich*, 290 S.W.3d 775, 779 (Mo.App.E.D. 2009), the court noted: "Title insurance differs from most other types of insurance because it seeks to eliminate risk of loss arising from past events, rather than assuming risk of loss for future events and then distributing the risk among policyholders. Stephen M. Todd, *Title Insurance*, in 1 Mo. Real Estate Practice 2–1, § 2.2, at 2–4—2–5 (Mo. Bar ed., 4th ed. 2000)." See also *GMAC Mortgage, LLC v. First American Title Ins. Co.*, 464 Mass. 733, 985 N.E.2d 823 (Mass. 2013) ("title insurers attempt to eliminate or reduce risks prior to the issuance of a title insurance policy"); *Farrington v. Commonwealth Land Title Ins. Co.*, 86 Wash.App. 399, 936 P.2d 1157 (1997) ("unlike most insurance, which aims to reduce risk from unforeseen future events, title insurance primarily seeks to eliminate risks and losses caused by defects in title arising out of past events") (citing Washington State Bar Ass'n, *Real Property Deskbook* sec. 35.3, at 35–3 (2d ed. 1986)).

[5] As noted in *Crossman v. Yacubovich*, 290 S.W.3d 775, 779 (Mo.App.E.D. 2009).

[6] These same unique characteristics of title insurance were noted in S. Quiner, *Title Insurance and the Title Insurance Industry*, 22 Drake L.Rev. 711 (1973), which was quoted in *Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17 (Iowa 1977), which held the Iowa statutory ban on the writing of title insurance in that state.

[7] In *BB Syndication Services, Inc. v. First American Title Ins. Co*., 780 F.3d 825 (7th Cir. (Wis.) 2015), the court said: "Unique in the insurance world, title insurance differs from other forms of property and liability insurance in that it only covers losses from defects in title and lien priority (and similar title-related risks), usually requires only a one-time premium, and lasts for as long as the insured holds title (or, in this context, a security interest). ... This model works because title insurance is retrospective rather than prospective; it generally protects against defects in title that arose prior to the issuance of the policy, allowing the insurer to reduce or eliminate risk by conducting a careful title search to identify defects. These features, however, cause some complications in the construction-loan context."

[8] R. Keeton, Insurance Law 17 (1971), as quoted in *Commercial Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. (Calif.) 1989).

Courts have used the above factors to distinguish between title and casualty insurance.[9] Courts have also held that title insurance operates under different principles than those that apply to general liability insurance.[10] This section examines the general principles on which the title insurance policy is based, and the rules used to construe the policy's terms.

9.1.1 Nature Of Policy Coverages

The title insurance policy indemnifies the insured against loss if the title to the insured parcel is held by someone other than the insured. It also indemnifies as to defects in or liens or encumbrances on title other than those shown in the policy schedules. Schedule B refers to those matters against which the insurer does not indemnify, both of general application (unfiled construction liens, for example) and those specific to the described property.

In addition to the indemnifications as to the title, the policy indemnifies the insured if the property is found to lack a right of access, or if title is found to be unmarketable as shown in the policy. The assurance as to marketability is closely related to, but not inseparable from, the assurances about title. The access right assurance goes beyond the subject of the title to the land. Rather, it has to do with a fundamental privilege attached to the ownership of the real property.

The ALTA loan policy includes four assurances specific to the mortgage or deed of trust held by the insured: indemnity as its validity, enforceability and priority generally, and priority specifically as to unfiled construction liens.

The title insurance policy insures the title to real property.[11] Title is synonymous with

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[9] In *Commercial Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. (Calif.) 1989), the court held that a casualty insurance policy is different in nature from a title insurance policy. It found support for that proposition in *Nevers v. Aetna Ins. Co*., 14 Wash.App. 906, 546 P.2d 1240 (1976), which distinguished between the same two lines of insurance by holding that "[d]efective title is clearly not a 'physical loss or damage.'"

[10] In *GMAC Mortgage, LLC v. First American Title Ins. Co.*, 464 Mass. 733, 985 N.E.2d 823 (Mass. 2013), the Massachusetts Supreme Judicial Court held that that title insurance is "fundamentally different" from general liability insurance in that it eliminates or reduces existing risks rather than assumes future risks. It ruled that the in- for-one, in-for-all rule does not apply in the "unique title insurance context." The Massachusetts high court reiterated this ruling in *Deutsche Bank Nat'l Ass'n v. First American Title Ins. Co*., 465 Mass. 741, 991 N.E.2d 638 (Mass. 2013). In *Philadelphia Indem. Ins. Co. v. Chicago Title Ins. Co*., 771 F.3d 391 (7th Cir. (Ill.) 2014), the Seventh Circuit Court of Appeals also held that the rationale of the in-for-one rule does not apply to title insurance. The court said: "[t]he complete-defense rule reflects and enforces the broad defense promise in standard general liability policies and makes sense given the comprehensive coverage provided by this kind of insurance. Title insurance is much narrower. A title insurer only assumes risks associated with defects in property title." In *Cherry Hills Farm Court, LLC v. First American Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 6682835 (D.Colo. 2019) (not yet released for publication), appeal filed January 6, 2020, the court held that the complete-defense rule adopted in Colorado for liability policies does not apply to title insurance, "which differs from general liability insurance in significant ways." Those decisions are fully discussed at §4.7.

[11] "A title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected. Instead, the defendant is insuring the title against defects which may damage the plaintiffs' interest in the property." *McLaughlin v. Attorneys' Title Guar. Fund Inc.*, 61 Ill. App.3d 911, 378 N.E. 2d 355 (1978).

ownership. Thus, a title insurance policy insures the ownership of an estate in real property. A title insurance policy protects the insured against a claim by another to own the real property, defects or flaws in the insured's own claim of ownership, and encumbrances and liens that burden the title. There are two aspects of real property titles: the ownership right, and the evidence of that ownership right. Such evidence of ownership, sometimes called the muniments of title, typically includes an instrument that serves as the root of title, such as a government patent, together with subsequent deeds that form a chain of title to the property.[12] The muniments of title may also be deemed to include the document or documents that evidence the chain of title, such as an abstract of title. A person holding good evidence of his or her title qualifies as a bona fide purchaser, which status is protected in each state against adverse ownership claims by a thoughtful pattern of statutes and case law.

Covered Risk 1 of the ALTA title insurance policies indemnifies the insured if title is not vested in the insured. An interest in real property is deemed to be vested when it belongs completely and unconditionally to a person, and the right cannot be impaired or taken away without the consent of the owner.[13]

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[12] See the following representative decisions discussing the concept of muniments of title: *Merrill v. Rocky Mountain Cattle Co.*, 26 Wyo. 219, 181 P. 964 (Wyo. 1919); *Cochran v. Stewart*, 57 Minn. 499, 59 N.W. 543 (Minn. 1894); *Turner v. Rice*, 178 Ark. 300, 10 S.W.2d 885 (Ark. 1928); and *H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District*, 736 So.2d 1167 (Fla. 1999) (describing the elements of title that make up its muniments, and relating them to the state Marketable Record Title Act).

[13] "The vested right is property which the law protects and is an immediate vested right of present or future enjoyment. To be vested in its accurate legal sense a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent. A vested right is the power to do certain actions or possess certain things lawfully and is substantially a property right and may be created either by common law, by statute or by contract." *Security Bank & Trust Co. of Miami, Oklahoma v. Barnett*, 169 Okl. 298, 36 P.2d 874, 880, as quoted in *Scamman v. Scamman*, 90 N.E.2d 617 (Montgomery Cty. Ohio Common Pleas 1950). Section 40 of the New York Real Property Law defines a remainder interest as being vested "when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates." In *In re Canfield's Will*, 105 N.Y.S.2d 654 (Surrogate's Court, Ulster County 1951), the court said "[a]n estate is said to be 'vested' under the laws of this State, where there are persons who will have an immediate right to possession of the property if the precedent estate therein should now cease according to the terms of the instrument creating it." It said that the courts favor the vesting of estates in land, "because vesting estates tend to result in fixed, definite rights, stripped of uncertainty and the element of change." The court relied on *Matter of Steinwender's Estate*, 176 App.Div. 517, 163 N.Y.S. 309 (1917). In *Curtis v. Citizens Bank & Trust Co. of Lexington*, 318 S.W.2d 33 (Ky.App. 1958), the court observed that "[t]he rule against perpetuities … is concerned with the remote vesting of estates. … The objective is to insure that the fee simple title shall have vested in some person or persons within the statutory period." The court then wrestled with the issue of when a future estate in land is deemed to have become vested in its holders, particularly when the holders are not identified by name in the instrument that grants those rights.

The issue of whether a property right is vested is frequently considered in relation to the rule that a statute may not be applied retroactively if such effect would be to take away vested rights in property. See, for example, *WSSC v. Riverdale Fire Co.*, 308 Md. 556, 564, 520 A.2d 1319, 1323 (1987) (a "statute, even if intended to apply retrospectively, will not be given that effect if it would take vested rights"); and *Waters v. Montgomery County*, 337 Md. 15, 29, 650 A.2d 712, 718 (1994) ("In the final part of a retroactivity analysis, a court must determine whether the retroactive application of the statute or ordinance would interfere with vested rights"). In fact, in *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 805 A.2d 1061 (Md.App. 2002), the court said that, in the statutory context, the term vested property right has become merely a label, because "it has long been recognized that the term 'vested rights' is conclusory—a right is vested

Covered Risks

In most situations, title vests in a purchaser when an instrument of conveyance is delivered from the rightful owner of the property to that purchaser, or whenever the conditions have been met for passage of title under the state's Statute of Frauds. Some conveyances are not made by deed. When title passes from a deceased owner to his or her heir or devisee, state law determines when the heir or devisee becomes vested in title.[14] Similarly, state law determines when title obtained by adverse possession vests in the possessor.[15] When property is foreclosed by a lender, state law determines the date on which title vests in the foreclosing party.[16]

A person must have a recognized ownership interest in real property in order to obtain a policy insuring the ownership of that interest.[17] In fact, the ALTA title insurance policies define "Title" based exclusively on the estate or interest held by the insured that is identified in the policy.[18] Almost any interest in real estate may qualify for the issuance of a title insurance policy, such as a fee simple estate, life estate, leasehold estate, the interest of a purchaser under a land contract or contract for deed, an easement, mortgage or deed of trust, or an option (in those states in which an option right is considered to be an interest in land). The policy insures the identified estate in the real property. The policy explicitly or implicitly references in Schedule A the instrument by which that interest was conveyed to the insured.

Conversely, a title insurer rarely if ever issues a policy in favor of a person who does not hold a recognized estate or interest in the real estate. Some state laws may prohibit the issuance of policies to persons not having an insurable interest in the property. See §7.1 concerning insurable interests in real estate. Some forms of the non-imputation endorsement give an assurance to a shareholder, partner or member of the entity that owns the real estate. However, the non-imputation endorsement is issued in conjunction with a policy insuring ownership of that real property.

The legal system in the United States provides a stable footing for the insuring of titles to real estate, particularly in contrast to certain other countries and regions. The certainty of the vesting of real estate titles allows Americans to easily transfer property, and to obtain capital through loans secured by real estate, not mere personal credit. This highly reliable land transfer system gives the United States an advantage over much of the rest of the world, and has been a large factor in the country's economic growth, as economists have observed.[19] The American situation stems from the

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when it has been so far perfected that it cannot be taken away by statute."

[14] See, for example, *In Re Schmidt's Estate*, 134 Wash. 525, 236 P. 274 (Wash. 1925); and *Matthews v. Goodenough*, 206 Ala. 229, 89 So. 708 (Ala. 1921).

[15] *J & M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493, 766 A.2d 1110 (N.J. 2001).

[16] See, for example, *Real Estate Mortgage Network, Inc. v. Squillante*, 184 Conn.App. 356, 194 A.3d 1262 (2018).

[17] As one court noted, "[t]he law does not recognize a title which it will not protect." *J & M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493, 766 A.2d 1110 (N.J. 2001), quoting *Patton on Land Titles*, § 15.2 at p. 760.

[18] The definition of "Title" given in Condition 1(j) of the ALTA policies is "The estate or interest described in Schedule A."

[19] "If you live in the U.S. or U.K., you can take recorded deeds for granted; the notion of enforceable rights to real estate goes back to feudal times. On that foundation of ownership is built a huge edifice of capital that includes trillions

original colonies' adoption of good land records laws a century before independence.[20] American courts have promoted the certainty of real estate titles ever since then. San Francisco's 1906 earthquake and fire burned up the county land records, creating uncertainty in land titles. The United States Supreme Court upheld a law providing for speedy quieting of title, because protection of real estate titles served an essential inherent power of government.[21] In 1980, a federal court ruled that a foreclosure deed could be overturned even after sale to a third party.[22] The Supreme Court struck down that decision because, if the ruling had stood, "[t]he title to every piece of realty purchased at foreclosure would be under a federally created cloud."[23] Thus, the American legal and land record systems have established and preserved certainty in the vesting and transfer of real estate titles.

The coverages of the title insurance policy have been fashioned to allow the insurer to defend its insured's title based on the law protecting the rights of bona fide purchasers for value. Such laws are the primary defenses available to any owner of real estate. It is for this reason that the title insurer will only issue a policy that insures an interest in property that has been recorded in that set of records that, by state law, imparts constructive notice of rights in real property. Also, the ALTA policies contain several exclusions for losses that may be suffered by the insured if it fails to qualify as a bona fide purchaser for value.[24] If the insured's title is attacked, the title insurer defends title based on the various laws protecting the rights of a purchaser who holds superior record title versus a party holding an unrecorded deed or one recorded after the insured's deed.[25] When appropriate, the title insurer will assert a marketable record title act to extinguish or subordinate a claim by the holder of an encumbrance or ownership interest that is barred under such a law.

Because a title insurance policy insures against adverse claims of ownership and

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of dollars in mortgage debt and trillions in real estate equity. Contrast that with the many parts of the world, from Mexico to Russia, where control of land has in the past century lurched from aristocrats to government confiscators to peasant squatters." Kerry A. Dolan, *Waking Dead Capital*, Forbes magazine, May 15, 2001.

[20] See Rufford G. Patton, *Patton on Land Titles*, §3, pp. 8-9 (2d Ed. 1957).

[21] "[I]t is undisputed that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles. …The well-being of every community requires that the title to real estate therein shall be secured, and that there be convenient and certain methods of determining any unsettled questions respecting it." *American Land Co. v. Zeiss*, 219 U.S. 47, 60, 31 S.Ct. 200, 204, 55 L.Ed. 82 (1911).

[22] *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980).

[23] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 1764-5, 128 L.Ed.2d 556 (1994).

[24] Those exclusions include Exclusions 3(a), for matters "created, suffered, assumed or agreed to" by the insured; 3(b), for matters known to the insured before it received its interest, and 3(e), which negates coverage for matters "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the" Title or Insured Mortgage. All exclusions are discussed in Chapter 11. The survey and parties in possession exceptions also negate coverage for matters that, in most states, are binding on a purchaser, based on inquiry notice. See Chapter 12.

[25] See, for example, § 3.4.7.4, discussing how a title insurer can defend title based on race-notice recording laws, and § 3.4.7.5 concerning the defense of the insured's title against a party whose conveyance is outside the record chain of title. See Basye, *Clearing Land Titles*, 3rd Edition, West Publishing Company, for a detailed analysis of title curative laws in all 50 states.

encumbrances on title, a dispute invokes policy coverage only if there is an attack on the property's ownership as insured in the policy.[26] Many disputes about the use of property or improvements on the land do not actually concern ownership of the real property, and therefore do not invoke policy coverage.[27]

Similarly, many kinds of issues can decrease the value of real estate. Only matters that attack title as insured invoke title insurance policy coverage. It is possible to hold flawless title to land having no value or that is not usable, in which case there is no claim payable under a title insurance policy.[28] See § 9.8.3 for a complete discussion of physical conditions that decrease a property's market value but that do not affect its title.

The policy also does not protect the insured against his or her own tortious conduct in obtaining ownership of property or related to its title.[29] The subject of fraudulent or other wrongful procurement of title is fully discussed at §11.2.7. The policy also does not protect against an action to rescind the contract under which the insured obtained title. Such situations include actions for rescission, the imposition of a constructive trust, or to remove the insured from title because of the insured's own tortious conduct.[30]

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[26] In *C & G Farms Inc. v. First American Title Ins. Co.*, 2018 WL 1281847 (Ariz.App. 1 Div.) (unpublished), the insurer owed no duty when the insureds were found to hold good title to the insured property, and no one was attacking that title.

[27] See, for example, *Cherry Hills Farm Court, LLC v. First American Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6682835 (D.Colo. 2019) (not yet released for publication), appeal filed January 6, 2020, in which the court held that the neighbors' demand for money equal to the value of improvements he built on the insured parcel did not affect title. The court said: "There was no dispute over ownership or possession—it was solely a claim to recover the value of the Zobolas' admittedly trespassory improvements. It is linked to the title only in that the improvements were located on the property. But this is no greater a link than, for example, a tort that occurred on the property. A claim does not affect title merely because it involves the property. Regardless of how the state court resolved the set-off counterclaim, Cherry Hills' title to the property would remain unaffected."

[28] "An individual can hold clear title to a parcel of land, although the same parcel is valueless or considered economically unmarketable because of some restriction or regulation on its use. A title insurance policy provides protection against defects in, or liens or encumbrances on, title. Such coverage affords no protection for governmentally imposed impediments on the use of the land or for impairments in the value of the land." *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 649 N.E.2d 1123, 1126-28 (1995) (quoting from *Hocking v. Title Ins. & Trust Co*., 37 Cal.2d 644, 234 P.2d 625 (Cal. 1951)); quoted with approval in *Bear Fritz Land Co. v. Kachemak Bay Title Agency*, 920 P.2d 759 (Ala. 1996). See also *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018)

[29] See *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999), holding that the policy does not protect the insured against a claim of tortious interference with an easement burdening the land. *Sabatino* is further discussed at §§4.5.2 and 11.5. Also, see *Sullivan v. Chicago Title Ins. Co*., 2017 WL 3494216 (D.Mont.) (unpublished), in which the court held that "criminal activities" the insured alleged to have occurred on the property that were somehow related to an easement did not affect title to the land.

[30] See, for example, *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal.App.3d 658, 172 Cal.Rptr. 248 (Cal.App. 2 Dist. 1981) (no duty to defend an "otherwise impeccable" title when sole allegation affecting it was that insured obtained title by fraud on seller).

The title insurance policy also does not protect against the effect of matters that affect or limit the use of the property but that do not affect its title, except to the extent of an endorsement such as a zoning endorsement. See § 11.1 concerning Exclusion 1, which confirms the lack of coverage for issues about the use of the property.

9.1.2 Policy Of Indemnity, Not Guaranty

The title insurance policy is a policy of indemnity as opposed to a guarantee or warranty of title.[31] The policy itself repeatedly and consistently declares that it is in the nature of an indemnification for actual monetary loss incurred by the insured based on covered matters.[32] A few early decisions likened the title insurance policy to a warranty of title.[33] This view, based on a construction of policies no longer in use, is inconsistent with the terms of modern title insurance policies.

The distinction between indemnity and guarantee or warranty is essential in two respects. First, the policy is written to indemnify the insured for losses resulting from a covered matter and no more. Second, the policy is not a representation or warranty that title is in the state that is recited in

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[31] This rule has been stated in, for example: *Rosen v. Nations Title Ins. Co.*, 66 Cal.Rptr.2d 714, 720 (Cal.App.2 Dist. 1997); *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (1974); *Golden Security Thrift & Loan Ass'n v. First American Title Ins. Co.*, 53 Cal.App.4th 250, 61 Cal.Rptr.2d 442 (Cal.App. 4 Dist. 1997); *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975); *Flockhart Foundry Co. v. Fidelity Union Trust Co.*, 102 N.J.L. 405, 132 A. 493 (1926); *Halfmoon Professional Offices v. American Title Ins. Co.*, 652 N.Y.S.2d 390 (N.Y.A.D. 3 Dept. 1997); *Pioneer Nat'l Title Ins. Co. v. Child, Inc.*, 401 A.2d 68 (Del. 1979); *Sattler v. Philadelphia Title Ins. Co.*, 192 Pa.Super. 337, 162 A.2d 22 (1960); *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432 (Tex.App. -Houston 14th Dist. 1994); *Gibraltar Savings Ass'n v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205 (8th Cir. (Minn.) 1990); *Diversified Mortgage Investors v. U.S. Life Title Ins. Co. of N.Y.*, 544 F.2d 571, 574 n. 2 (2nd Cir. 1976); *Goode v. Federal Title and Ins. Corp.*, 162 So.2d 269 (Fla.App. 1964) (quoting Annotation, Measure, extent, or amount of recovery on policy of title insurance, 60 A.L.R.2d 972, 975-76); and *Grunberger v. Iseson*, 75 A.D.2d 329, 331, 429 N.Y.S.2d 209, 210 (1980).

[32] The 2006 ALTA policies begin with the statement that the insurer "insures, as of Date of Policy … against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of" the enumerated Covered Risks. The Covered Risks are not guarantees, but statements of the conditions under which the duty to indemnify will arise, which is why they are phrased in the negative. Conditions 8 of the 2006 ALTA policies (Conditions & Stipulations 7 of the 1992 ALTA policies), which explains how loss is calculated, begins with this statement: "This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy."

[33] *Empire Development Co. v. Title Guarantee & Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918); *Ehmer v. Title Guarantee & Trust Co.*, 156 N.Y. 10, 50 N.E. 420 (1898); *Flockhart Foundry Co. v. Fidelity Union Trust Co.*, 102 N.J.L. 405, 132 A. 493 (1926) ("A contract of title insurance being one of indemnity, it must closely resemble a covenant of seizin in a deed, and, under such a covenant, where title fails to a part of the lands, the measure of damages is the value of the lands to which title failed, with interest."); *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981); *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*, 225 F.Supp. 287 (W.D.Mo. 1964), reversed by 361 F.2d 764 (8th Cir. 1966). *Empire Development* and *Flockhart* are the two cases most commonly cited for the warranty analogy.

the policy.

An insured sometimes suggests that a title insurance policy is a warranty or representation of the state of title to attempt to steer the insurer into selecting a particular option to resolve the claim. An insured may assert that the insurer is required to make title to be in the condition as insured. However, the policy gives the insurer numerous options in resolving a claim, in recognition that some ownership problems are insoluble or cannot be resolved in the insured's favor, and others could only be solved by paying the adverse party a ransom price. Those options are stated in §3.0. The insurer is not obligated to pay a ransom price to a third party in order to make title to be as insured.[34] The insurer also is not required to clear the insured's title by litigation, forsaking the option to pay the insured the diminution in value caused by the title issue.[35]

An insured may also use the warranty analogy to argue that the failure to except a title defect is a breach of the policy, the exclusive remedy for which is payment to the insured rather than the curing of title. The lack of an exclusion in the policy is not a breach of contract, however. One court rejected the insured's insistence that the insurer's only option was to pay diminution, because that interpretation would erase the insurer's right to clear title:

> We conclude that the latter view of what constitutes a "breach"--that the insurer is not immediately in breach simply because title is defective on the day the policy is issued--is more in line with both title insurance law and the standard form title insurance policy that we have before us. As we have observed, a title insurer does not guarantee the state of the title. Instead, a title insurance policy is a contract of indemnity. The view that a title insurer is in breach simply because there are defects in the title at the time the policy is issued would turn the title insurer into the guarantor of the grantee's title.[36]

Finally, it has been argued that the policy guarantees title, and any defect or encumbrance must be compensated even if there is no evidence that the insured has suffered loss as a result. Modern courts reject this argument, because it would relieve the insured of the duty to prove a loss.[37]

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[34] In *Hillsboro Cove, Inc. v. Archibald*, 322 So.2d 585 (Fla.App. 1975), the insured paid $50,000 to get title to a 30-foot strip of land, then tendered the bill to the insurer. The court held that the insurer owed only the true value of the land, which was $6,000.

[35] *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999) (insurer may elect to pay diminution rather than defend insured's title).

[36] *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996). The same analysis was used in *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916 (S.C.App. 1994), in which the court held that the insurer had the right to clear title at its option and, having done so, was not obligated to also pay diminution.

[37] In *Sattler v. Philadelphia Title Ins. Co.*, 192 Pa. Super. 337, 162 A.2d 22 (1960), there was an undisclosed lien on the property, but no evidence that it would ever be enforced before it outlawed. The court said: "A title insurance policy is a contract of indemnity and not of guaranty. Unless and until a loss occurs, there is no liability." It ruled that the insured was not damaged unless and until the lien was enforced. Also see *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999), in which the title defect was asserted by the insured in a lawsuit

This iteration of the guaranty theory would also render other policy provisions meaningless, in certain circumstances. For example, under the final determination provision, when there is litigation about the title defect, there is no loss payable until that lawsuit is concluded. The final determination provision will not be short-circuited by the warranty or guarantee analogy.[38] See §3.4.5 for a full discussion of the final determination clause. Also, the insured may not do an end run on the no-loss exclusion by asserting that the policy is a guaranty. For example, when the policy mistakenly included some land that the seller did not own and the insured submitted no credible evidence of the land's value, the insurer was found not to owe a loss payment.[39]

Lenders have also asserted the warranty analogy in order to try to force insurers to pay liens before loss has been established. Most courts agree that there are three conditions to loss under a loan policy, however: a covered defect, default on the loan, and diminution in the lender's security in the property. See §3.2.4 for a complete discussion of the defect-default-diminution analysis of loss under a loan policy. If the insurer paid the lender the amount of an undisclosed lien but the lender later recovered the full debt from the collateral, the lender would be unjustly enriched by the insurer's payment. Also, if the lien of the insured mortgage is defended against the adverse claim or lien, the lender suffers no reduction in security. Therefore, the strong majority of courts have enforced the rule that the insurer is not obligated to pay an insured lender before the lender proves that it has suffered a loss.[40]A minority of courts have adopted the warranty view that the insured lender suffers a loss as of the policy date, and a duty to "indemnify" exists once the defect is known and quantified, without proof that the lender has suffered a loss.[41]

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he filed, but his title was not attacked by anyone else. The court said: "To trigger the duty to indemnify, the insured must have a claim asserted against the title by a third party because an 'indemnity is a … collateral promise to make good a loss or injury suffered by a policyholder in consequence of the act of a third party.' Burke, supra at § 2.1.1 at 2:4-2:5. In the case herein, we find no loss was actually sustained by the plaintiff." 134 Ohio App.3d. at 614, 731 N.E.2d at 1168.

[38] *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990).

[39] *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash.App.Div. 1) (unpublished).

[40] "Another distinguishing characteristic of a contract to indemnify is that the loss must be actual; the mere existence of a defect covered by the policy in and of itself is not sufficient to justify recovery." *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990). See, for example, *Green v. Evesham Corp.*, 179 N.J.Super 105, 430 A.2d 944 (App.Div. 1981); and *Securities Service Inc. v. Transamerica Title Ins. Co.*, 20 Wash.App. 664, 583 P.2d 1217 (1978); *Title & Trust Co. of Fla. v. Parker*, 468 So.2d 520, 523 (Fla.Dist.Ct.App.1985); *Farrell v. Inter-County Title Guar. & Mortgage Co.*, 213 So.2d 518, 521 (Fla. Dist. Ct. App.1968); and *Goode v. Federal Title and Ins. Corp.*, 162 So.2d 269, 270 (Fla.Dist.Ct.App.1964).

[41] In *Bluff Ventures Limited Partnership v. Chicago Title Ins. Co.*, 950 F. 2d 139 (4th Cir. 1991), there was a judgment lien on property purchased at foreclosure sale. The insurer denied the claim because the claimant was not the named insured. The claimant then settled the judgment and sued the insurer. The court found that the claimant was an insured, and that it had fixed the "loss" as the settlement amount. The insurer argued that no loss would be suffered until the judgment was enforced. The insurer pointed to the "indemnity contract" language in the policy as a basis for distinguishing *Title Ins. Co. v. Industrial Bank of Richmond, Inc.*, 156 Va. 322, 157 S.E. 710 (1931), which had ruled that a lender need not prove a loss of security. The court adopted *Industrial Bank*. "The principal issue on appeal is whether Walde, Bluff Venture's predecessor in interest, suffered a loss covered by Chicago Title's policy. In Title Insurance Co. of Richmond v. Industrial Bank of Richmond, a case indistinguishable from the one at hand, the Supreme

The warranty analogy is also used to argue that the insurer is liable for any inaccuracy or misstatement of the condition of title in a commitment or policy. The insurer's position is that the policy is strictly a contract of insurance, and that the insurer's sole duty on breach is to indemnify the insured. Certain risks are taken as casualty risks. Insurers argue vehemently that it is their privilege to assume a risk, even if the result is that a particular matter is not disclosed in the policy or commitment. However, several cases held that the insurer could be liable for misrepresentations contained in the title insurance commitment.[42] An entire body of law has developed from these cases on the question of whether or not the policy contains representations for which the insurer may be liable in tort if proven untrue or unreliable. Again, by its terms, the policy makes clear that it is an indemnity contract. Whenever a case suggests that a particular phrase in a policy or endorsement might be considered a representation rather than an agreement to indemnify, the industry retires that language.[43] The so-called "duty to search" is the subject of Chapter 15.

9.1.3 Rules Of Policy Construction

In most respects, the title insurance policy is construed in the same manner as are all insurance policies.[44] The following principles are applicable in most jurisdictions. States vary somewhat in the gloss they put on rules of contract interpretation, so local law must always be consulted.

Court of Virginia, quoting from a case involving a purchase, held that '[t]he plaintiff's loss occurred at the time it, relying on the policy, made its purchase, and is not measured by what it might realize at some future time under other conditions.' 156 Va. 322, 334 (1931). Chicago Title argues that the contractual language mandates a different result than the Virginia Supreme Court reached in Industrial Bank. We do not agree."

[42] See *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1985).

[43] See the discussion of *Alliance Mortgage Co. v. Rothwell*, 32 Cal.Rptr.2d 592 (Cal.App. 1 Dist. 1994) in §15.12. In that case, the court suggested that an assurance about "any incorrectness in the following assurance" was "a guarantee, not merely a promise to indemnify, as in the conventional title policy." As a result of the *Rothwell* decision, numerous endorsement forms were altered by the California Land Title Association and American Land Title Association. *Rothwell* has since been mooted by statutory changes and case law. In *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished), for example, the insured cited *Rothwell* to support the argument that title insurance commitments made representations of fact. The court responded that the commitments "did not constitute representations, or conceal anything, about liens or clouds on title."

[44] "Title insurance policies are subject to the same rules of construction that apply to other types of insurance policies." *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990). See also *American Sav. & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. 1986); *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981); *Marandino v. Lawyers Title Ins. Corp.*, 156 Va. 696, 159 S.E. 181 (1931); *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976); *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103, 1107 (8th Cir.1980); *Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764, 768 (8th Cir.1966); *Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471, 479, 178 A.2d 1, 5 (1962); *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished); 9 Appleman, Insurance Law and Practice §5201 (1981).

9.1.3.1 Insurance Contract Interpretation Principles

There are a number of rules that have been developed for the interpretation of insurance contracts. A complete listing of those rules, and the authority for them, is beyond the scope of this book, and the reader should consult a treatise that provides a comprehensive review of those rules.[45]

Most states agree that, because a title insurance policy is a contract, an insurer does not assume a fiduciary duty to an insured by issuing an insurance contract to him or her or in the handling of a policy claim.[46]

A commonly-accepted principle is that an ambiguity in the insurance contract is to be construed against the insurer, because the insurance company drafted the policy language.[47] This is

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[45] One excellent resource is Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, Thomson Reuters.

[46] Courts agree that the mere issuance of an insurance contract does not impose on the insurer a fiduciary duty toward the insured. *Time Ins. Co., Inc. v. Burger*, 712 So.2d 389, 391 (Fla.1998) ("unlike the fiduciary relationship existent in a third-party claim, the relationship between the [insured and insurer] is that of debtor and creditor"). *Time Insurance* was quoted and adopted in the title insurance decision of *Kahama VI, LLC v. HJH, LLC*, 2013 WL 5177843 (M.D.Fla. 2016) (unpublished). In *Estate of Myrman v. U.S. Bank, N.A.*, 2016 WL 3264120 (Ariz.App. 1 Div.) (unpublished), the court held that an insurance company does not owe a fiduciary duty to an insured. In *Schwartz v. Stewart Title Guar. Co*., 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999), the court held that an insurer in Ohio does not have a fiduciary duty to an insured. See also *In re Johnson*, 292 B.R. 821 (E.D.Pa.Bankr.2003); *Contawe v. Crescent Heights of Am. Inc*., 2004 U.S. Dist. LEXIS 20344 (E.D.Pa. 2004); and *Davis v. Lawyers Title Ins. Corp.*, 2007 WL 782158 (N.D. Ohio 2007) (unpublished). A title insurer owes no duty, fiduciary or otherwise, to a borrower, after having issued a policy to the lender. *East Coast Athletic Club, Inc. v. Chicago Title Ins. Co*., 39 A.D.3d 461, 833 N.Y.S.2d 585, 2007 N.Y. Slip Op. 02878 (N.Y.A.D. 2 Dept. 2007). A title insurer does not have a fiduciary duty toward the insured to clear title. *Pruitt v. Colonial Mortgage Co.*, 548 So .2d 1039 (Ala. 1989). A title insurer does not have a fiduciary duty to accurately report the state of title. *Barstad v. Stewart Title Guar. Co.*, 145 Wash.2d 528, 39 P.3d 984 (Wash. 2002); *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982); *Williams v. Land Title Co. of Dallas*, 1997 WL 196345 (Tex.App.-Dallas) (unpublished); *Park v. First American Title Ins. Co*., 2011 WL 1991651 (Cal.App. 4 Dist.) (unpublished); *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 357 Utah Adv.Rep. 7 (1998); *Eller Media Co. v. DGE, Ltd.*, 2004 WL 2002449, 2004 Ohio 4748 (Ohio App. 8 Dist. 2004) (unpublished); *Fogg v. Fidelity Nat'l Title Ins. Co*., 89 A.3d 510 (D.C.App. 2014). See §15.12 for a complete state-by-state analysis of such claims. Also, an insurer does not owe a fiduciary duty to an insured to monitor or control an independent policy-issuing agency. In *Faith Assembly v. Titledge of New York Abstract, LLC*, 106 A.D.3d 47, 961 N.Y.S.2d 542 (N.Y.A.D. 2 Dept. 2013), a title agency owner stole money that was being held under a construction escrow for renovation of a church. The customer sued the title insurer. The court ruled on a motion to dismiss that the insurer had no fiduciary duty to detect or protect against the theft. Further, courts generally agree that an insurance company does not owe a fiduciary duty to an insured in the handling of a policy claim. In *Johnsen and Allphin Properties, LLC v. First American Title Ins. Co.*, 2016 WL 6459579 (D. Utah 2016) (unpublished), the court held that an insurer does not have a fiduciary duty to the insured in settling a policy claim. In *Security Title Guar. Corp. of Baltimore v. McDill Columbus Corp*., 543 So.2d 852 (Fla.App. 1989), when the insured and insurer jointly sought to recoup their losses after the insurer paid the claim, the insurer was found not to have a fiduciary duty to disregard its own interest and agree to a settlement that only benefited the insured. However, an insurer can assume a fiduciary duty by entering into an overreaching agreement with the insured in resolving a claim. For example, in *Matison v. Transamerica Title Ins. Co.*, 845 F.2d 867 (9th Cir. (Cal.) 1988), when the insurer settled the part of a lawsuit affecting title in exchange for the insured's agreement to repay the insurer by diligently pursuing non-title claims in the same lawsuit, the court held that the agreement violated the insurer's "duty of 'a fiduciary nature' not to benefit at the expense of its insured."

[47] *Santos v. Sinclair*, 884 P.2d 941 (Wash.App. Div. 2 1994); *Manchester Fund, Ltd. v. First American Title Ins. Co.*, 332 N.J.Super. 336, 753 A.2d 740 (1999). In *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998),

known as the contra proferentem doctrine. One commentator notes that, "[b]ecause in the vast majority of cases it is undisputed that the insurance company drafted and prepared the policy form, the contra proferentem rule has been automatically applied against insurers in thousands of reported decisions."[48] The drafter rule is broader than insurance; it is a basic rule for the construction of any contract. As such, the contract is sometimes not construed against the drafter when the other party is sophisticated and has negotiating power.[49]

The premise of the drafter rule, that the insurer that issued the policy wrote its language, is true for other insurers but not for title insurance policies. The policies in use today are all derivatives of a policy form written exclusively by customer life insurance company lawyers in 1928, known as the Life Insurance Company or LIC policy. Then, in 1929, a special committee of the American Title Association trade association produced a loan policy for general use in all states that was a variation on the LIC policy. No one insurer drafted the 1929 ATA policy. See §9.1.3.4, *Insurer As Drafter Rule As Applied To Title Insurance*, for a detailed description of the history of the drafting of the title insurance policies.

The following is a recitation of some of the rules of construction that courts have adopted, particularly as they have been applied to title insurance policies.

An insured is obligated to read the policy and is bound by its terms, and an unsophisticated individual insured is not excused from reading the policy, or from being bound by its terms if he or she elects not to read the contract.[50] The overall goal in interpreting an insurance policy, as with any contract, is to give effect to the expectations of the parties.[51] The policy is to be read "according to

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reh.den., the court said: "A policy is ambiguous only if it is not 'plain to a person of ordinary intelligence and understanding.' [citation omitted] 'A contract may be ambiguous because it is unclear or omits terms or ... 'if the terms used to express the intention of the parties may be understood to have two or more plausible meanings." [citation omitted] 'However, policy terms are not necessarily ambiguous just because one party seeks to endow them with a different interpretation according to his or her own interests.' … Rather, the other interpretation proposed must be plausible and reasonable in light of the language used."

[48] Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123, 1130 (Summer 1998).

[49] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, pp. 6-94 to 6-95, Thomson Reuters.

[50] *Safe Auto Ins. Co. v. Enterprise Leasing Co. of Indianapolis, Inc.*, 889 N.E.2d 392 (Ind.App. 2008); *Pike v. Conestoga Title Ins. Co*., 44 N.E.3d 787 (Ind.App. 2015).

[51] *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished); *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 530 F.Supp. 1110, 1118 (D.D.C.1982), aff'd in relevant part and rev'd in part, 743 F.2d 932 (D.C.Cir.1984); quoted with approval in *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990). In *Amfac Inc. v. Waikiki Beachcomber Investment Co.*, 839 P.2d 10 (Haw. 1992), the court stated the rule this way: "Where the language of a contract is 'susceptible of two constructions, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not likely enter into, the interpretation which makes a fair, rational and probable contract must be preferred.'" The rules of construction on insurance contracts are explained and well annotated with non-title insurance decisions in Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123 (Summer 1998).

its plain and ordinary meaning."[52] The "words in an insurance policy are to be interpreted as a layperson would interpret them, in their 'ordinary and popular sense.'"[53] Strained or absurd interpretations will not be adopted.[54] The entire policy is read in order to discern the intent and meaning of each provision.[55] Policies "should not be given interpretations that would render some portions superfluous," if possible.[56]

Insurance policies are contracts, and a court determines their interpretation as a matter of law.[57] The court may not resort to any fact outside the text of the policy in order to determine what it means.[58] Likewise, expert witness testimony on the meaning or interpretation of the policy is irrelevant if the court or trier of fact can establish a term's plain and ordinary meaning, but may be

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[52] *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998), reh.den. The Utah court approved the following rule of construction from *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272 (Utah 1993): "In sum, 'if a policy is not ambiguous, no presumption in favor of the insured arises and the policy language is construed according to its usual and ordinary meaning.'" "When 'contractual language is clear and explicit, it governs.' … ." *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. (Cal.)) (unpublished).

[53] *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d 1154, 286 Cal.Rptr. 146 (Cal.App. 3 Dist. 1991). In *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co.*, 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), the court applied North Carolina rules of policy interpretation, including the rule that terms that are not defined in the policy are not "technical terms and thus must be given a meaning 'consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise.'" In *Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016), the court said that policy terms must be given their "usual and common meaning" and "read as a layman would read [them,] not as [they] might be analyzed by an insurance expert or an attorney."

[54] *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. 522 (W.D. Tenn. 1993) ("[t]he contract should not be given a forced, unnatural or unreasonable construction which would extend or restrict the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion or render the policy nonsensical and ineffective"); *Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016) (where an insurance policy's terms are unambiguous, the Court must apply them regardless of whether the carrier or the insured benefits).

[55] In *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990), the court said: "In attempting to discern the expectations of the parties, Massachusetts courts look at the insurance contract as a whole in order to effectuate its overall purpose. Cullen Enter., Inc., 399 Mass. at 900 n. 27, 507 N.E.2d at 725 n. 27; Ober, 318 Mass. at 31, 60 N.E.2d at 91 (1945); see Lawyers Title Ins. Corp., 361 F.2d at 768. The corollary of this rule is that, whenever possible, each word in an insurance policy should be considered and given some meaning. Feinberg v. Ins. Co. of N. Am., 260 F.2d 523, 527 (1st Cir. 1958)."

[56] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-37, Thomson Reuters.

[57] *Haulers Ins. Co. v. Davenport*, 810 S.E.2d 617, 619 (Ga.App. 2018).

[58] "NatWest argues that the district court erred in interpreting the contract based solely on its written provisions without taking into account the context of the transaction. California law makes clear that the intent of the parties 'is to be inferred, if possible, solely from the written provisions of the contract.' Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263, 1270 (Cal.1993); see also Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 888 (Cal.1995)." *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. Cal.) (unpublished).

considered to explain a term of art or industry custom.[59]

Courts should, "in general, look to dictionary definitions to establish the ordinary and popular meaning of an undefined word in the policy."[60] Further, "unless there is some reason to conclude that a word was used in a technical or legal sense, a non-legal dictionary should be used," and a "standard non-legal dictionary is a more reliable guide to the construction of an insurance contract than definitions found in legal dictionaries."[61] However, a special definition of a term given by state law or in a legal dictionary may be used when "the nature of the policy evidences that such a technical meaning was intended."[62]

The insured has the burden of proof to establish that the title defect comes within the scope of the policy.[63] The burden then shifts to the insurer to prove that a defect within the policy scope is

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[59] *Pacific Indemnity Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App. 3d 1191, 1203, 223 Cal.Rptr. 312 (Cal.App. 2 Dist. 1985) (expert testimony irrelevant if meaning of terms is clear); *Fiserv Solutions, Inc. v. Endurance American Specialty Ins. Co*., 2014 WL 1415339 (E.D.Wis. 2014) (unpublished) (expert testimony useful for understanding terms of art and in explaining the customs and practices to which they relate; lengthy and erudite discussion of expert testimony on insurance matters). Many terms used in a title insurance policy are terms of art or are arcane and precise terms used in the conveyance of real estate interests, which can make expert testimony helpful to the trier of fact. The court may also use state conveyancing law to define a term. See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, Thomson Reuters.

[60] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-6, Thomson Reuters.

[61] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-7, Thomson Reuters. For example, in *Pasha v. Commonwealth Land Title Ins. Co.*, 2014 WL 5510931 (Ky.App.) (unpublished), the court construed an exception for "[a]ny easements or servitudes appearing in the public records." Because the word "servitude" was not defined in the policy and the insureds were consumers, the court turned to Merriam-Webster's Collegiate Dictionary, which provided a definition that the court found to be plain and understandable. It compared that definition to state court decisions that have defined the term, and found the two definitions to be consistent. Also, see the many decisions compiled at §11.2 that have used both lay and legal dictionaries to arrive at definitions for the terms "created," "suffered," "assumed" and "agreed to." In *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209 (10th Cir. (Colo.) 2016), the court quoted Black's Law Dictionary (10th ed. 2014) for its definition 5 of the word "right," which is "The interest, claim, or ownership that one has in tangible or intangible property," and for the word "access," which Black's defines as "A right, opportunity, or ability to enter, approach, pass to and from, or communicate with."

[62] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-7 to 6-8, Thomson Reuters. Many terms used in a title insurance policy are terms of art or are arcane and precise terms used in the conveyance of real estate interests. Courts frequently elect to use a layman's dictionary, a legal dictionary, state conveyancing law or all three to determine the best definition for a term used in a title insurance policy but not defined therein. See *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co.*, 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), which used the Black's Law Dictionary (Second Edition) definition of the term "suffer."

[63] *631 North Broad Street, LP v. Commonwealth Land Title Ins. Co.*, 2018 WL 4051798 (E.D.Pa. 2018) (unpublished), aff'd 2019 WL 3383878, 778 Fed.Appx. 164 (3rd Cir. (Pa.) 2019) (unpublished). In *Rosen v. Nations Title Ins. Co.*, 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714, 97 Cal. Daily Op.Serv. 6444 (Cal.App. 2 Dist. 1997), the court explored the burdens of proof on both insured and insurer: "Insurance policies are written in two parts: an insuring agreement which defines the type of risks being covered, and exclusions, which remove coverage for certain risks which are initially within the insuring clause. Therefore, before considering whether any exclusions apply, a court must

nonetheless excluded or excepted from coverage.[64] The court "will not allow an exclusion to eliminate coverage that is expressly and specifically provided for in the same policy form."[65]

These and other rules exist to assist the court in its goal to construe all of the policy terms together, to discern the parties' intent. If the insurance contract is ambiguous, after the court applies all rules of construction that would produce its plain and intended meaning, "the interpretation that is most favorable to the insured will be adopted."[66] Policy language "should not be held to be ambiguous, however, unless it can be given two alternate *reasonable* interpretations."[67] If the language used in an endorsement conflicts with the terms in the body of the policy, the endorsement controls.[68] If an exclusion controls, "there should be no coverage regardless of the inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions."[69] Also, "[t]ypewritten provisions supersede printed provisions when the two conflict."[70] If "there is no coverage under the terms of the insuring clause, coverage cannot be created based on the exceptions

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examine the coverage provisions to determine whether coverage exists at all. [citation omitted] This rule is significant for two reasons. First, when an occurrence is clearly not within the coverage clause, it does not also have to be specifically excluded. 'Second, although exclusions are construed narrowly and must be proven by the insurer, the burden is on the insured to bring the claim within the basic scope of coverage, and (unlike exclusions) courts will not indulge in a forced construction of the policy's insuring clause to bring a claim with the policy's coverage.' [citation omitted] 'To prevail, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential... .'"

[64] "[P]rovisions limiting or cutting down, or avoiding liability in the coverage made in the policy are construed most strongly against the insurer. …The insurer has the burden to prove that an exclusionary clause applies." *Crossman v. Yacubovich*, 290 S.W.3d 775 (Mo.App.E.D. 2009). "We strictly and narrowly construe insurance policy exclusions." *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 209 P.3d 859 (Wash. 2009). See also *Crawford v. Lawyers Title Ins. Corp*., 296 Ga.App. 459, 675 S.E.2d 232 (Ga.App. 2009) (insurer must prove up policy terms and that exclusion applies); *Boxer v. Commonwealth Land Title Ins. Co.*, 586 N.Y.S.2d 362 (App.Div. 1992); *Rosen v. Nations Title Ins. Co.*, 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714, 97 Cal. Daily Op.Serv. 6444 (Cal.App. 2 Dist. 1997); and *631 North Broad Street*, *LP v. Commonwealth Land Title Ins. Co*., ___ F.Supp.3d ___, 2018 WL 4051798 (E.D.Pa. 2018) (permanent citation not yet available), appeal filed September 21, 2018 (noting that Pennsylvania says that an insurance policy exclusion is enforceable only if it is unambiguous and is "conspicuously located" in the policy).

[65] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, p. 6-48, *Contract Interpretation*, Thomson Reuters.

[66] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-60, Thomson Reuters.

[67] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, pp. 6-61 to 6-62, Thomson Reuters.

[68] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-80, Thomson Reuters.

[69] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, pp. 6-83 to 6-84, Thomson Reuters.

[70] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-86, Thomson Reuters.

or qualifications contained in the exclusions."[71] An exclusion is not rendered ambiguous due to the fact that it is broad enough to encompass both matters within and without of the scope of the covered risks.[72]

An exclusion or exception is not ambiguous if its language is clear and understandable. An exception is "conspicuous, plain and clear" when it is not capable of two or more constructions,[73] and is not "buried in" the insuring provisions.[74] When an exclusion or exception is plain, the insurer is under no duty to advise the insured of the effect of the exclusion or exception.[75] As with a statute, when the policy makes a statement or coverage and then lists exceptions to that statement or coverage, the list of exceptions is considered to be complete and others will not be implied.[76] When a specific provision negating coverage follows a general provision asserting coverage, the specific provision controls.[77]

An exception that *is* capable of two or more reasonable meanings may be found to be ambiguous unless saved by another rule of construction. If it is ambiguous, the exception is given its

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[71] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, p. 6-87, Thomson Reuters. This rule was the key reason why ALTA made the significant revisions to the 2006 policies that replaced exceptions to Exclusions 1 and 2 with Covered Risks 5 through 8, and modified the exclusions for land use laws and eminent domain to negate coverage except for that given in the covered risks. See the extensive discussion of those changes at §11.1.

[72] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6.2, *Contract Interpretation*, pp. 6-91 to 6-92, Thomson Reuters. Exclusion 1 of the 2006 ALTA policies is a good example of an exclusion that describes subjects that are beyond the scope of the covered risks, since land use regulations do not affect the title to real estate.

[73] *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished).

[74] *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. Cal.) (unpublished). See §12.7 for a further discussion of the interpretation of language in an exception.

[75] *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998), reh.den.; *Dalessio v. Williams*, 111 Ohio App.3d 192, 675 N.E.2d 1299 (Ohio App. 9 Dist. 1996), app.den. 77 Ohio St.3d 1481, 673 N.E.2d 142 (1996). "Where an exclusion in a policy is plain, clear and conspicuous, as here, and the insured did not seek clarification of the exclusion after receiving the policy, the insurer is under no duty to advise the insured of the effect of the exclusion on coverage. [citation omitted] Once the exclusion itself was conspicuous, plain, and clear, Fidelity had no further duty to provide NatWest with additional notice." *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. (Cal.)) (unpublished).

[76] "'Under the familiar maxim of expressio unius est exclusio alterius it is well settled that, when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded.' [citation omitted] This canon, based on common patterns of usage and drafting, is equally applicable to the construction of contracts." *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1985).

[77] *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished). Thus, a general assurance against easements affecting the title was negated by a more specific exception for survey matters, removing coverage for a claim of prescriptive easement.

most narrow reasonable construction.[78] Also, when the insurer fails to make a specific exception for an instrument that affects a parcel, a general exception may be found ambiguous, and thus read in a light most favorable to the insured.[79] When more than one party had a right of redemption, an exception for "[r]ights of redemption from foreclosure of mortgage" was found ambiguous because it gave inadequate notice of the IRS's redemption rights. The agent's decision not to use the underwriter's more descriptive exception was found to be evidence that the agent had taken the risk of confusing or misleading the insured.[80]

An insurer is entitled to place reasonable limitations on the coverages provided by the policy.[81] The insured may modify some policy terms on payment of an additional premium.[82] The acceptance of the policy without objection or request for modification is an implicit agreement to the policy's terms and limitations.[83]

9.1.3.2 Adhesion Contract Rule

When one party to a contract has unequal bargaining power, the contract is considered to be one of adhesion.[84] Many insurance contracts are considered adhesion contracts.[85] Once a contract is

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[78] See *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 44 Cal.Rptr.2d 370, 900 P.2d 619, 627 (Cal. 1995) ("[a] policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable"); *Manchester Fund, Ltd. v. First American Title Ins. Co.*, 332 N.J.Super. 336, 753 A.2d 740 (1999).

[79] *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978).

[80] *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990). The insurer was found to have recklessly misrepresented the facts to the proposed insureds by the deliberate use of an exception contrary to the clear form contained in the underwriter's own manual. The agent who prepared the commitment testified that he did not use the underwriter's form because it "would 'only clutter the commitment.'" 570 So.2d at 583.

[81] *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999). In *Logan v. Barretto*, 251 A.D.2d 552, 675 N.Y.S.2d 102, 1998 N.Y. Slip Op. 06379 (A.D. 2 Dept. 1998), the court said:"'[T]he liability of the title insurer to its insured is essentially based on contract law [and] is governed and limited by agreements, terms, conditions and provisions contained in the title insurance policy'" (Citibank v. Commonwealth Land Title Ins. Co., 228 A.D.2d 635, 645 N.Y.S.2d 826, quoting 5A Warren's Weed, New York Real Property, Title Insurance, § 1.03 [6] [4th ed.] at 15)."

[82] *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W. 2d 893 (1984); *Stearns v. Title Ins. & Trust*, 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (1971) ("At additional cost he could have purchased a policy affording extended coverage insuring against risks such as those involved in Corona's claim").

[83] *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.W.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), reh.den., app.den. 189 Ill.2d 661, 731 N.E.2d 765, 246 Ill.Dec. 916 (2000); *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. (Cal.)) (unpublished).

[84] "The name 'contract of adhesion' indicates that the legal transaction is not formulated as a result of the give and take of bargaining where the desires of one party are balanced to those of the other. The customer, by entering the transaction, has to adhere to the terms prescribed by the enterprise and only a very few terms may be open to his determination." *Akin v. Business Title Corp*., 264 Cal.App.2d 153, 70 Cal.Rptr. 287, fn. 4 (1968).

[85] See further references in Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the*

proven to be an adhesion contract, it is policed by the court to remove or restrict terms that are unfair to the weaker party. Some courts have found the title insurance policy to be a contract of adhesion as to members of the general public.[86] Others have not.[87]

9.1.3.3 Reasonable Expectations Doctrine

Some states, notably California, ascribe to the doctrine of reasonable expectations. Others do not, or find it inapplicable to the title insurance policy.[88] The reasonable expectations doctrine

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ALTA Loan Title Policy, 33 Tort & Ins.L.J. 1123 (Summer 1998).

[86] *Hahn v. Alaska Title Guar. Co.*, 557 P.2d 143 (Ala. 1976); *Ticor Title Ins. Co. of Cal. v. American Resources Ltd.*, 859 F. 2d 772 (9th Cir. (Hawai'i) 1988); *Steinle v. Knowles*, 265 Kan. 545, 961 P.2d 1228 (Kan. 1998), rev'g 24 Kan.App.2d 568, 948 P.2d 670 (1997) ("the language of the contract must be construed against Chicago Title because it prepared the contract and its language"; court assumed without deciding that title insurance is adhesion contract because it is insurance). New Jersey has consistently found that the title insurance policy is an adhesion contract. Some references include: *Manchester Fund, Ltd. v. First American Title Ins. Co.*, 332 N.J.Super. 336, 753 A.2d 740 (1999); *Sears Mortgage Corp. v. Rose*, 607 A.2d 1327 (N.J. Super.1992) and *Sylvania v. Stein*, 177 N.J.Super. 117, 425 A.2d 701 (Ch.Div.1980). In *Amidano v. Donnelly*, 615 A.2d 654 (N.J. Super. 1992), the court said: "In recognition of the parties' unequal bargaining power and the title insurer's specialized expertise in its field, New Jersey courts have consistently treated such policies as contracts of adhesion. See Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304, 320-321 (1985); Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 305 (1965)." In *Akin v. Business Title Corp*., 264 Cal.App.2d 153, 70 Cal.Rptr. 287 (1968), the California court found a standard form of escrow instruction to be a contract of adhesion. However, in *Rooz v. Kimmel*, 55 Cal.App.4th 573, 64 Cal.Rptr.2d 177 (Cal.App. 1 Dist. 1997), an indemnity and hold harmless agreement used for accommodation recordings was found not to be an adhesion contract. Thus, not all escrow forms are adhesion contracts, even in California.

[87] "We likewise reject plaintiff's contention that the 'accurate survey' exception should be deemed unenforceable because the title insurance policy represented an adhesion contract. Title insurance policies without exceptions are also available, although at a higher premium. Thus, plaintiff was not without a choice and could have bargained with his seller for the provision of a title insurance policy without exceptions." *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W. 2d 893 (1984). "Secondly, there is no evidence of the factors generally found supporting a court's resort to the principles relating to adhesion contracts. … Appellant purchased a standard coverage policy. There is no evidence that this coverage was offered to him on a "take or leave it" basis. At additional cost he could have purchased a policy affording extended coverage insuring against risks such as those involved in Corona's claim. … The purchase of such extended coverage would have necessitated his obtaining a correct survey, however …, and the boundary dispute would in all likelihood have become known to the insurer." *Stearns v. Title Ins. & Trust*, 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (1971).

[88] The reasonable expectations doctrine was applied to the title insurance policy in *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal.App.3d 917, 941, 122 Cal.Rptr. 470 (1975); *Cale v. Transamerica Title Ins. Co.*, 225 Cal.App.3d 422, 275 Cal.Rptr. 107 (1990); *U.S. Life Title Ins. Co. of Dallas v. Hitsell*, 296 S.E. 2d 760 (Ga. App. 1982) ("where the policy binder referred to the survey plat and the cover letter received with the policy indicated that the survey had been insured, there was the question for the trier of fact of whether a reasonable insured could reasonably expect that the policy coverage extended to survey defects included mathematical shortage of area"); *Ticor Title Ins. Co. of Cal. v. American Resources Ltd.*, 859 F. 2d 772 (9th Cir. (Hawai'i) 1988); *Sandler v. N.J. Realty Title Ins. Co.*, 36 N.J. 471, 478-479, 178 A.2d 1 (1962); *MacBean v. St. Paul Title Ins. Corporation*, 169 N.J.Super. 502, 405 A.2d 405 (App.Div.1979); *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985) ("the reasonable expectation of the insureds [is] that the purpose of requiring a survey is not only to locate the outbound lines of the survey but also to insure its accuracy in the location of those conditions which are shown within the boundaries of the survey"); *Walker Rogge Inc v. Chelsea Title & Guar. Co.*, 562 A.2d 208 (N.J. 1989) (reasonable expectations and tort duty to search); *Herbil Holding Co. v. Commonwealth Land*

applies only if the policy provision at issue is ambiguous.[89] The court in *White v. Western Title Ins. Co.*[90] stated the rule as follows:

> '[A]ny ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and ... if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates.' The purpose of this canon of construction is to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy. Its effect differs, depending on whether the language to be construed is found in a clause providing coverage or in one limiting coverage. 'Whereas coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured ... exclusionary clauses are interpreted narrowly against the insurer.'[91]

Title Ins. Co., 183 A.D.2d 219, 590 N.Y.S.2d 512 (N.Y.A.D. 2 Dept. 1992) (an insured has a "reasonable expectation that he or she would be covered for a problem arising from interests created by instruments the examiners would review during a title search"); and *Manchester Fund, Ltd. v. First American Title Ins. Co.*, 332 N.J.Super. 336, 753 A.2d 740 (1999). In *James v. Chicago Title Ins. Co*., 2014 MT 325, 339 P.3d 420 (Mont. 2014), the Montana Supreme Court acknowledged that that state employs the doctrine, but refused to rewrite the access coverage based on it. The court held that the access rights that the insureds claimed they had "expected" to receive were not reasonable, as well as being considerably different from the rights they got. "Courts will not act to distort policy language in the face of a reasonable interpretation of the policy provision," it said. But see *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996) (Exclusion 3(a) unambiguous, not subject to modification under the doctrine of reasonable expectations); *Farrington v. Commonwealth Land Title Ins. Co.*, 86 Wash.App. 399, 936 P.2d 1157 (1997) (reasonable expectations doctrine not adopted because insured's claimed expectation not reasonable in any event); *Greenberg v. Stewart Title Guar. Co.*, 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992) (rejecting reasonable expectations as basis for duty of accurate search).

[89] See *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished) (court refused to resort to doctrine because exceptions at issue were not ambiguous); *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996) (Exclusion 3(a) unambiguous, not subject to modification under the doctrine of reasonable expectations). In *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W. 2d 893 (1984), a Michigan court ruled that the reasonable expectation doctrine did not apply to a clearly-worded survey exception: "Furthermore, even if this insurance policy represented an adhesion contract over which plaintiff had no power to bargain, we must reject plaintiff's claim that he had a 'reasonable expectation' of coverage, Zurich Ins. Co. v. Rombough, 384 Mich. 228, 233, 180 N.W.2d 775 (1970), in view of the unambiguous and clearly set forth 'accurate survey' exclusion in the policy and the absence of any misrepresentation of the policy to him."

[90] 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1985).

[91] *White* also cited another seminal California case, *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (1975), which applied the reasonable expectations doctrine to title insurance: "In determining what benefits or duties an insurer owes his insured pursuant to a contract of title insurance, the court may not look to the words of the policy alone, but must also consider the reasonable expectations of the public and the insured as to the type of service which the insurance entity holds itself out as ready to offer. [citation omitted] Stated in another fashion, the provisions of the policy, '"must be construed so as to give the insured the protection which he reasonably had a right to expect" [citation omitted]… ." 48 Cal.App. 3d at 941.

The reasonable expectations rule can be used to interpret a policy term, but should not be used to give the insured more coverage than he or she bargained for.

> "[I]f an insured's 'reasonable expectations' contravene the plain meaning of a policy, even ... [the policy's] plain meaning can be overcome." [citation omitted] Still, courts "should not write for the insured a better policy of insurance than the one purchased."[92]

9.1.3.4 Insurer As Drafter Rule As Applied To Title Insurance

The premise that an insurance contract should be construed against the insurer because it drafted the policy does not apply to title insurance policies.[93] Title insurance is a unique line of insurance, as discussed in §9.1. One of its unique aspects is that the modern title insurance policy is the offspring of a policy written by customers, and has been the product of joint drafting that began in 1929.[94]

The first title insurance company was formed in Philadelphia, after an 1868 decision of the Pennsylvania Supreme Court refused to find a lawyer liable for having given an incorrect opinion about title to real estate in Philadelphia, leaving the owner with no recourse.[95] Commonwealth Land Title Insurance Company is the descendant of that first title insurer. After the first insurer was formed, other title insurance companies were formed in a number of states, and were domiciled in

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[92] *Manchester Fund, Ltd. v. First American Title Ins. Co.*, 332 N.J.Super. 336, 753 A.2d 740 (1999).

[93] In *BB Syndication Services, Inc. v. First American Title Ins. Co.*, 780 F.3d 825 (7th Cir. (Wis.) 2015), the court noted that, although a Wisconsin court had previously applied the construed-against-the-drafter rule to a title insurance policy, there is "reason to doubt the application of this rule of contract construction in this context." The court said that the Wisconsin Supreme Court "has suggested various justifications for the rule, but all rely on the assumption that insurance policies are drafted by insurers." The core principle, in Wisconsin and elsewhere, is the view that, as the drafter of the policy, "the insurer is the party best situated to eliminate ambiguity in the policy... ." However, Wisconsin, like other states, also recognizes that the *contra proferentem* ("against the offeror") principle of contract interpretation does not apply to standard form insurance contracts drafted jointly by insurers and their customers. *See Tri City Nat'l Bank v. Fed. Ins. Co.,* 268 Wis.2d 785, 674 N.W.2d 617, 621–22 (Wis.App.2003), stating that a fidelity bond should not be construed against the insurer because it was the product of joint drafting. The Seventh Circuit concluded: "The same is true of title insurance in the construction-loan context. The first standard-form policy—from which the more recent versions are derived—was drafted by *lenders,* and the construction-lending industry has since remained involved in the revision process. *See* Kenneth E. Dzien & Keith Jonathan Turner, *Not All Insurance Policies Are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy,* 33 TORT & INS. L.J. 1123 (1998); Quintin Johnstone, *Title Insurance,* 66 YALE L.J. 492, 504–05 (1957); Christian Ness, Note, *Insurance—Judicial Construction of the Lender's Policy of Title Insurance,* 49 N.C. L. REV. 157, 160–62 (1970)."

[94] See the historical research about the joint drafting of the title insurance policy form by title insurers and customer groups in Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123, 1137 (Summer 1998).

[95] *Watson v. Muirhead*, 57 Pa. 161, 1868 WL 7160 (1868). See a discussion of *Watson* and the genesis of title insurance in Joyce D. Palomar, *Title Insurance Law*, § 1:3; and in Benjamin J. Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance,* in Title News, Volume XXXV, Number 5, May, 1956, at p. 11.

their states of origin. Most companies were based in large cities, such as New York, Chicago, Minneapolis, Detroit, Los Angeles, Houston, Philadelphia, Richmond, Atlanta, Baltimore and Milwaukee. Most of those companies were local. Every insurer drafted its own form of policy.

The policies in use today are all derived from a policy form written exclusively by customer life insurance company lawyers in 1928. In that year, representatives of several life insurers produced the Life Insurance Company Standard Loan Policy, sometimes called the LIC policy. The drafter insurance companies mandated that all title insurers issue that policy form to them.[96] The life insurers wanted to receive the same policy from all insurers in all states, with policy terms that were favorable to the insured. One commentator said this about the LIC policy:

> [T]he original title insurance loan policy form was prepared by four major *lenders* - the very "customers" that would be purchasing insurance on the form - so that the usual "contract of adhesion" reasoning applied in construing other types of insurance policies should have no application to the real estate title insurance loan policy.[97]

The LIC policy created an uproar with title insurers. In the following year, 1929, the American Title Association trade association formed a committee to produce a loan policy for general use in all states. That product was a slight variation on the LIC policy.[98] No one insurer drafted the 1929 ATA policy. Further, that policy was heavily negotiated with customer groups. In addition, since that time, ALTA has promulgated revisions to the loan policy and has developed an owner's policy derived from the loan policy.

The fact that no title insurer may claim rights in the policy language is boldly emphasized by

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[96] "In 1928, representatives of many life insurance companies, including Metropolitan Life Insurance Company, The Prudential Insurance Company of America, The Equitable Life Assurance Society of the United States, John Hancock Mutual Life Insurance Company, and New York Life Insurance Company, drafted and adopted a form of policy, designated the Life Insurance Company Standard Form Loan Policy, or 'the LIC Form.' The insurance companies demanded that the LIC Form be used for all insurance given relative to their mortgage loans." James P. McAndrews, *History of Title Insurance and ALTA Forms*, GPSolo eReport, Volume 1, No. 8 (March, 2012), found at http://www.americanbar.org/publications/gpsolo_ereport/2012/march_2012/title_insurance_alta_forms.html. See also, Jeremy Yohe, *The Juice Behind the Squeeze: Evolution of Standardized Title Policies Lubricate the Real Estate Transfer Process*, Title News, Volume 88, Number 7, p. 10 (December, 2009).

[97] Jones & Messall, *Mechanic's Lien Title Insurance Coverage*, 16 Real Estate L. J. 291, 307 (1988), citing Ness, *Insurance--Judicial Construction of the Lender's Policy of Title Insurance*, 49 N.C.L. Rev. 157 (1970). The Ness article recites the history of the ALTA loan policy forms, giving a strong argument that the form should be construed against the lender as drafter. The author recounts the history of the LIC policy and subsequent American Title Association and ALTA policy forms.

[98] "In 1929, after the terms and provisions were considered at joint meetings of representatives of the title companies and of the counsel for the life insurance companies, the form of policy known as the American Title Association Standard Loan Policy, or 'ATA Loan Policy,' was approved by the ATA. Subsequently, in 1943, after a number of conferences, the ATA adopted the ATA Loan Policy–Revised and the ATA Loan Policy–Additional Coverage." James P. McAndrews, *History of Title Insurance and ALTA Forms*, GPSolo eReport, Volume 1, No. 8 (March, 2012). See also, Jeremy Yohe, *The Juice Behind the Squeeze: Evolution of Standardized Title Policies Lubricate the Real Estate Transfer Process*, Title News, Volume 88, Number 7, p. 10 (December, 2009).

the fact that the ALTA policy forms are copyrighted by American Land Title Association, and may be used only by its members and with its permission.[99]

The influence of governmental agencies, private lenders and real estate attorneys on the title insurance policy remains strong. The ALTA policies are revised only rarely and in small increments.[100] Most of the revisions that have occurred have been forced on the insurers by their customer groups.[101] Customer groups, including the federal government, regularly exercise veto power over changes that insurers would like to make. Loan and life insurer counsel have long had their own committees of the American Land Title Association.[102] These committees and their constituents have had significant influence on the standard terms of the ALTA policy forms, sometimes with disastrous results for the title insurer.[103] FNMA and FHLMC also have heavy influence on the terms of the policy. Large governmental bodies that buy title insurance, and large private industry customer groups, require policies as promulgated by these bodies.

The ALTA promulgated an owner's policy for the first time in 1959.[104] The revisions to that

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[99] The ALTA policy forms page on its website says: "This site provides access to the ALTA® collection of forms and related documents to ALTA Members, Licensees, and Subscribers. As always, the forms have been developed by the ALTA Forms Committee and approved by the ALTA Board. An opportunity to review and comment is extended to ALTA Members and industry customers before final publication. The forms, in general, are made available for customer convenience. The parties are free in each case to agree to different terms, and the use of these forms is voluntary, unless required by law. See more at: http://www.alta.org/forms/index.cfm#sthash.bAScUsvu.dpuf." Found at http://www.alta.org/forms/index.cfm. Each ALTA policy form prominently displays that copyright claim: "Copyright 2006-2009 American Land Title Association. All rights reserved. The use of this Form is restricted to ALTA licensees and ALTA members in good standing as of the date of use. All other uses are prohibited. Reprinted under license from the American Land Title Association."

[100] "The policies were revised in 1962, 1969, 1970, 1984, 1987, 1988, 1990, 1992, 1997, 2001, 2006 and 2007." James P. McAndrews, *History of Title Insurance and ALTA Forms*, GPSolo eReport, Volume 1, No. 8 (March, 2012). The author omitted the fact that ALTA adopted a new loan policy in 1946. See the recitation of successive policy forms in Ray E. Sweat, *Mechanics' and Materialmen's Lien Coverage*, in *Title News*, Volume 53, Number 1 (January 1974), p. 24.

[101] The primary impetus for the policy revisions in 1984, 1987, 1988, 1990, 1992 and 2006 were to appease the concerns of customers by broadening coverages and expanding definitions of terms. See §9.12, *Scope Of Policy Definition Of "Public Records" And Recorded Instruments That Do Not Affect Title*; §9.9.2, *Notice Of Enforcement Coverages*; §9.9.3, *Creditors' Rights Coverage*; and §11.1, *Land Use Laws, Police Power And Eminent Domain*. Only once in modern times did ALTA modify a policy coverage without permitting customer groups to weigh in in advance, and that decision sparked considerable outrage from customer groups even though the removal of "creditor's rights" coverage was recognized as being essential for the very survival and solvency of the insurers. See §9.9.3, *Creditors' Rights Coverage*.

[102] See Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123, 1143 (Summer 1998).

[103] Note the ambiguity in the governmental regulation exclusion as found by the court in *New England Federal Credit Union v. Stewart Title Guar. Co.*, 171 Vt. 326, 765 A.2d 450 (Vt. 2000), discussed at §11.1. The language that the court found ambiguous had been inserted in the policy at the insistence of lender groups, not insurers.

[104] "It was not until 1958 that consideration was given to having a form of owner's policy insuring marketability. In 1959, after many more conferences between the representatives of the title industry and the life insurance industry, two

policy have always been in tandem with changes to the loan policy form, and are made using the same procedures. Lender groups also buy many owner's policies, and have exercised significant influence as to their terms also.

Also, following the pattern laid down by the life insurers in developing the LIC policy, the same ALTA policy forms are used by all insurers in all states except three. The insurance departments of two states, Texas and New Mexico, promulgate their own policies, which all insurers are required to use in the insuring of land titles in those states. The Title Guaranty division of the Iowa Finance Authority, similarly, has developed its own promulgated title guaranty forms.[105] In California, the California Land Title Association developed the CLTA standard coverage owner's policy, which is used verbatim by all insurers in that state when appropriate. Individual insurers are not permitted to modify any of these policy forms and yet have them retain the names of the promulgating bodies.[106]

The history of the ALTA and CLTA title insurance policy forms, and the promulgated policy forms that are derived from them, convincingly shows that the policies were not drafted by any one title insurer, and that they are the product of decades of joint drafting by the insurers who use them and the customers who buy them. The contra proferentem doctrine should not apply to cause a court to construe the policy against a title insurer as if it were the drafter. Although some courts have reflexively applied the contra proferentem doctrine to the title insurance policy, the only decisions that have considered the basis for the use of that doctrine have concluded either that the policies are the product of joint drafting, or that the insureds were sophisticated policyholders who were not entitled to the benefit of that doctrine.[107] No court that has considered the drafting history of the title insurance policies has ruled to the contrary.

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forms of owner's policy were presented for approval and were ultimately adopted—one that insured marketability and one that did not." James P. McAndrews, *History of Title Insurance and ALTA Forms*, GPSolo eReport, Volume 1, No. 8 (March, 2012).

[105] See http://www.iowafinanceauthority.gov/TitleGuaranty/Index. The Title Guaranty division is enabled by Iowa Code Chapter 16 and administered under 265 Iowa Administrative Code Chapter 9.

[106] The CLTA forms may be found at http://www.clta.org/publications/publicationsIndex.html.

[107] In *BB Syndication Services, Inc. v. First American Title Ins. Co.*, 780 F.3d 825 (7th Cir. (Wis.) 2015), the court noted that, although a Wisconsin court had previously applied the construed-against-the-drafter rule to a title insurance policy, there is "reason to doubt the application of this rule of contract construction in this context." The court said that the Wisconsin Supreme Court "has suggested various justifications for the rule, but all rely on the assumption that insurance policies are drafted by insurers." The core principle, in Wisconsin and elsewhere, is the view that, as the drafter of the policy, "the insurer is the party best situated to eliminate ambiguity in the policy... ." However, Wisconsin, like other states, also recognizes that the *contra proferentem* ("against the offeror") principle of contract interpretation does not apply to standard form insurance contracts drafted jointly by insurers and their customers. *See Tri City Nat'l Bank v. Fed. Ins. Co.,* 268 Wis.2d 785, 674 N.W.2d 617, 621–22 (Wis.App.2003), stating that a fidelity bond should not be construed against the insurer because it was the product of joint drafting. The Seventh Circuit concluded: "The same is true of title insurance in the construction-loan context. The first standard-form policy—from which the more recent versions are derived—was drafted by *lenders,* and the construction-lending industry has since remained involved in the revision process. As to the sophisticated policyholder exception to the contra proferentem rule, see *Amfac Inc. v. Waikiki Beachcomber Investment Co.*, 839 P.2d 10 (Haw. 1992), *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990) and other decisions discussed below, this section.

In addition to the fact that no one title insurer has written these policy forms, the insureds in many individual transactions are sophisticated insureds. Governmental bodies, lenders, developers and life insurers obtain modifications to the standard forms by exerting their ability to control the placement of thousands or tens of thousands of policies each year. Those entities and other sophisticated parties have an excellent knowledge of real estate and insurance, and are often represented by attorneys who are sophisticated and have the power to influence policy drafting.

Sophisticated insureds are not entitled to the presumption that the contract should be construed in their favor.[108] This is known as the "sophisticated policyholder" exception to the contra proferentem doctrine.[109] The sophisticated policyholder exception applies to institutional lenders and equity investors.[110]

Similarly, an endorsement or exception is sometimes specially negotiated between the insurer and the insured as part of a transaction. Whenever the insured or its attorney has written or heavily negotiated an exception or coverage, the insured is the drafter, and any ambiguity is construed against the insured as drafter.[111]

The sophisticated policyholder exception has been applied in several title insurance cases to negate the contra proferentem doctrine.[112] It was used against a title agency as the insured under an

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[108] In *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990), the court said: "The rationale behind interpreting ambiguities against the insurer would not seem to apply as strongly when the transaction is between two parties of equal sophistication and equal bargaining power," citing numerous authorities, including *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co*., 682 F.2d 12, 21 n. 6 (1st Cir.1982), cert. denied, 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d 500 (1983); and *First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co*., 803 F.2d 1308 (3d Cir.1986).

[109] See, generally, Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123, 1130 (Summer 1998) and references collected therein; Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 Drake L.Rev. 807 (1993); and C. Caton, et al., *The Rules of Insurance Policy Construction and the Myth of the Sophisticated Insured*, 385 P.I./Lit. 9 (1990).

[110] In *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990), a bank was found to be a sophisticated policyholder and thus not entitled to have a claimed ambiguity in the policy construed against the insurer.

[111] See *Amfac Inc. v. Waikiki Beachcomber Investment Co.*, 839 P.2d 10 (Haw. 1992), and *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990), discussed below.

[112] In *Amfac Inc. v. Waikiki Beachcomber Investment Co.*, 839 P.2d 10 (Haw. 1992), the court refused to interpret a letter agreement, made in connection with the insurance over an easement, against the insurer largely because the insured was a sophisticated insured. The insured's sophistication was shown in part by the fact that the insured negotiated the terms of the letter agreement heavily. "Both parties alleged that the other side was responsible for drafting the language of the second condition of the Letter Agreement and Therefore that any ambiguities in the language should be construed against the drafter. However, the fundamental principle that any ambiguities in a contract should be interpreted most strongly against the party who has drafted the language is applicable only where a contract is open to more than one reasonable construction. … When the contract has been negotiated between two parties of equal sophistication and equal bargaining power, the rule of interpreting ambiguities against the drafter has been held inapplicable."

Also, in *Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co.*, 706 F. Supp. 477 (S.D. Miss. 1988), the court said that the insurer had no duty to tell a sophisticated insured what the policy exceptions meant: "Willow Ridge appeared to take the position at trial that Stewart Title breached its duty to Willow Ridge by failing to specifically inform Willow Ridge that if it lost title through foreclosure, the coverage of the policy would cease. In the court's opinion, a errors and omissions policy.[113] A variant of the doctrine was employed to defeat an indemnitor's claim that he was tricked into giving the cash collateral used to insure over the lien on the property he sold.[114]

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sophisticated business enterprise such as Willow Ridge, represented by counsel, did not need to be told to read its policy. And had it read the policy, surely it should have realized the implications of the foreclosure as concerned coverage."

Similarly, in *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990), the court found that a bank was a sophisticated insured, and thus the claimed ambiguity between the final determination clause and the measure of loss paragraph would not be construed against the insurer. The court said: "the sophistication of the Bank and the fact that it negotiated specific terms of the policy lead us to believe that the general rule of interpreting ambiguities in favor of the insured does not apply with the same force here and therefore does not compel us to adopt the Bank's interpretation."

The business savvy of an owner insured, plus his overreaching interpretation of the policy, together caused the court to refuse to employ contra proferentem in *Malkin v. Realty Title Ins. Co. Inc.*, 244 Md. 112, 223 A.2d 155 (1966): "[t]he Malkins cast themselves in the role of simple, 'unsophisticated' people who relied upon the expertise and superior knowledge of appellee's settlement officer. We do not see it quite that way. Mr. Malkin's experience in the accounting field and his training in the law alone would seem to be enough to lift him out of the ranks of the 'unsophisticated.' Nevertheless, he employed a competent and experienced attorney to represent him at the settlement. We can certainly assume that his attorney knowledgeably and carefully inspected the deed, the deed of trust, the statement of settlement, the survey, and the title policy. It is very likely that Mr. Malkin did likewise. … The Malkins emphasize the payment of the larger premium for the owner's title policy and they seem to suggest that this should enhance their claim for damages. In the circumstances this must be rejected as being without merit. Mr. Malkin and his attorney were fully cognizant of the function and the value of tile insurance. The mortgagee policy had to be paid for in any event and it seems to us most unlikely a prudent attorney would recommend against an additional expenditure of $60 to protect a $26,000 investment. Nor do we think it likely either Mr. Malkin or his attorney thought that the appellee, for an additional $60, would undertake the obligation of evicting Montgomery County from its occupancy of part of the lot or, in the alternative, of paying the Malkins $2,500." In *Dare Investments, LLC v. Chicago Title Ins. Co*., 2011 WL 5513196 (D.N.J.) (unpublished), the court held that a commercial entity that bought a complicated loan, represented by two law firms, and which sought an exotic endorsement that its counsel drafted, was a sophisticated policyholder who was not entitled to claim the benefit of the reasonable expectation doctrine. The court cited a number of New Jersey cases adopting the sophisticated policyholder exception to the reasonable expectation doctrine. In *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished), the court held that a credit union was not entitled to assert an alleged ambiguity in the policy's access coverage because it was "experienced and sophisticated" on title matters. In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), the court found that a claim for negligent misrepresentation must be judged based on the level of knowledge and sophistication of the insured. The sophisticated insured argument was rejected in *Bragman v. Commonwealth Land Title Ins. Co.*, 421 F.Supp. 99 (E.D. Pa. 1976). There, however, the insured's expertise was not asserted to avoid a claimed ambiguity being construed against the insurer. Rather, the insurer argued that the claimant's expertise made him aware of the matter that it failed to except in the policy. The court refused to judicially amend the policy simply because the insured had business smarts.

[113] *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174 (3rd Cir. 1979) (title agent is sophisticated policyholder, cannot argue ambiguity of errors and omissions policy).

[114] In *Rockwell v. Klein*, 2000 WL 1887846 (Conn.Super. 2000) (unpublished), the sellers tried to unwind a secured indemnity they gave to induce the insurer to protect the buyer against a judgment lien on the property. They argued that the insurer tricked them into handing over the indemnity collateral. The court said they were too savvy to have been tricked: "The Indemnification and Escrow Agreement of November 16, 1998 that the Kleins both signed states explicitly and unambiguously that the Kleins knew that the judgment lien filed by Mr. Collard was an encumbrance on 391 North Main Street. They also knew that these premises could not be sold to the Straights that day unless First American issued a policy of title insurance containing 'affirmative coverage over said encumbrance.' They also understood that the only

An institutional lender typically has bargaining power equal to or greater than that of a title insurer.[115] This is particularly true in the modern age, in which lenders have significantly greater financial strength and internal resources than do title insurers, and some lenders purchase hundreds of thousands of policies each year. The same holds true of life insurers:

> Even though the life insurance customers may not control as much lending business as they once did, for the purpose of the exception it would be difficult to imagine that an institutional lender would prevail on an argument that it was not a relatively sophisticated party or that it had not benefited by the negotiating clout of other lenders.[116]

Also, lender counsel frequently draft endorsements and special coverages.[117] Some of these later become industry-wide products. This factor also militates for a finding that the institutional lender is the drafter and thus not entitled to assert the contra proferentem doctrine.

9.1.3.5 Policy Construed As A Whole; Integration Of Endorsements

Condition 15 of the 2006 ALTA title insurance policies[118] covers three distinct subjects: (a)

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way that First American would do this would be if an escrow of $150,000 was created. The Kleins wanted to sell their property and this was the only way to do so. The claim that Mr. Collard and/or First American tricked the Kleins is farfetched indeed, particularly as Mr. Klein is an attorney and both of them are very definitely intelligent and experienced in real estate matters. Furthermore, the Kleins were represented by an attorney at the closing and Mr. Klein participated in negotiating the terms of the Agreement."

[115] See Ostrager and Ichel, *The Role of Bargaining Power Evidence in the Construction of the Business Insurance Policy: An Update*, 18 Forum 577 (1983), discussed in Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123, 1143 (Summer 1998).

[116] Dzien and Turner, *Not All Insurance Policies are Adhesion Contracts: A Case Study of the ALTA Loan Title Policy*, 33 Tort & Ins.L.J. 1123, 1144 (Summer 1998).

[117] See Ostrager and Ichel, *The Role of Bargaining Power Evidence in the Construction of the Business Insurance Policy: An Update*, 18 Forum 577 (1983), for a discussion of cases in which the insured rather than the insurer custom-drafted the insurance coverage at issue.

[118] Conditions 15 of the 2006 ALTA policies states:

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

that the policy terms provide the exclusive remedy for a breach of the contract, (b) that the policy and all endorsements are one integrated contract, and (c) that the title insurance commitment merges into the policy and does not survive as a separate contract after the policy's issuance. The subject of the merger of the title insurance commitment into the policy is discussed at §6.2. Conditions 15(b), which is often termed the "exclusive remedy" provision, declares that the policy is not an abstract of title. That provision is discussed at §15.6.

This section discusses the third subject of Conditions 15, which is the statement that the policy and all endorsements as to be construed as a whole, that any amendment to the policy must be in writing, and that an endorsement alters the policy's terms only to the extent it does so expressly. These three provisions are known collectively as the integration provisions. All ALTA endorsements contain a standardized corresponding integration clause that declares the same principles.[119]

The integration provisions of the policy and endorsements have been applied and enforced. Court have held that all terms of the policy and any endorsements must be read together, rather than in isolation, in order to correctly interpret their meaning.[120] Courts have also held that policy terms

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

[120] The policy provision actually merely incorporates and expressly states the fundamental contract construction principle that "insurance policies, like other contracts, are to be read as a whole." *Blum v. 1st Auto & Cas. Ins. Co*., 326 Wis.2d 729, 786 N.W.2d 78, 83–84 (2010), quoted in *BB Syndication Services, Inc. v. First American Title Ins. Co*., 780 F.3d 825 (7th Cir. (Wis.) 2015). That principle is often applied by the courts without any reference to the policy's integration clause. For example, *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F. 2d 1058 (1st Cir. 1990), stated: "In attempting to discern the expectations of the parties, Massachusetts courts look at the insurance contract as a whole in order to effectuate its overall purpose. ... The corollary of this rule is that, whenever possible, each word in an insurance policy should be considered and given some meaning." The court cited *Lawyers Title Ins. Corp. v. Phillips Title Agency*, 361 F.Supp.2d 443 (D.N.J. 2005) and other authorities. In *Pete Lien & Sons, Inc. v. First American Title Ins. Co.*, 478 N.W.2d 824 (S.D. 1991), the court held that that two mineral rights endorsements did not modify or delete the policy exclusions, because they did not expressly refer to or modify and of the policy Conditions. The court said: "Our statutes provide every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application lawfully made a part of the policy." It quoted this statement from 13A J. Appleman Insurance Law and Practice § 7538 (1976): "Endorsements or riders on a policy become a part of the policy, and must be construed with it. Such provisions in the body of the policy are not to be abrogated, waived, limited, or modified by the provisions of an endorsement or rider unless expressly stated therein that such provisions are substituted for those in the body of the policy, or unless the provisions in the policy proper and in the rider or endorsement are conflicting." Similarly, in *380 Kings Highway, LLC v. Fidelity Nat'l Title Ins. Co*., 2011 WL 6182117 (N.Y.Sup.), 2011 N.Y. Slip Op. 52223(U) (unpublished), the court did not quote the integration clause of the policy, but relied on the general insurance contract principle that, "in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." It concluded, based on the integration provision in the endorsement, that the endorsement did modify the policy's Conditions, and that the endorsement trumped the Conditions, but only to the extent that they were inconsistent with each other. See also §9.1.3.1, which recites this and other general principles of insurance contract interpretation.

apply to and control the administration of a claim in which the coverage was granted by an endorsement, except to the extent that a policy provision was explicitly amended or deleted by the endorsement.[121] Further, courts have enforced Conditions 15(c), which says that "Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy."[122]

9.2 Vesting Of Title And Defects In Title

All ALTA title insurance policies indemnify the insured in the event that the party recited as being the owner of the property in Schedule A of the policy is not vested in title.[123] This most

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[121] In *Pete Lien & Sons, Inc. v. First American Title Ins. Co.*, 478 N.W.2d 824 (S.D. 1991), the court held that that two mineral rights endorsements did not modify or delete the policy exclusions, because they did not expressly refer to or modify and of the policy Conditions. The court concluded: "The special endorsement contains no express language modifying the policy, and there is no conflict between the policy and the special endorsement. The special endorsement clearly states it was meant to insure against the potential risk of damage to the surface estate should someone properly exercise mining rights. As a result, the special endorsement does not modify the exclusions." In *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co*., 706 F.3d 622 (5th Cir. (La.) 2013), the court rejected the insured's argument that the policy loss provision should not apply to a zoning endorsement because zoning affects the use of property, not its title, and thus loss should not be measured as a loss in its value. The court noted that the loss provision (Conditions 8(a) of the 2006 ALTA policies) does not limit the measure of loss to defects in title, but uses the phrase "the value of the Title subject to the risk insured against by this policy." Further, the court said, the insured's logic "is misguided because the zoning endorsement insures the value of the title in the event certain use is not allowed (here, multi-family housing), therefore the word 'use' is a necessary term in describing the coverage it provides. That does not transform it into stand-alone coverage insuring against any loss related to any use of the property apart from the value of the property's title." The court held that the policy and endorsement must be read together, as is expressly stated in Conditions 15 and the endorsement integration provision. Also, in *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 329 P.3d 1066 (Idaho 2014), the court held that loss under a location endorsement was controlled by the measure of loss found in the policy's conditions, because all the endorsement said about loss was that "loss or damage" was payable, and that the endorsement was part of the policy. Similarly, in *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished), the insured lender argued that the policy exclusions did not apply to its claim under a zoning endorsement, in part because the endorsement gave more specific coverage than the policy. The court rejected the argument because the integration provision of the endorsement said that it did not "modify any of the terms and provisions of the policy," and that the endorsement was "subject to all of the terms and provisions of the policy and of any prior endorsements." In addition, the court found that the endorsement did not modify the exclusions, and could not simply be read out of the policy: "The Zoning Endorsement is silent, however, with regard to disclosures of matters known to the insured but unknown to Commonwealth. Those terms are instead included in the exclusions provisions of the Policy. ... Because there is no conflict between the plain language of the endorsement and the exclusions, the terms of the Policy's exclusions are applicable here... ." Also, in *RA Southeast Land Company LLC v. First American Title Ins. Co*., 2016 WL 4591740 (D.Nev.) (unpublished), the court held that the fact that policy coverage emanated from an endorsement rather than a covered risk did not expand the policy's loss provisions or negate the application of the final determination clause. The court held that the integration clauses of the policy and the endorsement controlled.

[122] See *Van Arsdale v. Metropolitan Title Guaranty Co*., 103 Misc.2d 104, 425 N.Y.S.2d 482 (1980), which held that the modification of an exception by a closer was not enforceable because it did not qualify as a written endorsement to the policy. See §9.11 for a complete discussion of policy endorsements.

[123] Covered Risk 1 of the 2006 ALTA policies indemnify against "Title being vested other than as stated in Schedule A." Covered Risk 1 of the 1992 ALTA policies indemnifies in the event that "[t]itle to the estate or interest described in Schedule A being vested other than as stated therein… ." The ALTA Residential Limited Liability Junior Loan policy

fundamental assurance of the title insurance policy indemnifies the insured against loss suffered by the insured if he or she is not the rightful owner of the property and is divested of title. See § 9.1.1 for a discussion of the meaning and definition of the terms title and vesting of title.

The insured may be found not to be the rightful owner of property, or be divested of his or her title, for a plethora of reasons. Most of these risks fall into three categories: problems with the conveyance to the insured that cause that transfer to fail, problems with a prior conveyance that cause the grantor to the insured to have no title to convey, and a competing claim of ownership emanating from a different source or root of title than the insured's chain of title.[124]

The risk that the insured owner will be found not to be the rightful owner of the real property is the most significant risk covered by the policy. The risk is equally serious for the insured lender, because if the borrower is not the rightful owner of the property, in most instances the insured mortgage is also void. Much of Chapter 3 is devoted to the discussion of the methods used by a title insurer to protect an insured against these threats.

When a person or entity is found not to be the rightful owner of real property, it is common to say that that party's title is defective. Covered Risk 2 of the 2006 ALTA policies protects against "[a]ny defect in or lien or encumbrance on the Title." Covered Risk 2(a) amplifies the coverage, by stating that the policy protects against "[a] defect in the Title caused by" any of seven enumerated circumstances and issues.[125] Further, Covered Risk 2 states that that coverage "includes but is not limited to" the recited risks.

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provides a more limited indemnification as to vesting of title, protecting in the event that the "Grantee" recited in the policy is not "the named grantee on the last document recorded in the public records purporting to vest title to the fee estate in the land… ."

[124] One insurer's website lists over 70 ways in which a person can lose title, including 29 deficiencies in the conveyance and dozens of types of competing interests in the land that could be deemed paramount to the insured's deed. See First American's Title Insurance Company's *70+* Ways *to Lose Your Property*, found at http://www.firstam.com/title/resources/reference-information/title-insurance-reference-articles/70-ways-to-lose-your-property.html. Some of the threats it lists to the vesting of title are that the deed may be: forged; from a person who is insane or mentally incompetent; from a minor; from a corporate officer, partner or trustee acting without authority; from a legal non-entity; from a foreign citizen, on a conveyance that is unauthorized or defective under that country's laws; from a party fraudulently using a name deceptively similar to that of the true owner; void due to fraud, undue influence or duress; from an attorney-in-fact who has no authority or under a forged or expired power of attorney; emanating from a court order that is not final or that may be challenged as defective; procured from the true owner by trickery, sometimes known as fraud in the factum; or that may be challenged by heirs, a spouse, a former spouse or a co-owner. For example, in *212 Marin Boulevard, LLC v. Chicago Title Ins. Co*., 2014 WL 8849641 (N.J.A.D. 2015) (unpublished), cert.den. 223 N.J. 280 (Oct. 5, 2015), the title conveyed by a deed from a railroad was attacked as void because the railroad failed to obtain the authority to abandon the rail line from state and federal regulators.

[125] Covered Risk 2(a) lists: "(i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation; (ii) failure of any person or Entity to have authorized a transfer or conveyance; (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered; (iv) failure to perform those acts necessary to create a document by electronic means authorized by law; (v) a document executed under a falsified, expired, or otherwise invalid power of attorney; (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or (vii) a defective judicial or administrative proceeding."

Covered Risks

All or most of the issues listed in Covered Risk 2(a) will typically cause the conveyance to fail, which would also invoke Covered Risk 1, the vesting of title coverage. To that extent, the term defect in Covered Risk 2(a) overlaps the vesting of title assurance found in Covered Risk 1. However, the principal coverage in Covered Risk 2 is against liens and encumbrances on title. Courts have put the label of title defect on a number of issues, at least some of which would be better categorized as encumbrances on title.[126] If the term defect is understood to mean something that burdens the insured's title, without divesting that title, the use of the term defect in Covered Risk 2 is logical. Also, because Covered Risk 2(a) protects against a title defect caused by "fraud," the policy has been found to protect against fraudulent conduct by others that could render the insured's title to be defective.[127]

The vesting covered risk is invoked only if another party asserts a claim of ownership that is adverse to the insured's title.[128] A trespasser, by definition, does not attack the insured's title. Thus, the title insurance policy does not protect against trespass. See §9.3 regarding trespass generally, and §12.2.3 regarding trespass and the possession exception. The policy also does not protect against

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[126] In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, ___ Ga.App. ___, 835 S.E.2d 21 (Ga.App. 2019), the policy did not contain an exception for a recorded notice advising that oil had leaked into the groundwater below the surface of part of the insured property. The court found an ambiguity in the policy because the terms "defect" and "encumbrance" were not defined. The court held that title was defective. It supported that ruling with this statement: "Indeed, as Old Republic's counsel acknowledged in its reply brief and at oral argument before this Court, an easement can be a title defect." The court refused to follow the numerous prior decisions holding that environmental contamination is a physical condition that does not affect title, finding this case distinguishable because of the recorded notice that was not excepted. There was no assertion in the case that the insured was not the owner of the property, or that the title conveyed to it was defective. In *Loflin v. BMP Development, LP*, 427 S.C. 580, 832 S.E.2d 294 (S.C.App. 2019), the insureds received a Residential policy. They contracted to buy a vacant lot in a new subdivision before the plat was final. The size of the lot was specified in their contract. The plat was recorded and the policy issued, with the recorded plat depicting the lot with the expected size and configuration. Four years later, however, the developer informed the insureds that, in his opinion, they owned a smaller lot as depicted on an unrecorded amended plat. The court held that the developer's attack on title created a title defect.

[127] In *Loflin v. BMP Development, LP*, 427 S.C. 580, 832 S.E.2d 294 (S.C.App. 2019), the insureds received a Residential policy. They contracted to buy a vacant lot in a new subdivision before the plat was final. The size of the lot was specified in their contract. The plat was recorded and the policy issued, with the recorded plat depicting the lot with the expected size and configuration. Four years later, however, the developer informed the insureds that, in his opinion, they owned a smaller lot as depicted on an unrecorded amended plat. The court held that the policy might protect the insureds against the developer's claim that the insureds own the lot as revised, because Covered Risk 3 of the Residential policy protects against fraud. The court said the term "incompetency" might also apply, because the insureds asserted that the developer recorded the wrong plat, suggesting that he was incompetent as a real estate developer. However, in *Mortazavi v. Federal Ins. Co*., 2019 WL 2609779 (Cal.App. 4 Dist.) (unpublished), the insured former owner was sued by his purchaser for various claims concerning encroaching structures he had built while he was the owner, including a claim for fraud. The court held that the term fraud in Covered Risk 2 is not invoked when the fraud allegation is made against the insured, citing *Moskopoulos*. See § 11.2.7 for a complete discussion of the cases holding that there is no coverage for the insured's fraudulent or tortious conduct in the obtaining of title.

[128] In *C & G Farms Inc. v. First American Title Ins. Co.*, 2018 WL 1281847 (Ariz.App. 1 Div.) (unpublished), the insurer owed no duty when the insureds were found to hold good title to the insured property, and no one was attacking that title.

alleged defects in the insured's title that are asserted only by the insured.[129] There also is no coverage for defects in title that have been cured or are barred by law.[130]

The subsections below discuss the most common issues that can cause an insured's title to be divested or defective.

9.2.1 Forgery and Fraud

Forgery is the unauthorized execution of a document in the name of the true owner, and renders the deed void unless saved by a defense such as ratification. Forgery is a significant risk covered by the policy. Sometimes, a group of people conducts a scheme in which many properties are conveyed by forged deeds so that they can be sold or used as collateral for fraudulent loans.[131]

A form of fraud that is closely related to forgery is business identity theft, in which the fraudster purports to act for a company that owns real estate. The fraud often begins with the filing of a change of registered agent, naming the fraudster as the new registered agent, followed by delivery to the title company of a fabricated operating agreement naming the fraudster as the managing member of the company. The fraudster then sells or borrows against the real estate.[132]

Forgery and most of its relatives are "true" title risks that insurers often tout as being covered by the policy.[133] The title insurance policy protects the insured owner or lender against a claim that

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[129] *First American Title Ins. Co. v. Hegedus*, 2013 WL 4077033 (D.Del.) (unpublished) (no coverage for rights of contract purchaser, as asserted by insured, when that purchaser was paid at closing and disclaimed any ownership of the property); *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999) (no duty to cure defects in condominium regime asserted only by insured); *C & G Farms Inc. v. First American Title Ins. Co.*, 2018 WL 1281847 (Ariz.App. 1 Div.) (unpublished) (insurer owed no duty when insureds were found to hold good title to insured property and no one was attacking that title). See additional cases cited in §9.1.2 and in § 11.4.3.

[130] See § 3.1 for a discussion of title curative laws, including marketable record title acts. See § 3.4.7.4, discussing how a title insurer can defend title based on race-notice recording laws, and § 3.4.7.5 concerning the defense of the insured's title against a party whose conveyance is outside the record chain of title. See Basye, *Clearing Land Titles*, 3rd Edition, West Publishing Company, for a detailed analysis of title curative laws in all 50 states.

[131] See Staker, *Anatomy of a Flip*, Title Technology and Settlement Services, November, 1999; John Gibeaut, *Mortgage Fraud Mess*, ABA Journal (July 2007), p. 50 (focusing on legal issues including risks to attorneys who own title agencies); Lynn Wilburn, *Mortgage and Real Estate Fraud—Is Anything New?*, Title News (July/August 2007), p. 10; Carole Bullion, *Recognizing Mortgage Fraud, Part 2*, 87 Title News No. 3 (May/June 2008), p. 20 (providing useful tips for detection of fraud for use by closers and title examiners).

[132] See Jeremy Yohe, *Don't Let Your Title Company Fall Prey to Business Identity Theft*, in *Title News*, Volume 92, Number 10 (October 2013), p. 10, describing several large business identity theft rings and how they operated. In *Elm Cabin John, LLC v. United Bank*, ___ F.Supp.3d ___, 2019 WL 1755398 (D.Md. 2019) (permanent citation not yet available), a real estate developer filed and delivered documents naming himself as the managing member of an entity that owned vacant land in Maryland. He then borrowed money, giving a lien on the property as collateral. The true sole member of the owner entity, Nancy Long, sued the bank that lent the money, and the court refused to dismiss the complaint, disturbed by the fact that the bank knew that Long was the original sole member of the entity but never spoke to her about the loan.

[133] In fact, the industry's promotion of these risks in marketing material can make it difficult for an insurer to assert even appropriate limitations on these coverages. See *Lawyers Title Ins. Corp. v. First Fed. Sav. Bank & Trust*, 744 F.Supp. 778 (E.D.Mich. 1990); *People's Building & Loan Ass'n v. Safeco Title Ins. Co. of Maryland*, 1988 WL 72388,

the insured deed or mortgage has been forged. The standard form 1992 and earlier ALTA policies do not insure against these risks by name. Rather, forgery and other issues that would divest the insured of title are encompassed by Covered Risk 1, which indemnifies in the event that title is not vested in the insured as shown in the policy. The 2006 ALTA policies, by contrast, protect against a "defect in the Title caused by forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation..." Covered Risk 2(a)(i), 2006 ALTA owner's policy. The 2006 ALTA loan policy also protects against forgery and related risks that would cause the owner's title to be void. Covered Risks 2(a)(i) and 9(a). Similarly, the Residential owner's policy protects against defects in title caused by "[f]orgery, fraud, duress, incompetency, incapacity or impersonation."[134] The Homeowner's policy provides assurances against claims of others affecting title arising out of "forgery or impersonation" or "fraud, duress, incompetency or incapacity."[135]

The policy protects against forgery and related defects that would divest the insured of title,[136] or that would void the insured mortgage.[137] The measure of loss for a forgery is the insured's actual loss, not policy limits.[138]

The coverage does not assure against forgeries that do not affect the vesting of title or validity of the insured mortgage, such as the non-title transaction documents. Thus, the policy does not insure that the note creating the underlying debt is valid and not forged.[139] If the note is forged, rendering the mortgage unenforceable, the forgery of the debt instrument alone does not invoke coverage. See §9.10. Conversely, there is no loss if the mortgage is valid, and an otherwise unenforceable note can be enforced by ratification, estoppel, unjust enrichment or some other theory.[140]

Forgeries and fraud committed by the insured also are not covered. Such situations fall under Exclusions 3(a) or 3(b). See §11.2.7 regarding fraud in the procurement of title and related matters, and §11.3.5 as to Exclusion 3(b) and the lender's knowledge of fraud or forgery by the borrower.

1988 Ohio App. LEXIS 2782 (Ohio App. 2 Dist.) (unpublished).

[134] The Covered Risks of the ALTA Residential policy are discussed at §9.14.1.

[135] The ALTA Homeowner's policy is discussed in further depth at §9.14.2.

[136] *Coast Mutual Building-Loan Ass'n v. Security Title Ins. & Guarantee Co.*, 14 Cal.App.2d 225, 57 P.2d 1392 (Cal.App. 2 Dist. 1936).

[137] *Bank of Miami Beach v. Fidelity & Casualty Co. of New York*, 239 So.2d 97 (Fla. 1970); *Ferrell v. Inter-County Title Guar. & Mortgage Co.*, 213 So.2d 518 (Fla.App. 1968); *Personal Finance Co. v. Commonwealth Land Title Ins. Co.*, 678 So.2d 463 (Fla.App. 3 Dist. 1996); *Lloyd v. Chicago Title Ins. Co.*, 576 So.2d 310 (Fla.App. 3 Dist. 1990). See also *Fidelity & Deposit Co. v. Ticor Title Ins. Co.*, 943 P.2d 710 (Wash.App. 1997) (in fraudulent double "sale" of loan, holder of forged note does not obtain the better title to the loan by recording its assignment of deed of trust first, since ownership of a loan depends on possession of a valid debt instrument, not prior recording).

[138] *Ferrell v. Inter-County Title Guar. & Mortgage Co*., 213 So.2d 518 (Fla.App. 1968).

[139] *Bank of Miami Beach v. Fidelity & Casualty Co. of New York*, 239 So.2d 97 (Fla. 1970).

[140] Id.

In most cases of forgery, impersonation and fraud, there are victims who are not insureds. The policy provides no protection to those non-insureds other than whatever serendipitous effects may flow from policy coverage to the insured. The insurer owes no duty to the non-insured forgery victim.[141]

Policy coverage must be in place before the insurer is liable for damages caused by the forgery. Forgery detection is a key claims-prevention education subject.[142] When the insurer detected a forgery on the deed to be insured before the policy was issued, the insurer had the right to a judgment declaring that it was not obligated to issue the policy. The forged instrument was found not to satisfy the commitment requirement of a deed "to be executed by" the sellers, since one of the sellers did not in fact execute the deed.[143] Also, when a title insurance commitment was altered by the perpetrators to vest title in a party to their conspiracy as part of a loan fraud, and the mortgage was not recorded, the insurer had no obligation to issue the policy, and there was no claim payable.[144]

There is no claim payable as to a forgery that does not cause the insured's claimed loss. When the insured held a second mortgage claimed to be a forgery, but the insured lien was wiped out by foreclosure of the superior mortgage, the claimed forgery was "immaterial" and no compensable loss was suffered by the insured lender.[145] There is no loss payable when the insured's claim of a forgery is unsupported, or is contrary to a finding by a court.[146]

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[141] See *Anthony v. Chicago Title Ins. Co.*, 2007 WL 1144802 (S.D. Ohio) (unpublished), which held that the person claiming that her signature on a deed was forged was not entitled to sue the insurer on a policy issued to the grantee, because the grantor was not an insured and the insurer owed her no duty. In *Celestin v. Simpson*, 153 A.D.3d 656, 59 N.Y.S.3d 773, 2017 N.Y. Slip Op. 06153 (N.Y.A.D. 2 Dept. 2017), a property owner sued a title insurer for aiding the sale of his property by a forged deed. The court dismissed the action based on the statute of limitations and did not address the question of whether or not the owner has a right to sue the buyer's title insurer.

[142] See the Ticor Title checklist attached as an exhibit to Rifkin, *Warning Signals of Financial Difficulty: Forgery Indicators and Identity of Parties*, in *Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992, pp. 219-27, and similar material by First American Title included with Beasley, *Fraud and Forgery*, pp. 607-620, of the same publication. See also Robert Kratovil, *Fraud and Misrepresentation in Real Estate Transactions*, the Guarantor, May/June 1986, issued by Chicago Title Insurance Company.

[143] *Glass v. Stewart Title Guar. Co.*, 181 Ga.App. 804, 354 S.E.2d 187 (Ga.App. 1987). See §6.4 concerning Schedule B-I requirements in the commitment.

[144] *Bankers Trust Co. of Ca. v. Stewart Title Ins. Co.*, 2004 N.Y. Slip Op. 02494, 2004 WL 636251 (N.Y.A.D. 1 Dept.).

[145] *Sipes v. Kansas City Title Ins. Co.*, 372 S.W.2d 478 (Kan.App. 1963).

[146] *Gillard v. Fidelity Nat'l Title Ins. Co*., 2017 WL 345086 (Cal.App. 4 Dist.) (unpublished) (insured's lawsuit against insurer claiming that deed to insured was forged was barred by court order declaring that deed passed good title to insured).

9.2.2 Impersonation

FORM 88, Appendix A
Loan policy does not protect against impersonation

The ALTA title insurance policies did not identify impersonation as a defect in title for which the policy provides coverage until the 2006 ALTA policies, which list impersonation as a defect in title under Covered Risk 2(a)(i) along with forgery, fraud, undue influence, duress, incompetency or incapacity.

Impersonation is the act of pretending to be a different person. Impersonation is more than the use of an assumed name, because an impersonator is pretending to be a different but real person. False impersonation is the term commonly used to refer to impersonation conducted with the intent to use the other person's credit or other credentials for illegal gain.

When a person impersonates the true owner to convey or mortgage property owned by that party, the deed or mortgage given by the impersonator does not convey good title, because the impersonator lacks actual authority to act on behalf of the true owner.[147] This type of impersonation falls under Covered Risk 2(a)(i) of the 2006 ALTA policies. The issue in this type of impersonation is the lack of authority to act for an entity or person. This coverage is thus essentially synonymous with another risk identified in the same Covered Risk 2, for "failure of any person or Entity to have authorized a transfer or conveyance."

There is a different type of impersonation involving title to real estate, however, that does not invoke policy coverage. When a person comes into title using the name of another real person, or a fictitious name, the conveyance is not void. Title is held by the impersonator, despite the fact that the person has used another's name and that act may be a fraud on the person whose name was used. Thus, a mortgage granted by a person who took title in the name of another is valid and enforceable, despite the fact that the mortgagor took title in the name of another real person or a fictitious or assumed name.[148]

The 1992 and earlier ALTA policies did not contain an assurance concerning impersonation. Courts found that earlier versions of the title insurance policy did not to protect against an

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[147] In *GO Properties, LLC v. BER Enterprises, LLC*, 112 N.E.3d 200 (Ind.App. 2018), a person pretended to be the managing member of a limited liability company in conveying real estate owned by the entity by changing the registered agent and issuing fake resolutions. That deed was declared to be void, rendering the deed to the next buyer void also. The court used title insurance underwriting memos describing this type of entity authority fraud to show that a prudent title agent would have done more than rely on the impersonator's own claim to be a representative of the selling LLC. In recent years, title insurers have paid numerous claims involving total failure of title when a person has purported to sell or mortgage property on behalf of the owner entity, but the actor had no authority to do so. See *Southern Title Ins. Corp. v. Syed Rizwan Mohiuddin (In re Mohiuddin)*, ___ B.R. ___, 2017 WL 2123870 (Bkcy.S.D.Tex.-Houston 2017) (permanent citation not yet available), which emanated from just such a fraud.

[148] In *Howard v. Fidelity Nat'l Title Ins. Co*., 2015 WL 5021768 (E.D.Mo. 2015) (unpublished), Mr. Howard took title to property and mortgaged it. When the lenders sought to foreclose and to pursue the real Mr. Howard for the loan debt, under the note, he asserted in filed pleadings that he had no knowledge of the loans and had been the victim of identity theft. However, after the lenders foreclosed and extinguished Mr. Howard's title, he sued the title insurer for his "loss" of title. The court found that Howard could not assert a policy loss, and that Exclusion 3(a) barred any such claim.

impersonation that did not cause title to be defective.[149] Thus, when a party took title and later mortgaged it using an assumed name, the insured mortgage was not rendered invalid and there was no loss under the policy.[150] Similarly, in *Brucha Mortgage Bankers Corp. v. Nations Title Ins. of New York, Inc.*,[151] Brucha Mortgage Bankers gave a mortgage loan to a borrower who "falsely represented his identity." The court did not explain whether the borrower assumed a fictitious name or impersonated a real person with good credit. The loan went into default, and then the lender discovered that the property had also been appraised for more than value. The lender foreclosed and took title without protest from the borrower. Brucha then sued Nations Title on the theory that the policy protected the lender against the borrower's use of a false identity. The appeals court gave the insurer summary judgment. The court noted cases holding that a lender has a title policy claim only to the extent that its security is impaired and to the extent of the resulting loss which it sustains. Therefore, the court said:

> [I]nasmuch as a valid title was transferred, and [Brucha] received a valid and enforceable first mortgage lien on the property, as evidenced by its ability to successfully foreclose, the defendant satisfied its obligations under the policy (see, Citibank v. Chicago Title Ins. Co., supra, at 222, 632 N.Y.S.2d 779).[152]

The court found that the successful foreclosure was evidence that the validity of the mortgage had not been disputed. The fact that the lender's security was worth less than it expected also did not create coverage, because the policy does not insure that the security for the loan is equal to the loan amount. Impersonation was also found not to be a covered title defect, on very similar facts, in *Home American Credit, Inc. v. Investors Title Ins. Co.*[153] In that case, the perpetrator apparently took title in the name of a deceased person, Ms. Aud, then used her credit and a phony appraisal to obtain a loan for more than the property's real value. As in *Brucha*, the lender received no contest in its foreclosure action. The court said:

> The essence of the suit and claim for title insurance by Home American is that the transfer of a valid deed to real property to an impersonator does not suffice, that the subject deed was never delivered to the "real" Aud, that title has not vested in Ms. Aud, that Home American's lien on the real property is invalid and unenforceable,

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[149] *Mortgage Associates, Inc. v. Fidelity and Deposit Co. of Maryland*, 2002 WL 31863341 (Cal.App. 2 Dist.) (unpublished); *Home American Credit, Inc. v. Investors Title Ins. Co.,* 199 F.R.D. 563 (E.D.N.C. 2001); *Brucha Mortgage Bankers Corp. v. Nations Title Ins. of New York, Inc*., 712 N.Y.S.2d 151, 2000 N.Y. Slip Op. 07395 (A.D. 2 Dept. 2000).

[150] *Scott v. Pennsylvania Title Ins. Co.*, 48 Berks 239, 10 Pa. D. & C.2d 129, 1957 WL 6485 (Pa.Com.Pl. 1956).

[151] 712 N.Y.S.2d 151, 2000 N.Y. Slip Op. 07395 (N.Y.A.D. 2 Dept. 2000).

[152] Id. at 152.

[153] 199 F.R.D. 563 (E.D.N.C. 2001).

> and that consequently Home American alleges the deed of trust lien on the property is invalid and unenforceable so that Home American cannot foreclose. However, on inspection of the record and a close review of the title insurance agreement between the parties, the court finds that there is no adverse claim against title by the prior owners of the property and no loss to the lender as a result of any title problem. Title insurance, which "operates to protect the purchaser or mortgagee against defects or encumbrances on title which are in existence at the time the insured takes his title," Mortgage Corp. v. Insurance Co., 299 N.C. 369, 374, 261 S.E.2d 844, 847 (1980), is irrelevant to the issue at hand, and a suit by a lender against the title insurance company is inappropriate.[154]

Thus, if the insured lender is able to foreclose the insured mortgage and take title without challenge, the coverage is not invoked because no defect in title results from the impersonation.

Impersonation is sometimes an element of a loan fraud scheme, in which the impersonator applies for a loan in the name of a real person who has good credit.[155] Such an impersonation scheme is often a facet of fraudulent property flipping.[156] Loan fraud involving impersonation was illustrated in *First American Title Ins. Co. v. Vision Mortgage Corp.*[157] In that case, the perpetrators stole the identity of a person named Zarifian. The property was then conveyed to Zarifian, and someone impersonated Zarifian as a borrower in a falsified loan. *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*[158] is another illustration of an impersonation scam. In that case, attorney Ben Friedman convinced scores of people to invest millions of dollars in limited partnerships he formed. Friedman bought land under assumed names, sometimes using the identities of real people. In each case, Friedman purchased property from legitimate sellers at market prices, and resold the property to the partnerships at inflated prices. Friedman used the partnership's own money to purchase from the legitimate sellers, and kept the resale profit. The defrauded parties were the partnership investors. A similar flipping operation was the source of the dispute in *Mark*

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[154] *Id.* at 564.

[155] One article outlined three common flipping schemes. In the first variant, the perpetrator buys the property in a legitimate transaction. Then he obtains an inflated appraisal and borrows as much as possible from a mortgage lender in reliance on the phony appraised value. The participants split the "profit" (the loan proceeds) and, typically, walk away from the real estate. In the second scam, the perpetrator leases desirable property short-term and moves in. He then assumes the owner's identity and mortgages the property. The third scheme noted in the article is for a mortgagor to forge a satisfaction of his own mortgage, and then obtain a new loan. There are other variations as well, such as the vacation scam, in which the perpetrator forges a deed from the true owner to himself and takes possession while the true owner is on vacation, then sells the property to a legitimate buyer. Wilburn, *Current Scams*, Condell Private Letter, March 13, 1997, p. 14. Flip transactions are further discussed at §13.9.3.

[156] Dunlevy, *Title and Mortgage Fraud*, American Bar Association Tort and Insurance Practice Title Insurance Litigation Committee Newsletter, Winter, 1996.

[157] 298 N.J.Super. 138, 689 A.2d 154 (1997).

[158] 197 Ariz. 535, 5 P.3d 249, 320 Ariz.Adv.Rep. 51 (Ariz.App.Div. 1 2000).

Properties, Inc. v. National Title Co.[159]

Despite the specific coverage against impersonation in the 2006 ALTA policy, the reasoning of *Brucha* and *Home American Credit* still applies to claims made under that policy form. Covered Risk 2 is only invoked if an impersonation causes "a defect in the Title."[160] The decisions discussed above held that title to the property was not rendered defective by the type of impersonation used in those cases.

9.2.3 Undue Influence, Duress and Incapacity

The 2006 ALTA policy protects against a defect in the title caused by "undue influence, duress, incompetency, incapacity" and "failure of any person or Entity to have authorized a transfer or conveyance."[161] All or some of these issues are also covered under the 1992 and earlier ALTA policy forms.

There is a dearth of case law concerning this coverage of the policy, perhaps because there is rarely a dispute about whether or not the policy protects against such title defects. This coverage includes defects caused by the lack of capacity of a fiduciary to transfer or encumber the property.[162] One court found that an insurer that issued a policy insuring a lien granted by a trustee, without reviewing the trust agreement to see if he had such powers or to determine the identities of the trust beneficiaries, accepted the risk that the trustee might have violated his duties, and that the lien could be overturned.[163]

9.3 Trespass And Interests Evidenced By Possession

Most parties in possession are on the property with the consent of the owner. A recorded lease will typically appear as an exception in the policy because the title examiner can find the lease in the public records. The standard exception for rights of parties in possession applies to tenants whose leases are not evidenced in the public records. The application of the possession exception to leasehold interests is discussed in §12.2.1.

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[159] 34 P.3d 587 (Nev. 2001). Opinion at 14 P.3d 507 (Nev. 2000) withdrawn and superseded on rehearing.

[160] In *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195 (10th Cir. (Utah) 2016), the court held that there is no coverage for any of the matters listed in Covered Risk 2 unless the issue causes a defect in the title. Similarly, in *New South Federal Savings Bank v. Commonwealth Land Title Ins. Co*., 940 So.2d 739 (La.App. 3 Cir. 2006), the court held that none of the terms listed in the survey coverage in Covered Risk 2(c) invoked coverage unless the effect of the "survey" issue was to create a defect in the title.

[161] Covered Risks 2(a)(i) and (ii).

[162] In *Carr v. Chicago Title Ins. Co.*, 2018 WL 6521029 (Cal.App. 2 Dist.) (unpublished), Mr. Carr asserted that Abel Galvez had induced him to transfer his property to an entity controlled by Galvez, presumably by undue influence. Carr did not prevail against Galvez or his lender, however, and instead sued the insurer based on the California Elder Abuse and Dependent Adult Civil Protection Act, which claim the court dismissed because California title insurers are immune from tort suits.

[163] *Mercantile-Safe Deposit & Trust Co. v. Chicago Title Ins. Co*., 2007 WL 892103 (D.Md.) (unpublished). The court refused to find that the lien was void solely because the underlying debt was no good, which would have barred coverage because the policy does not assure the validity of the debt.

Another form of possession claim is the overlap between two deeds, in which two neighbors have at least purported record title to the land but only one is in possession of the overlap area. See §12.3.9 for a full discussion of overlaps in the context of the survey exception.

Adverse possession and prescriptive easements are also adverse claims that are typically covered by the policy unless Schedule B contains a relevant exception. The relationship between adverse possession claims and the possession exception is discussed at §12.2.4. Adverse possession may also be visible on inspection, and thus removed from coverage under the survey exception or its inspection clause. See §12.3.17.1.

Trespass is possession or use of property without permission or right. A trespass on the insured parcel does not invoke policy coverage.[164] In *Southwest Title Ins. Co. v. Woods,*[165] involving a Texas form of policy, a company cut timber on the insured land after the insured bought it. The logger held a deed from a stranger to title. Thus, the logger was found to be a trespasser. The insured sued the insurer for the timber lost. The court said:

> The policy does not, either expressly or by implication, purport to insure against damage done to the land by a trespasser under the circumstances of this case.[166]

The court also found that there was no loss suffered as a result of the fact that the trespasser had color of title from a recorded deed. This fact did not create a defect in the insured's title, and therefore did not cause a loss, it said. The latter holding, however, is contrary to an Alabama decision that found that a recorded timber deed affected title despite a statute declaring timber rights to be personal property.[167]

The "parties in possession" exception confirms the lack of policy coverage for trespass. See

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[164] In *Murphy v. Ticor Title Ins. Co*., 316 Ga.App. 97, 729 S.E.2d 21 (Ga.App. 2012), the court held that a policy that insured an access easement did not protect against a neighbor's blockade of that easement path 20 years after the policy date, in part because of the post-policy exclusion and in part because the blockade was a trespass. It said that "[t]here is no allegation that, in 1987, there were any defects in the title conveyed to the Murphys and insured by Ticor as of that date." It further said "[w]e also note that there is no evidence to show that Murphy does not still have the legal right to use the easement, only that a neighbor is interfering with it." In *Straily v. Lawyers Title Ins. Corp.*, 2011 WL 6742505 (Tex.App.-Tyler) (unpublished), the court found that a sewer pipe that the city admitted had been laid without an easement or other right was a trespass and not an encumbrance on title, and thus did not invoke policy coverage. In *Chorches v. Stewart Title Guar. Co*., 48 F.Supp.3d 151 (D.Conn. 2014), the court found that there was no coverage or duty to defend as to a dispute in which the insured claimed that easement holders were trespassing on the insured parcel by placing utility lines outside the easement path, while the easement holders claimed the insured had consented to the location of the service lines. In *CH Properties, Inc. v. First American Title Ins. Co*., 43 F.Supp.3d 83 (D. Puerto Rico 2014), recons.den. 2014 WL 7140507 (D. Puerto Rico, Dec. 15, 2014), the court held that the occupation of the insured land by protesters was not covered by any of the four Covered Risks of the 1992 ALTA policy "for a simple reason: the trespassers' presence does not affect title to the [insured] leasehold interest." Rather, it said, the "trespassers [did not] enjoy a legally cognizable interest in the Property affecting CH Properties' title… ."

[165] 449 S.W.2d 773 (Tex. 1970).

[166] 449 S.W.2d at 775.

[167] *Parker v. Ward*, 614 So.2d 975 (Ala. 1992).

§12.2.3 regarding trespass and the parties in possession exception. However, a major structure that is both a trespass and an encumbrance may be deemed to render title unmarketable.[168]

9.4 Real Estate Taxes, Assessments And Charges

All ALTA policy forms protect against real estate taxes that are liens on date of policy. Covered Risk 2(b) of the 2006 policies protects against "liens" and also "[t]he lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid." The 1992 ALTA policies protect against "liens." The more specific coverage found in the 2006 ALTA policy may restrict the policy tax coverage.[169] The Residential policy lists real estate taxes as Covered Title Risk 7: "There is a lien on your title because of: … a judgment, tax, or special assessment…" The ALTA Homeowner's policy provides the most extensive coverage, against both existing taxes (Covered Risk 8.b), and any post-policy assessment or supplemental tax that is triggered by construction or change in ownership (Covered Risk 24). The latter coverage indemnifies in the event that:

> A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.

However, except as stated above concerning the Homeowner's policy, there is no coverage against tax liens that obtain their lien status after the date of policy.[170] One court explained this limitation on policy coverage as follows:

> It has been held that the mere liability as to an assessment or tax, which was levied or became a lien after the issuance of a title insurance policy, did not constitute a charge, lien, or encumbrance within the meaning and coverage of the policy… . However, an assessment which was made a lien on the property by an ordinance

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[168] See, for example, *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993), and the other cases discussed at §9.8.

[169] In *Lone Star Equities, Inc. v. Dimitrouleas*, 34 N.E.3d 936, 2015-Ohio-2294 (Ohio App. 2 Dist. 2015), the court held that the policy did not protect against real estate taxes that were reassessed after the policy date even though the reassessment process had begun before closing. The court relied in part on the fact that the 2006 ALTA policy at issue contained the statement in Covered Risk 2(b) that the policy protected against taxes "due or payable, but unpaid," because the tax had not become due before the policy date.

[170] *District Title Ins. Co. v. United States*, 169 F.2d 308 (D.C.Cir. 1948); *Butcher v. Burton Abstract Title Co.*, 52 Mich.App. 98, 216 N.W.2d 434 (1974); *Edwards v. St. Paul Title Ins. Co.*, 39 Colo.App. 235, 563 P.2d 979 (1977); *Chudy v. William Raveis Real Estate, Inc.*, 2010 WL 5188445 (Conn.Super.) (unpublished) (no coverage for assessment made after policy date); *Rhone v. First American Title Ins. Co.*, 928 N.E.2d 1185, 340 Ill.Dec. 588 (Ill.App. 1 Dist. 2010) (possibility on policy date of later reassessment did not bring within coverage taxes that did not become a lien until two years after policy date); *Vurimindi v. LandAmerica Financial Group, Inc.*, 2012 WL 8700440 (Pa.Cmwlth.) (unpublished) (policy did not protect against taxes that became liens after policy date, especially when tax liens were likely invalid due to their late filing).

> approved prior to the date of a title insurance policy insuring against liens or encumbrances charging the property at the date of the policy has been held to be an encumbrance within the contemplation of the policy.[171]

State law controls as to whether or not the tax, assessment or charge was a lien on the date of policy.[172] Real estate taxes that were not excepted in a policy insuring the United States were held to be liens covered by the policy, even though the taxes could not be foreclosed against the federal government.[173]

A special assessment is a tax assessment imposed against a parcel for the cost of an improvement that confers a special benefit on the parcel, such as a sidewalk running along its boundary. Special assessments are typically levied and paid in installments that can stretch over a period of five or more years. Every state's special assessment law creates a different statutory process for the levying of special assessments and their lien status and collection, and the claim administrator must be familiar with local law in addressing a claim about a special assessment. However, typically, the policy protects against installments of special assessments that had become due and that had obtained lien status before the date of policy.[174] If all installments that had achieved lien status by the policy date were paid on the policy date, there is no policy coverage for future installments that have not yet become liens.[175] Also, the policy does not indemnify against contemplated or pending assessments that have not achieved lien status as of the policy date.[176] The special assessment process contains a number of steps, typically including an initial resolution to proceed with the project, the letting of contracts, construction of the improvements, a resolution or report fixing the cost for each property owner, public hearings, and culminating in the levy or assessment of the tax. A looming assessment is not an "encumbrance" before it becomes a lien.[177]

Some statutes or ordinances permit less formal assessment procedures for minor street and

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[171] Annotation, *What Constitutes a Charge, Encumbrance, or Lien Within Contemplation of Title Insurance Policy*, 87 ALR3d 764, §2.

[172] *Atlanta Title & Trust Co. v. Inman*, 42 Ga.App. 191, 155 S.E. 364 (1930).

[173] *United States v. City of Flint*, 346 F.Supp. 1282 (E.D. Mich. 1972).

[174] *Real Estate-Land Title & Trust Co. v. Real Estate-Land Title & Trust Co.*, 15 Pa.D.&C. 409 (1931).

[175] *Ackley v. Lawyers Title Ins. Corp.*, 16 Misc.2d 402, 182 N.Y.S.2d 76 (1958); *Butcher v. Burton Abstract Title Co.*, 52 Mich. App. 98, 216 N.W.2d 434 (1974); *Mayers v. Van Schaick*, 268 N.Y. 320, 197 N.E. 296 (N.Y. 1935).

[176] *Dokel v. Title Guarantee & Trust Co.*, 147 Misc. 72, 263 N.Y.Supp. 438 (City Ct. 1933); *Shefts v. Security Title and Guar. Co. of N.Y.*, 22 Bucks 189, 55 Pa. D. & C.2d 616, 1972 WL 15826 (Pa.Com.Pl. 1972); *Medeiros v. Guardian Title & Guar. Agency, Inc.*, 57 Ohio App.2d 257, 387 N.E.2d 644 (Cuyahoga Co. 1978); *Cummins v. U.S. Life Title Ins. Co. of N.Y.*, 40 N.Y.2d 639, 389 N.Y.S.2d 319, 357 N.E.2d 975 (1976); *Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester*, 283 N.Y. 33, 27 N.E.2d 225 (1940); *Union Realty Co. v. Ahern*, 93 A.2d 84 (D.C.App. 1952); *McFaw Land Co. v. Kansas City Title & Trust Co.*, 357 Mo. 797, 211 S.W.2d 44 (1948); *Cole v. Home Title Guar. Co.*, 29 A.D.2d 552, 285 N.Y.S.2d 914 (A.D. 2 Dept. 1967).

[177] *Strass v. District-Realty Title Ins. Corp.*, 31 Md.App. 690, 358 A.2d 251, 87 A.L.R.3d 752 (1976).

sidewalk repair. Again, state law or local ordinance controls as to the date on which such assessments become liens. Such an assessment is covered by the policy if it has become a lien as of the date of policy and is not excepted.[178]

The fact that property is in a special taxing district is not a lien or encumbrance that invokes a covered risk.[179] The same is true as to a developer's agreement that obligates the developer to make payments to the municipality for the subdivision improvements.[180] However, the existence of a special taxing district or a payment-in-lieu-of-tax agreement may be an encumbrance on title, even if no taxes emanating from the district were liens on the date of policy.[181]

Contested assessments may create "hidden" liens. When the seller paid under protest, then contested the assessment and won, and then the municipality levied a new tax for the same year after the insured purchased, the tax was found payable by the insurer. The court reasoned that the status of the tax payment and contest was discoverable by the insurer.[182]

An exception for the taxes owed for a particular year will typically take away policy coverage for those taxes, no matter what enforcement action the taxing district may have taken as to those taxes on the policy date.[183]

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[178] *Atlanta Title & Trust Co. v. Inman*, 42 Ga.App. 191, 155 S.E. 364 (1930).

[179] *Burman v. Richmond Homes Ltd.*, 821 P.2d 913 (Colo.App. 1991); *Edwards v. St. Paul Title Ins. Co.*, 39 Colo. App. 235, 563 P.2d 979 (1977); *Vestin Mortgage, Inc. v. First American Title Ins. Co*., 139 P.3d 1055, 553 Utah Adv. Rep. 3, 2006 UT 34 (Utah 2006) (also finding no coverage under CLTA 104 or F.A. Form 31 endorsements, regarding taxes or other liens that can cut off or affect the priority of the insured mortgage); *Luboff v. Security Title & Guar. Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965); *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co*., 830 F.3d 1195 (10th Cir. (Utah) 2016) (2006 ALTA policy tax Covered Risk does not alter analysis under 1992 form that policy does not protect against existence of a special taxing district under which no assessment had been made on the policy date; court adopted the reasoning of *Vestin Mortgage*, which construed a 1992 ALTA policy).

[180] *Luboff v. Security Title & Guar. Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965).

[181] In *MBK Celamonte, LLC v. Lawyers Title Ins. Corp.*, 2010 WL 1697703 (Cal.App. 4 Dist.) (unpublished), reh.den. May 28, 2010, rev.den. July 21, 2010, the court held the taxing district was an encumbrance on title but that no tax lien existed on the policy date. It said: "Lawyers Title argues throughout its appellate briefs that the special tax was not a lien. Whether Lawyers Title is correct in this regard is irrelevant. The Policy covers loss or damage resulting from not only liens on title, but also *encumbrances* on title. The evidence supporting the trial court's finding that the special tax was an encumbrance on title is substantial." (emphasis in original) In *AHF-Bay Fund, LLC v. City of Largo*, 227 So.3d 740 (Fla.App. 2 Dist. 2017), the court held that a recorded memorandum about a payment-in-lieu-of-tax agreement was an encumbrance on title, but did not represent a lien. In *Title Resources Guar. Co. v. The Lighthouse Church & Ministries*, ___ S.W.3d ___, 2019 WL 3293692 (Tex.App.-Houston 2019) (not yet released for publication), when property had been exempt from tax because it was owned by a church, the exemption was revoked because the church sold the property. The title insurer for the buyer paid the tax, and then had difficulty recovering the tax from the church.

[182] *National Holding Co. v. Title Ins. & Trust Co.*, 45 Cal.App.2d 215, 113 P.2d 906 (Cal.App. 2 Dist. 1941).

[183] In *Heidi Associates v. Lawyers Title Ins. Co.*, 67 N.Y.2d 1041, 495 N.E.2d 350 (N.Y. 1986), rev'g, 112 App.Div.2d 844, 492 N.Y.S.2d 949 (App.Div. 1985), the policy was found not to protect against an in rem action to foreclose delinquent taxes because the policy excepted the taxes, although it did not separately recite the foreclosure action. The court said that the foreclosure action did not create a separate lien or encumbrance, and thus fell under the subject of the exception.

The policy's tax lien coverage is not negated, in most situations, by evidence that the insured contracted to take title to the property subject to existing taxes. In one case, when the policy failed to except general taxes for the year in which the policy was dated, a court rejected the argument that general taxes are automatically assumed as a burden with ownership of property, and therefore the insured suffered no loss in having to pay them.[184] However, the matter may fall under Exclusion 3(a), for matters "assumed or agreed to," if there is unequivocal evidence that the insured knew of and assumed the tax debt. See §11.2.1 regarding liens "assumed" by the insured.

In many jurisdictions, a municipality may impose various charges for the connection to municipal services or utilities, such as sewers. In at least some states, those charges are not liens against the real estate. There is no coverage against connection fees that are not liens.[185]

Also, many locales make charges for the use of municipal services or utilities, such as water, sewer or municipal electricity. State law will govern whether or not those charges become liens on the real estate and, if so, at what juncture. Some state laws provide that such charges will be added to the tax roll if they become delinquent, becoming liens some time after the date the service is provided. If the service charge is not a lien as of the date of policy, the insurer has no duty to pay the charge on behalf of either the insured owner or lender. [186] However, the insurer may become liable for such a charge if it had become a lien on or before the policy date.[187] It is common, in those jurisdictions in which utility service liens may be imposed, for the title insurance commitment to recite a special exception for the lien of utility charges, and for the purchaser to get final readings from the service provider on the day of closing and pay those charges from closing to induce the insurer to remove that exception from the policy.

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[184] In *Bragman v. Commonwealth Land Title Ins. Co.*, 421 F.Supp. 99 (E.D.Pa. 1976), the court admitted that the result was inequitable, but likened the insured's fleecing of the insurer to gambling winnings: "To pose the dilemma in extremis, if a person wins a sum of money in a dice game or a casino, we do not say that he has not suffered a loss if that money is stolen from him as he is exiting or if it is destroyed in an accident or fire." 421 F.Supp. at 103. The analogy is weak, since the insured won the jackpot without having risked a wager.

[185] *TSM Development, Inc. v. Chicago Title Ins. Co.*, 2005 WL 3111840 (Minn.App.) (unpublished) (charge for connecting to municipal water system, which is not an assessment under state law, is not a lien covered by title policy); *Concepts TV Productions, LLC v. Sharpe*, 2019 WL 4020197 (N.J.A.D.) (unpublished) (one-time charge for connecting to municipal sewer and water service not a lien on policy date and therefore no policy coverage for charge).

[186] *Van Dinter v. Orr*, 2005 WL 1796965 (Wash.App. Div. 3 2005) (unpublished) (monthly sewer use charge was not a lien or encumbrance; therefore, no loss suffered under either owner's or loan policies).

[187] In *Giacalone v. New York*, 104 Misc.2d 405, 428 N.Y.S.2d 792 (N.Y. Sup. Ct. 1980), a bill and payment therefor were presented at closing. The insurer-closer wrote "omit, see bill attached" on the marked-up policy at closing. However, below that note the closer added: "Except- ... Policy will Except additional water meter and sewer rent charges since the last mailing noted herein... ." Below this typewritten exception were the words, "Water Department Violation # 52829 dated 1/29/75 Meter # 5948 not registering." The owner-insured got a substantial water bill after closing for meter 5948. She sought payment from the insurer, on the theory that the insurer either had not excepted the charges or that a certain special procedure, by which the insurer could ascertain what additional water meter charges existed at closing time, should have been followed. The court disagreed, finding the water charges "clearly excepted in Schedule B."

In most cases, a tax that is reassessed or modified after the policy date is not covered, because the new portion of the tax was first levied after the date of policy.[188] However, there is the possibility of coverage if the reassessment process had begun before the policy date, particularly if there was public notice of that fact.[189]

A taxing authority occasionally seeks to assess additional taxes for prior years, or to back-date a special assessment, often because of an error in the tax roll or the assessment process. Unlike a reassessment, which typically is a process for which notice is given, there is often no prior notice that the taxing authority will seek to impose an after-the-fact tax. If there was no notice of the levy on date of policy, such assessments are not covered by most forms of ALTA policies, because they occur post-policy.[190] As noted above, however, Covered Risk 24 of the Homeowner's policy provides a limited protection against future assessments imposed after the policy date "because of construction or a change of ownership or use that occurred before the Policy Date." A reassessment due to a mistake in the roll would not be covered by that assurance.

Title insurers incur claims due to taxing authorities' inaccurate assessment rolls or records. Sovereign immunity makes it difficult to force the taxing authority to honor its earlier incorrect information and forgive or abate the taxes. The likelihood of success in such a case often hinges on the relative solemnity of the document by which the incorrect representation was made by the taxing authority, the degree to which the insured relied thereon, and the egregiousness of the error. In *Ilana*

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[188] In *Lone Star Equities, Inc. v. Dimitrouleas*, 34 N.E.3d 936, 2015-Ohio-2294 (Ohio App. 2 Dist. 2015), the court held that the policy did not protect against real estate taxes that were reassessed after the policy date even though the reassessment process had begun before closing. The court relied in part on the fact that the 2006 ALTA policy at issue contained the statement in Covered Risk 2(b) that the policy protected against taxes "due or payable, but unpaid," because the tax had not become due before the policy date. In *Princeton South Investors, LLC v. First American Title Ins. Co*., 437 N.J.Super. 283, 97 A.3d 1190 (N.J.Super.A.D. 2014), cert.den. 220 N.J. 268 (Jan. 23, 2015), the court held that an appeal by the municipality asserting that property was under-assessed, pending but undecided on the policy date, did not impose a lien or encumbrance or render title unmarketable, and neither the appeal nor the possible future tax triggered policy coverage. In *Rhone v. First American Title Ins. Co.*, 928 N.E.2d 1185, 340 Ill.Dec. 588 (Ill.App. 1 Dist. 2010), the policy did not cover the reassessment of a tax for a tax year before the policy date, when the reassessment did not occur until two years after the policy date. However, *Rhone* was distinguished in *Menconi v. Stewart Title of Illinois*, 2015 WL 4534148, 2015 IL App (1st) 143043-U (Ill.App. 1 Dist.) (unpublished), in which the court refused to dismiss a suit against the insurer for a tax levy made after the date of policy for an "omitted" tax from several years prior to the policy date, because the law gave the "omitted" tax a retroactive lien date prior to the policy date. See the separate discussion in this section of so-called omitted taxes, which differ from reassessments.

[189] In *Bel-Air Motel Corp. v. Title Ins. Corp. of Pennsylvania*, 183 N.J.Super. 551, 444 A.2d 1119 (1981), the court found that there was coverage as to an assessment that had been made prior to policy date, but challenged, voided and reassessed after the policy date. The court noted that the assessment had been levied before policy date, on which date it became a lien, and the only dispute after that date was the amount. All improvements had been completed, and the court found sufficient notice of the proceedings in the public records.

[190] However, see *Menconi v. Stewart Title of Illinois*, 2015 WL 4534148, 2015 IL App (1st) 143043-U (Ill.App. 1 Dist.) (unpublished), in which the court refused to dismiss a suit against the insurer for a tax levy made after the date of policy for an "omitted" tax from several years prior to the policy date, because the law gave the "omitted" tax a retroactive lien date prior to the policy date and the insured argued that the tax could have been discovered in the public records before closing.

Realty, Inc. v. Village of Haverstraw,[191] for example, a village gave a verbal report of taxes that was wrong. Two years before, the same title insurer had gotten a correct written tax statement, for another transaction involving the same property. The court was so impressed by the weight of the stale but correct written tax statement, and the presumed lack of weight to be accorded an oral statement, that it found it "would be an error of law" to "preclude [the village] from recovering its tax revenue."[192]

Insureds and others sometimes seek to make the title insurer the guarantor of the accuracy of tax information obtained from the municipality and reported in the title insurance commitment. While the title insurance policy protects against the lien of real estate taxes not excepted, it is not a guarantee of tax information obtained from the government. There are many facts about taxes that the insurer discloses in the commitment or policy as a mere courtesy, such as tax parcel numbers, the party to whom the tax bill will be sent, tax sales, redemption rights, balances owed, and installment plans. There is no loss payable if the policy contains an incorrect statement about one of the above items of information, as long as it accurately excepts those taxes which are liens against the property as of the policy date. As an example, in *Corvetti v. Fidelity Nat'l Title Ins. Co.*,[193] the policy contained exceptions for 1993 and 1994 unpaid taxes, interest and penalties. However, the 1993 taxes had been sold at an auction, which fact was not noted. The court found that the insurer was not obligated to disclose the tax sale in the policy. It said:

> The obligations of a title insurance company are "to be determined by reference to the provisions of the policy of title insurance"… . Here, Fidelity insured against loss or damage sustained by reason of, inter alia, title being vested other than as described in the policy. The policy unequivocally states that it "does not insure against loss or damage …which arise by reason of …[the] 1993 state, town and county taxes …and any additional interest and penalties" (emphasis supplied). In our view, the instant action falls squarely within this exclusion and, accordingly, plaintiffs lack a cognizable claim against Fidelity.

Certain older Illinois decisions imposed a duty on title insurers to protect the insured from "title surprises,"[194] which the courts deemed to include the provision of accurate information concerning the status of taxes. In *Oak Park Trust & Savings Bank v. Intercounty Title Co. of Illinois*,[195] the title insurance commitment correctly excepted the interest of the purchaser at the tax

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[191] 558 N.Y.S.2d 566 (Sup.Ct.A.D. 1990).

[192] Id.

[193] 258 A.D.2d 32, 691 N.Y.S.2d 645 (N.Y.A.D. 3 Dept. 1999).

[194] The "title surprise" idea, which is not an accurate paraphrase of the Covered Risks, was first announced in *Pohrer v. Title Ins. Co. of Minn.*, 652 F.Supp. 348 (N.D.Ill. 1987). Although the *Pohrer* decision has been cited by later courts, it was vacated in 882 F.Supp. 114. The order of vacation said: "This Court's Memorandum and Order entered on January 14, 1987 is hereby vacated, and, having been vacated, has no precedential value."

[195] 287 Ill.App.3d 647, 678 N.E.2d 723 (Ill.App. 1 Dist. 1997).

sale for the 1982 taxes. It made no exception for the 1983 and 1984 taxes, which had been paid. The tax sale buyer had paid those taxes. Under Illinois law, in order to redeem from the 1982 tax sale, the insured was obligated to also reimburse the tax buyer for the 1983 and 1984 taxes. The insured argued that the insurer had a duty to disclose in its commitment exception the identity of the person who paid the taxes. The court held that, if the identity of the taxpayer was shown in the public records, that information would be "subject to disclosure" by the title insurer in the commitment to insure. However, since that decision was issued, Illinois has declared that a title insurance commitment is not a representation of the state of title, which overturns the "title surprise" decisions.[196]

9.5 Liens Other Than Taxes

ALTA title insurance policies also protect against liens other than real estate taxes. Covered Risk 2 of the 2006 policies protects against "[a]ny defect in or lien or encumbrance on the Title." The 1992 policy provides protection against "liens." The Residential policy contains Covered Title Risk 7, which protects against liens resulting from "a judgment, tax, or special assessment…" and charges by a homeowner's or condominium association, as well as "other defects, liens, or encumbrances" (Covered Title Risk 14). The ALTA Homeowner's policy identifies coverage against mortgages, judgments, state or federal tax liens, and charges by a homeowner's or condominium association.

The policy protects against liens that have attached to the property on the date of policy, unless excepted in Schedule B of the policy. These include judgments, construction or mechanic's liens, state and federal tax liens, mortgages, deeds of trust and similar consensual liens, and private condominium or association assessments.[197] Federal tax liens are discussed at § 3.4.7.1. Policy coverage for construction liens is discussed in Chapter 10. There is no duty to indemnify an insured against a lien that had attached to the property as of the policy date, but which has since expired as a lien without having been enforced against the insured parcel.[198]

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[196] *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill.2d 326, 300 Ill.Dec. 69, 843 N.E.2d 327 (2006).

[197] *Commonwealth Land Title Ins. Co. v. Graoch Associates No. 73*, 2010 WL 1257748 (E.D.Ky.) (unpublished) (no coverage for future homeowner's association assessments that were not liens on date of policy, although amendment to restrictions imposing the obligation was not excepted); *Clairton Corp. v. Chicago Title Ins. Co.*, 438 Pa.Super. 488, 652 A.2d 916 (1995) (claims against insurer dismissed when judgment proven not to attach to property); *Weinhold v. Chicago Title Ins. Co*., 83 Mass.App. Ct. 1116, 83 Mass.App.Ct. 1116, 983 N.E.2d 749 (Table), 2013 WL 776685 (Mass.App. Ct.) (unpublished) (policy does not protect insured owner against mortgage foreclosure brought on by his failure to pay the note he gave that is secured by the mortgage he gave).

[198] See *Alford v. Chicago Title Ins. Co.*, 3 S.W.3d 164 (Tex.App.-Eastland 1999), in which the court held that the insurer was not obligated to remove judgments that had expired without enforcement before the coverage suit against the insurer was tried. The court declared: "[b]ecause there was never a loss of title, we find that there was no failure of the Alfords' title which would provide a basis for recovery under the Alfords' title insurance policy."

The owners' policy does not protect against a lien against the insured, as discussed at §11.2.9. However, the owner's policy does protect one insured against a lien attaching to the interest of a different insured, unless an exclusion applies.[199] The policy does not protect against a lien that attaches after the policy date.[200]

An insurer may resolve a claim concerning a covered lien in one of several ways. For example, the insurer may remove the lien or bring an action to clear title if the insurer considers the lien to be invalid or unenforceable. See §3.4.7.1 concerning the way in which the insurer defends against and removes federal tax liens. One defense to a tax lien or judgment that is discoverable in a name index only is the lien holder's failure to correctly recite the debtor's name, which is discussed at §3.4.7.6. See §3.6 regarding the right to pay an adverse claimant, and §3.4 regarding the clearing of title. An insurer may not have satisfied its duty under an owner's policy by agreeing to insure over a covered lien.[201] See §9.8.2 regarding insuring over and the marketability coverage. See §3.1 concerning the insurer's right to conduct watchful waiting as to a lien that has not been enforced and which will expire within a reasonable time after the insured submits the claim notice.

The insurer is not obligated to pay off a lien that does not attach to the property under state law. For example, a judgment docketed against the seller after he or she has delivered a deed to the insured purchaser, but before the deed is recorded, may appear to attach to the property because the seller remains the record owner, but does not attach because title has passed by equitable conversion, as further discussed at §3.4.7.1.3. Similarly, in some states, a purchase money mortgage has priority over all other liens, even those docketed or recorded before the mortgage; that doctrine is further

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[199] *Degueyter v. First American Title Ins. Co. of Louisiana*, 230 So.3d 652 (La.App. 3 Cir. 2017) (when sister and brother-in-law took title to house together, policy protected sister against liens that attached to property only because brother-in-law also took title; dissent would have ruled that Exclusion 3(a) applied based on indications that sister was put in title to defraud judgment creditor).

[200] In *Wells Fargo Bank, N.A. v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 2062947 (D.Nev. 2019) (permanent citation not yet available), appeal filed June 11, 2019, the court held that there was no coverage under a loan policy or certain endorsements for a homeowner's association lien based on assessments made after the policy date, even though the Nevada statute grants an HOA lien super-priority as to recorded deeds of trust, including the insured deed of trust. Essentially the same ruling was issued in *Wells Fargo Bank, N.A. v. Fidelity Nat'l Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 5578487 (D.Nev. 2019) (permanent citation not yet available), appeal filed November 18, 2019 and in *HSBC Bank USA, N.A. v. Fidelity Nat'l Title Group, Inc.*, ___ F.Supp.3d ___, 2019 WL 5596392 (D.Nev. 2019) (permanent citation not yet available), appeal filed December 2, 2019. These decisions emanate from the declaration by the Nevada Supreme Court in *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408 (Nev. 2014), that NRS 116.3116(2) grants a homeowner association lien that is recorded after a first deed of trust priority over that recorded first deed of trust in an amount equal to nine months of assessments. Any additional assessments have priority only as of the date the HOA lien is recorded. In *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113 (Nev. 2018), as amended on denial of reh'g Nov. 13, 2018, the Nevada Supreme Court held that payment by the lender of the amount of the super-priority assessments before the auction sale preserves the priority of the deed of trust and causes the buyer at auction to take title subject to the deed of trust. The high court also held that an offer to pay the super-priority amount, even if tender is rejected by the association, is a offer discharge of the super-priority portion of the HOA lien. *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 435 P.3d 1217 (Nev. 2019).

[201] *Shada v. Title & Trust Co. of Fla.*, 457 So.2d 553 (Fla.App. 1984); *House v. First American Title Ins. Co.*, 883 N.E.2d 197 (Ind.App. 2008).

discussed at §3.4.7.2.

A claim about a lien is handled differently under an owner's policy than under a loan policy. Under an owner's policy, courts have stated that the loss caused by a lien is immediate, so that the insurer's obligation to remedy the lien is not subject to any further condition.[202] However, as to a loan policy, the effect of a covered lien is most often not "immediate." The lien will not cause the lender to suffer a loss if its loan is repaid and, if the borrower does default, the lender still will suffer a loss only to the extent that the lien causes the lender to recover less than the loan amount from the property. Thus, in considering a loan policy claim concerning a lien, a New Jersey court stated:

> The fee interest of an owner is immediately diminished by the presence of a lien thereon since its resale value will always reflect the cost of removing the lien. It is otherwise with a mortgage lender whose loss cannot be measured unless the underlying debt is not repaid and the security of the mortgage proves inadequate. To say that the loss here consisted of the diminution in the security misses the point that the diminished security is now supplied by the title policy, but only to the extent that there has been a debt loss which remained unsatisfied from the proceeds of the mortgaged property. By requiring the insurer to pay now for the cost of removing the lien merely creates the conditions for a windfall should the debt be repaid or should the remaining lands provide sufficient security for payment.[203]

The measure of loss under a loan policy is fully discussed at §3.2.4.

9.6 Easements, Restrictions And Other Encumbrances

Most ALTA policies indemnify the insured against the existence of encumbrances on the title to the property.[204] Under the 2006 ALTA policies, the protection against encumbrances is found in Covered Risk 2.[205]

The encumbrance covered risk of the ALTA policy is invoked by various types of encumbrances, including easements and restrictions, unless the right is excepted from coverage in Schedule B. Another type of encumbrance is the restraint on alienation, such as an option to purchase and a right of first refusal.[206] The policy's protection against encumbrances has been held to

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[202] *Shada v. Title & Trust Co. of Fla.*, 457 So.2d 553 (Fla.App. 1984).

[203] *Green v. Evesham Corp.*, 179 N.J.Super 105, 430 A.2d 944, 946 (App.Div. 1981).

[204] The ALTA Residential Limited Liability Junior Loan policy, however, does not provide an assurance against encumbrances. See *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp*., 282 F.R.D. 423 (N.D.Ill. 2012).

[205] The 2006 ALTA policies indemnify against loss or damage due to "[a]ny defect in or lien or encumbrance on the Title." Earlier ALTA policy forms contain the same type of coverage.

[206] See *Ryan v. Lawyers Title Ins. Corp.*, 959 N.E.2d 870 (Ind.App. 2011), in which the insurer acknowledged that a right of first refusal invoked policy coverage, but the court found that the right in question was a personal covenant and did not burden the land after it had been transferred.

cover various matters that are deemed to be encumbrances under state law.[207] The definitions of "encumbrance" and other terms in the policy for types of encumbrances, such as "servitude," may be deduced from state law or dictionaries, whether lay or legal, depending on the circumstance.[208]

Not every statement appearing on a deed is a covenant, condition or use restriction that rises to the level of an encumbrance on title.[209] Recorded instruments that do not create encumbrances on title do not invoke policy coverage.[210] See §9.12 for a discussion of those classes of instruments that

[207] A conditional use permit was found to be an encumbrance when recorded in the chain of title pursuant to a statute whose legislative history showed the intent that such a permit would be an encumbrance on title, *1119 Delaware v. Continental Land Title Co.*, 20 Cal.Rptr.2d 438 (Cal.App. 2 Dist. 1993). See also *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424 (1909) (encroachment of front steps of neighbor's house); *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993) (encroaching underground foundation); *Ticor Title Ins. Co. v. University Creek*, Inc., 767 F.Supp. 1127 (M.D.Fla. 1991) (lis pendens is an encumbrance when it gives notice of an action in which the plaintiff claims a title interest in the land). In *MBK Celamonte, LLC v. Lawyers Title Ins. Corp.*, 2010 WL 1697703 (Cal.App. 4 Dist.) (unpublished), reh.den. May 28, 2010, rev.den. July 21, 2010, the court held the taxing district was an encumbrance on title. In *AHF-Bay Fund, LLC v. City of Largo*, 227 So.3d 740 (Fla.App. 2 Dist. 2017), the court held that a recorded memorandum about a payment-in-lieu-of-tax agreement was an encumbrance on title. In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, ___ Ga.App. ___, 835 S.E.2d 21 (Ga.App. 2019), the policy did not contain an exception for a recorded notice advising that oil had leaked into the groundwater below the surface of part of the insured property. The court found an ambiguity in the policy because the terms "defect" and "encumbrance" were not defined. The court held that title was defective and that the recorded notice was an encumbrance on title.

[208] One definition of encumbrance is "an invasion of the interest in the exclusive possession of land." *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993) (District of Columbia law), quoting *Carrigan v. Purkhiser*, 466 A.2d 1243, 1243 (D.C. 1983), which in turn quoted from the Restatement (Second) of Torts § 821D, comment (d); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 13, at 77, 82-83 (5th ed. 1984). See Annotation, *What Constitutes A Charge, Encumbrance, or Lien Within Contemplation of Title Insurance Policy*, 87 A.L.R.3d 764; *GC Finance, LLC v. Old Republic Nat'l Title Ins. Co.*, 2010 WL 1408823 (M.D.Tenn.) (unpublished), affirmed 2011 WL 5966512 (6th Cir. (Tenn.)) (unpublished) (partial release of easement not an encumbrance, because it modified and reduced burden on property originally imposed by easement). An excellent discussion of matters which constitute "encumbrances" under New York law is found in Pedowitz, *Title Insurance in New York Today*, New York State Bar Journal, Vol. 68, No. 2, p. 12 at 16 (Feb. 1996). In *Pasha v. Commonwealth Land Title Ins. Co*., 2014 WL 5510931 (Ky.App.) (unpublished), the court found an exception for "[a]ny easements or servitudes appearing in the public records" to bar coverage for a use restriction for which the policy did not contain a separate exception that identified the instrument by its recording data. It said that the use restriction was a "servitude." Because that word is not defined in the policy and the insureds were consumers, the court turned to Merriam-Webster's Collegiate Dictionary, which provided this definition: "a right by which something (as a piece of land) owned by one person is subject to a specified use or enjoyment by another." The court said that definition perfectly fit the restriction. It also found that the classification of a use restriction as a servitude was consistent with Kentucky real estate law.

[209] However, the statement in a deed that "[a]ny listing of real estate should be done through Antonio Russo unless otherwise agreed upon by both the buyer and seller" was found to be a mere suggestion and not an enforceable restriction or encumbrance on title, and thus not covered by the title policy. *GRPL Enterprises, Inc. v. Angelo*, 2006-Ohio-7065, 2006 WL 3849859 (Ohio App. 7 Dist.) (unpublished).

[210] *Veeder v. Old Republic Nat'l Title Ins. Co*., 88 Mass.App.Ct. 1104, 36 N.E.3d 79 (Table), 2015 WL 5102856 (Mass.App. 2015) (unpublished) (recorded conservation commission order of conditions "places a restriction on the use of the land," but "does not create a restriction on the title to the property," and thus is not an encumbrance on title); *Yen v. Chicago Title Ins. Co.*, 2013 WL 5429458 (Cal.App. 4 Dist.) (unpublished) (title to condominium unit was not encumbered by pending lawsuit about an excepted matter which later caused increase in monthly assessments but did not

are recorded in the real estate records but that do not affect title.

The insurer is not obligated to indemnify the insured for loss incurred by the insured that is related to, but not caused by, an encumbrance for which there is policy coverage.[211] Also, there may be no diminution in value due to a recorded restriction, if the use prohibited by the restriction would also be barred by a zoning or building ordinance.[212] Structures, improvements and other physical objects on the property rarely if ever are deemed to be encumbrances on title, although issues about

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affect unit's title); *GRPL Enterprises, Inc. v. Angelo*, 2006-Ohio-7065, 2006 WL 3849859 (Ohio App. 7 Dist.) (unpublished) (statement in deed that property shall be listed for sale through a certain broker not an encumbrance on title); *Pavilion Park, LLC v. First American Title Ins. Co.*, 2011 WL 43222 (W.D.Ky.) (unpublished) (recorded covenant making owners of property responsible for any future cleanup of remediated waste disposal site was a physical condition that was not an encumbrance); *Chesapeake Land Development Company LLC v. Chicago Title Ins. Co.*, 2017 WL 5930295 (W.D.Okla.) (unpublished) (finding that use restriction was an encumbrance and rejecting *Pavilion Park* analysis of an encumbrance on title); *First American Title Ins. Co. v. McGonigle*, 2013 WL 1087353 (D.Kan.) (unpublished); 2013 WL 1092893 (D.Kan.) (unpublished) (recorded agreement to repair dam, though binding on subsequent owners, was not an encumbrance on title); *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins. Co*., 128 So.3d 107 (Fla.App. 3 Dist. 2013) (insurer not liable for failing to except easement that was time-barred under Florida Marketable Record Title to Real Property Act). The existence of a special taxing district, or a developer agreement, were held not to be encumbrances in *Burman v. Richmond Homes Ltd.*, 821 P.2d 913 (Colo.App. 1991); *Edwards v. St. Paul Title Ins. Co.*, 39 Colo.App. 235, 563 P.2d 979 (1977); and *Luboff v. Security Title & Guar. Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965). Title was not deemed to be encumbered by a developer's failure to comply with a subdivision ordinance on the sale of the parcel, in *Busch v. Nervik*, 38 Wash.App. 541, 687 P.2d 872 (1984). An "Agreement to Retain Land in Irrigable Status" was found not to affect the title to the property, and was thus properly not excepted in Schedule B, in *Lombardo v. Pierson*, 852 P.2d 308 (Wash. 1993). A township record of an abandoned septic tank was not a document which affected title, and thus the insurer was not required to report it as an exception to title, in *Rood v. Commonwealth Land Title Ins. Co*., 936 A.2d 488, 2007 PA Super 315 (Pa.Super. 2007), pet.den. Nov. 19, 2008. Likewise, a covenant not to convey or encumber the property was not a lien against its title, and the insurer did not owe a duty to the lender that held the covenant to insist that the debt be paid at the time the property was transferred, in *Titan Management, L.P. v. First American Title Ins. Co.*, 2006 WL 3732995 (N.J.Super.A.D.) (unpublished). Title was held not to be encumbered by an agreement that dictated how the proceeds from the sale of the property were to be divided, in *Klickman v. Title Guar. Co. of Lewis County*, 105 Wash.2d 526, 716 P.2d 840 (1986), which states: "Put simply, the agreement here is not a title defect because it does not affect title. The agreement merely gives Herman Klickman a lien on one-third of the proceeds derived from a sale of the property in question. It does not give Herman Klickman any interest in the property, nor does it give him the right to disturb the buyers in their possession of the property. In short, the buyers could not possibly be affected by the terms of the agreement." Id. at 842. In *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the court held that the language of the policy and the definitions of marketability of title in legal dictionaries established that marketability is "limited to issues regarding" the right to own or possess the property. Therefore, subdivision ordinances and conditions placed on a subdivision map did not render title to the subdivided lots unmarketable.

[211] In *Furey v. Chicago Title Ins. Co*., 2012 IL App (2d) 120203-U, 2012 WL 6968946 (Ill.App. 2 Dist.) (unpublished), flood damage to the insured's house was caused by the overflowing of a river, not a drainage easement that was not excepted in Schedule B; therefore, the insurer was not required to pay for the flood repairs.

[212] In *Gibbs v. Williams*, 2015 WL 5440628 (W.D.Wis. 2015) (unpublished), the court held that an attorney for the insureds did not commit malpractice by failing to submit a claim notice to the insurer concerning a recorded use restriction prohibiting use of the property for a business, because a county zoning ordinance also prohibited the property's use as a resort. The court held that, because the policy included Exclusion 1, the insureds "could not recover under the title policy."

permanent and substantial structures may affect the marketability of the title.[213]

Also, an adequate exception in Schedule B removes coverage for an encumbrance.[214] The standard exception for easements not of record is discussed at §12.4. Some policies contain exceptions for all easements of record, as discussed at §12.7.4. The policy also excludes easements granted by or to which the insured agreed at time of purchase. See §11.2.2 regarding easements, restrictions "agreed to" in the purchase agreement. An exception for "restrictions" contained in certain deeds was found insufficient notice of a condition in the deed requiring that buildings be constructed before the property could be sold.[215] An exception for a recorded restriction may not eliminate coverage as to an identical restriction contained in another instrument,[216] or for a reverter clause contained in the same document.[217]

The existence of an encumbrance on title for which there is coverage does not provoke a positive duty of the insurer to enforce the right. When the insured property was subject to a declaration of restrictions that prohibited further division of parcels in the development, the title insurance policy did not obligate the insurer to prosecute the insured's lawsuit to enforce the no-subdivision restriction against another lot owner.[218] The policy does not protect against restrictions to which the insured agreed at time of purchase, per Exclusion 3(a), as discussed in §11.2.2. See §3.2.3.1.3 for a discussion of how to measure loss due to a restriction on title.

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[213] *Thomas v. Tradesmen's Trust & Savings Fund Co.*, 21 Pa.C.C. 151, 7 Pa. D. 375, 1898 WL 3681 (Pa.Com.Pl. 1898) (party wall); *Udell v. City Title Ins. Co.*, 12 App.Div.2d 78, 208 N.Y.S.2d 504 (1960) (party wall); *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006) (substantial parking structure encroachment into public street). In *Straily v. Lawyers Title Ins. Corp.*, 2011 WL 6742505 (Tex.App.-Tyler) (unpublished), the court found that a sewer pipe that the city admitted had been laid without an easement or other right was a trespass and not an encumbrance on title, and thus did not invoke policy coverage. Many other physical conditions, and their claimed effect on the marketability of title, are discussed in §9.8.3. Encroachments are discussed in depth at §12.3.10.

[214] *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953).

[215] *Feldman v. Urban Commercial, Inc.*, 78 N.J.Super. 520, 189 A.2d 467 (Ch. 1963), aff'd, 87 N.J.Super 391, 209 A.2d 640 (App. Div. 1965).

[216] *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (Fla.App. 1979).

[217] *Holly Hotel Co. v. Title Guarantee & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1933).

[218] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. July 23, 2009).

9.7 Right Of Access

FORM 71, Appendix A
Access--alternate right available

FORM 90, Appendix A
Access--regulatory restriction

Covered Risk 4 of the 2006 ALTA policy indemnifies the insured if, as of the date of policy, there was "[n]o right of access to and from the Land." Covered risk 4 of the 1992 ALTA policies insured against loss caused by the "lack of a right of access to and from the land" as of the date of policy. The coverage is identical though worded slightly differently. The ALTA Residential policy coverage is also identical, though worded as: "[y]ou do not have any legal right of access to and from the land." The coverage has been found not to be ambiguous.[219]

The access coverage is invoked when it has been established that there was no right of access to the insured land on the policy date.[220] The nature of the assured access right is not further described or defined in the ALTA policies. The policy does not assure that the access right in existence on the date of policy will continue in perpetuity, or that it cannot be terminated or extinguished after the policy date.[221] See §9.7.1 for a complete discussion of the types of access rights that are deemed adequate to fulfill the policy coverage. The insured should have the burden of

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[219] *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209, 1214 (10th Cir. (Colo.) 2016); *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo.App. 1991).

[220] See, for example, *Clements v. Stewart Title Guar. Co.*, 537 S.W.2d 126 (Tex.App. 1976); *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 421 N.Y.S.2d 232, 70 A.D.2d 455 (Sup.Ct.App.Div. 1979); 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650, 17 A.L.R.4th 1067 (1981); subsequent appeal, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983); mod. 63 N.Y.2d 955, 483 N.Y.S.2d 984, 473 N.E.2d 234 (1984); and *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996). In *Emmert v. Stewart Title Guar. Co*., 2012 WL 2117036 (D.Or.) (unpublished), recommendations adopted in 2012 WL 2117632 (D. Or.) (unpublished), the court held that the coverage had not been invoked, because the insured easement had not been found to be invalid, and that a buyer's demand for a different easement did not attack the insured easement. In *James v. Chicago Title Ins. Co*., 2014 MT 325, 339 P.3d 420 (Mont. 2014), the court found that the Covered Risk had not been triggered by the insureds' assertions that the access easement was deficient because it did not describe the path by a centerline or depict it on a map. No one else claimed the right was deficient, and the neighbors whose properties the insureds cross for access had signed affidavits declaring that they did not object to the use of the private drive.

[221] In *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished), the policy insured a recorded access easement with a five-year term. After the easement expired, leaving the property landlocked, the court held that the access coverage was not invoked by the expiration of the easement, and that the post-policy exclusion confirmed the lack of coverage. In *Buroker v. Phillips*, 169 A.D.3d 992, 93 N.Y.S.3d 397, 2019 N.Y. Slip Op. 01386 (N.Y.A.D. 2 Dept. 2019), the insured's sole means of access was blocked several years after the policy date, by people who took title through a post-policy tax foreclosure. The court refused to grant summary judgment to the insurer based on the post-policy exclusion, but conceded that the exclusion would apply if the insurer could prove that the neighbor's blocked the access drive on the theory that the post-policy tax sale extinguished the insured easement.

proving that it did *not* have a right of access as of the policy date, in order to establish that the coverage has been invoked and that there is a duty to indemnify.[222] See §3.2.3.1.5 for a discussion of how to resolve a covered claim in which the insured parcel does not have a right of access.

The policy may recite an access easement in Schedule A, which causes the policy to indemnify the insured in the event the easement is invalid or unenforceable for the benefit of the insured parcel.[223] When the policy insures an access easement in Schedule A, the fact that the property has other access does not negate the covered risk, but may significantly reduce the amount of the loss, which is measured as the diminution in value caused by the lack of the easement.[224] The subject of easements described in Schedule A of the policy is covered at §8.8.

An insured may also get enhanced access coverage in other ways. The ALTA Homeowner's policy contains a more comprehensive coverage, by indemnifying the insured if the property does "not have both actual vehicular and pedestrian access to and from the Land, based upon a legal right." Also, various endorsements exist that provide additional assurances as to access rights, particularly the California Land Title Association 103.7 and ALTA 17 series endorsements. Those assurances may include: that the adjoining street is a public road, that it is physically open, that it is publicly maintained, and that the insured has the right to use any existing curb cuts on the insured property for access onto the street. Those coverages are given explicitly by endorsement, on payment of additional premium and only if the title examiner or underwriting personnel have investigated to determine that there is a sound basis on which to provide the additional indemnification. The fact that these access endorsements provide specific additional assurances as to access rights explains by negative inference that those assurances are not implicit in the generic access coverage found in the standard ALTA policies. See §9.11.2 for a complete discussion of access endorsements.

Access to property has nothing to do with its title. Therefore, the policy access coverage is distinct from the covered risks concerning the property's title. Most courts that have considered the

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[222] In *Guenther v. Old Republic Nat'l Title Ins. Co.*, 2014 WL 912168 (D. Idaho) (unpublished), the insured asserted that there was no right of access created by a recorded dedication for roadway, because it was subject to a reverter in the event of a condition subsequent, which was the failure to build the roadway to government specifications by a stated date. The access right was confirmed after the policy was issued. The insureds were never cut off from the property. The insureds made the rather convenient assertion that the reverter had occurred several decades before the policy was issued, triggering policy coverage. The court put the burden on the insurer to establish that the reverter had not occurred, which incorrectly relieved the insureds of the burden to prove that policy coverage had been invoked. The court then ruled that the right had reverted, despite any documentary or witness testimony clearly establishing that the roadway had not been built to governmental specifications by the specified date. *Guenther v. Old Republic Nat. Title Ins. Co.***,** 2014 WL 5810984 (D. Idaho) (unpublished).

[223] In *Emmert v. Stewart Title Guar. Co*., 2012 WL 2117036 (D.Or.) (unpublished), recommendations adopted in 2012 WL 2117632 (D. Or.) (unpublished), the insured used an access route that was different from the path of the easement insured in the policy because there was a creek in the way, and there was no bridge in that location. The insured attempted to sell the property. The buyer demanded a new easement grant for the path actually used. The court found that this demand did not trigger policy coverage, particularly because the easement grant was not defective.

[224] See *Old Republic Nat'l Title Ins. Co. v. Minnesota Office Plaza, LLC*, 2010 WL 155175 (Minn.App.) (unpublished) (insured's inability to use insured access easement because there was a Target store built in its path caused no loss, because the other access grants to the insured provided superior access and the access actually used by the insured).

issue have held that a lack of a right of access to the property does not render its title unmarketable, although one court so found. See the discussion of this issue at §9.7.1.

Access commonly means the right to travel to a public street, directly or indirectly. In some cases, access is by water or air rather than street. State law is used to determine the existence or lack of a right of access, as discussed fully at §9.7.1.

When the policy insures two contiguous parcels, one of which has a right of access, the coverage is not triggered by a lack of a right of access to the other parcel, since the insured may pass over his or her own land to obtain access.[225] This remains true even when the physical characteristics of the property may prohibit travel from the landlocked parcel across the other parcel to the public street.[226] Similarly, if the insured has more than one means of access, coverage is not invoked unless all rights fail. Thus, when the policy had insured access via three separate easements, the insurer had no duty to assert the insured's claim to a prescriptive easement over a fourth route.[227] Likewise, when one access right failed, an alternate access was found to suffice even though it is only passable on foot or by horse and was twice the distance from the nearest highway.[228]

The sections below address the four main issues concerning the scope of the access coverage: the nature and quality of access that qualifies as a right of access, the effect of public and private restrictions on that access right, the legal status of the adjacent right of way, and the physical improvement of the roadway.[229] See §8.8 concerning the related issue of policy coverage affirmatively insuring rights in adjoining streets or access easements (so-called "abutter's rights").

9.7.1 Access That Qualifies As A "Right Of Access"

FORM 23, Appendix A
"Reasonable" access not insured

FORM 86, Appendix A
Access onto public street not insured

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[225] *Havstad v. Fidelity Nat'l Title Ins. Co.*, 58 Cal.App.4th 654, 68 Cal.Rptr.2d 487, 97 Cal. Daily Op.Serv. 8107 (1 Dist. 1997), mod. Oct. 20, 1997, rev.den. Dec. 10, 1997; *Coles v. Lawyers Title Ins. Corp.*, 2006-Ohio-4802, 2006 WL 2640266 (Ohio App. 6 Dist.) (unpublished); *Green v. First American Title Ins. Co.*, 2005 WL 2249760 (Cal.App. 4 Dist. 2005) (unpublished).

[226] *Magna Enterprises, Inc. v. Fidelity Nat'l Title Ins. Co.*, 104 Cal.App.4th 122, 127 Cal.Rptr.2d 681 (Cal.App. 4 Dist. 2002) (landlocked parcel at a different grade than the street-access parcel, and enclosed by a fence).

[227] *Talley v. Baker*, 207 A.D.2d 967, 617 N.Y.S.2d 80 (A.D. 4 Dept. 1994).

[228] *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo.App. 1991).

[229] Additional sources of information on this subject include: Ellis, *Title Insurance Law Handbook*, pp. 235-9; Annotation, *Absence of Effectual Subdivision, or of Street or Easements, as Within Title Insurance Coverage*, 40 A.L.R.2d 1247; Joyce Palomar, *Title Insurance Law*, 2014-2015 Edition, §5:8; and Barlow Burke, *Law of Title Insurance*, §3.2.5.

The 2006, 1992 and Residential policies assure a "right of access" to the insured property (the ALTA Homeowner's policy has a broader coverage, as discussed in §9.7). The nature of that right, and limitations on its use, vary widely, depending on the property and its locale. This generic assurance of a right of access is limited.

The quality of the "right of access" assured by the policy is not measured by a universal standard of "reasonableness." A 1979 North Carolina decision, *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*,[230] is the sole decision to find that the policy coverage must be read to assure a "reasonable" right of access. That court found that pedestrian access only was not reasonable access to an urban parcel intended as a restaurant site. In *Marriott*, however, the restriction on access was due to the municipality's implicit refusal to grant a driveway permit. The court held that this post-policy municipal regulation of the property was excluded under the police power exclusion. See §11.1.5 regarding the police power exclusion. Therefore, despite its reasonable-access holding, the court found no coverage for the lack of vehicular access.

Marriott has been rejected by many other courts, and followed by none. In discussing its "reasonable" access statement, one court declared "[t]his dicta in *Marriott* has been roundly criticized," and held that an insured has no reasonable expectation of vehicular access based on the basic policy coverage.[231] A number of other courts have also rejected *Marriott*.[232] By contrast, no court has ever adopted the *Marriott* position, even in North Carolina. The fact that *Marriott* improperly adds to policy coverage may also be deduced from the fact that there are access endorsements that provide an assurance of vehicular access, including the ALTA 17. Those endorsements are available in all or most states for an additional charge, if additional underwriting requirements can be met. Such endorsements would be unnecessary if *Marriott* were the correct interpretation of the basic access coverage found in the policy.

Nonetheless, at least one commentator, professor Palomar, incorrectly continues to cite the "reasonable access" dicta in the 1979 *Marriott* decision as support for the notion that the policy affords the insured a reasonable "expectation" of vehicular access coverage, without noting the decisions that have rejected that statement.[233] Professor Palomar makes the following assertion:

> To satisfy the insurer's obligations under the title insurance policy, the legal access that exists must be adequate and reasonable in light of the insureds' expectations. The title insurer's obligation as to access is not satisfied by mere pedestrian access or by access to the insured land via only boat or seaplane. Surely, insureds reasonably

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[230] 288 N.C. 122, 217 S.E.2d 551 (1975), aff'ming 23 N.C.App. 377, 209 S.E.2d 423 (1974).

[231] *Riordan v. Lawyers Title Ins. Corp.*, 393 F.Supp.2d. 1100, 1105 (D.N.M. 2005).

[232] In addition to *Riordan*, see *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209 (10th Cir. (Colo.) 2016); *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo.App. 1991) ("Marriott seems to stand alone in offering any support for plaintiff's policy claim"); *Magna Enterprises, Inc. v. Fidelity Nat'l Title Ins. Co*., 104 Cal.App.4th 122, 127 Cal.Rptr.2d 681 (Cal.App. 4 Dist. 2002); and *Title & Trust Co. of Fla. v. Barrows*, 381 So.2d 1088 (Fla.App. 1979).

[233] See Joyce D. Palomar, *Title Insurance Law*, 2014-2015 Edition, § 5:8, p. 278, West/Thomson Reuters.

> expect that insurance of a right of access means they will have access to the insured property over land by car or truck. This would seem to go without saying and one would naturally question the good faith of a title insurer who declined a claim for lack of a right of access on the basis that the insured could legally walk to the property or access it by boat or plan over a lake. Yet, a magistrate judge actually upheld such a defense by one such insurer. On appeal, the First Circuit "recoiled" at that idea and remanded the case for a determination of whether lake access was adequate in that case as a matter of fact. Unfortunately, the First Circuit let pass the better ruling—that "a right of access" in a title insurance policy means "access over land by vehicle" as a matter of law, unless the title insurer expressly indicates that its access coverage is something less.[234]

Perhaps it is true that, in a perfect world, every parcel in the United States would have access via an abutting public road or a perpetual easement that would grant a right of vehicular travel leading to a public road. However, in the world that actually exists, no matter what a buyer or lender might wish to be true, hundreds of thousands of parcels do not have access by a convenient public road, or over the path of a recorded easement, on a paved surface that supports a vehicle. Many parcels, particularly in rural areas, have limited access rights and, yes, some have access only by water, airplane or on foot. This is a fact, and one that a title insurer is powerless to change. A purchaser of property is charged with notice of what may be observed on a personal inspection of the property. The buyer should, and normally does, inquire of the neighboring owner about the right, if any, to cross that land. Many parcels have limited access because they are separated from a public road by land whose owner does not have authority to grant a recorded easement, or whose long-time practice is not to do so. Thus, a buyer of land surrounded by a national forest, the courts have recognized, has no reasonable expectation that he or she holds a perpetual easement for vehicular access running across the Forest Service land, and presumably pays accordingly.[235]

Further, despite the professor's assertions about the "title insurer's obligation as to access," a title insurer cannot bestow access rights; it can only indemnify the insured if the rights already granted to a parcel are not valid and enforceable. A title insurance policy insures the rights actually

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[234] Joyce D. Palomar, *Title Insurance Law*, 2013-2014 Edition, § 5:8, p. 278, West/Thomson Reuters.

[235] In *James v. Chicago Title Ins. Co*., 2014 MT 325, 339 P.3d 420 (Mont. 2014), the Montana Supreme Court acknowledged that that state employs the doctrine, but refused to rewrite the access coverage based on it. It noted that a buyer of real estate has the duty to examine the property before purchase, and such an inspection reveals the true state of the property's access. The court held that the access rights that the insureds claimed they had "expected" to receive were not reasonable, and considerably different from the rights they got. "Courts will not act to distort policy language in the face of a reasonable interpretation of the policy provision," it said. In *Riffle v. United General Title Ins. Co*., 64 Ark.App. 185, 984 S.W.2d 47 (Ark.App. 1998), likewise, the court held that, if the court does not account for what the insureds observed about access before they bought and the price they paid based on the access that was readily observable, the policy would be converted from an indemnity contract to a windfall: "[a]ppellants were well aware of the access problem when they decided to move ahead and purchase the property at issue. In fact, as the trial judge found below, the purchase amount tends to reflect due regard for the problem of access. Appellants received what they bargained for and cannot now claim that they have suffered damages. Furthermore, appellants acknowledged that they do have access, though only by boat. Thus, in terms of calculating value based on access, this property does retain some value."

possessed by the insured from attack. An increase in the quality of access required to meet a higher policy standard would not cause an increase in the actual access right that exists in favor of any parcel. In fact, the recurring theme in lawsuits about access coverage is that the insured seeks to have the policy construed as assuring a higher quality of access than the actual right that appertains to the parcel. If successful, the insured obtains a court order commanding the insurer to buy the insured a better right than the property has ever enjoyed. This transmutes the title insurance contract from the assurance of existing rights to an obligation to buy *better* property rights than the seller held or had the power to convey. This is not the bargain the insurer believes it is making when it insures the buyer's title in exchange for a small, one-time premium.

Professor Palomar offers her opinion that a "better ruling" by a court would set the bar very high in describing the "right of access" assured by the policy.[236] She does not offer a solution for those many parcels that have more meager access rights than her proposed universal high standard for a "right of access." She tacitly admits that the insurer cannot *grant* access rights or issue a fiat that a parcel's access rights shall henceforth meet this high standard. Rather, she allows that, if the coverage is defined so that parcels with lesser access rights do not qualify even for the policy's basic, generic access assurance, the insurer's only option will be to "expressly indicate[] that its access coverage is something less." In other words, she recommends that the "right of access" be redefined as setting a higher standard, even for policies already issued, but that policies to be issued in the future on parcels that do not meet this higher quality access standard should contain exceptions or endorsements deleting the coverage for which they do not qualify.

A title insurer may indeed make an exception or issue an endorsement that deletes or limits the access Covered Risk. However, let the thoughtful reader consider what would occur if title insurers were to be compelled to delete the access coverage whenever the parcel does not adjoin a public road or have the benefit of a perpetual recorded easement grant that permits vehicular travel. Lenders and purchasers of mortgage loans would in turn refuse to lend money on those parcels unless and until the owner obtained a perpetual recorded easement grant that permits vehicular travel, *qualifying the parcel to obtain access coverage*. Even if one ignores the question of the cost and time involved in thousands of such exercises, the owners of most such parcels would simply not be able to obtain a perpetual recorded easement grant that permits vehicular travel for the benefit of a parcel that does not have that right already. The actual effect of raising the definition of a qualifying "right of access" would be to cause the owners of thousands and thousands of parcels not to be able to obtain loans secured by their real estate, and to make those parcels more difficult to sell and worth less money.

The professor's analysis ignores the considerations and deliberations actually employed in the drafting of the "right of access" Covered Risk. That coverage is intentionally very broad and inclusive, setting a low bar as to the quality or nature of the access right, so that most parcels qualify to obtain that assurance. As one court framed it, "a right of access is all that is necessary to fulfill [the insurer's] contractual obligation, even if that access is not ideal."[237] If a parcel actually possesses

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[236] As is addressed below, the professor's vision of what definition should be used for the term "right of access" is contrary to the court decisions that have considered the issue, and would render most of the additional coverages given by access endorsements to be surplusage for which insureds should not be spending premium dollars.

[237] *Coles v. Lawyers Title Ins. Corp.*, 2006-Ohio-4802, 2006 WL 2640266 (Ohio App. 6 Dist.) (unpublished).

greater access rights, title insurers offer endorsements that permit an insured to obtain an assurance of those greater rights. The several ALTA and CLTA access endorsements, for example, assure a right of vehicular travel. Those endorsements are offered for parcels that have such a right, but of course are not available for parcels that do not have such a right.

The Tenth Circuit Court of Appeals rejected the notion that a limited-term, revocable license was less than the right of access assured by the policy, and expressly rejected the position taken by the professor in her book. That court ruled that a title insurer that had obtained a revocable license for access over federal land managed by the Bureau of Land Management had satisfied the access coverage:

> Consequently, we think the Colorado Supreme Court would determine that a long-term, revocable right-of-way grant—like the one that provides Woody Creek a right to enter and pass through BLM land to access the remote parcel—constitutes a "right of access" as that phrase is used in the title insurance policy.[238]

The court relied in part on the definitions of the terms "right" and "access" as found in Black's Law Dictionary.[239] It cited and quoted from many other decisions about the access coverage, and summarized those rulings as follows:

> Other jurisdictions have narrowly and literally construed right-of-access provisions in title insurance policies, finding a right of access even when the insured lacks a practical, physical means of access to the property or when the insured lacks an established means of access in the particular legal form the insured desires.[240]

The court also rejected the "reasonable" right of access notion, saying that:

> Finally, although Woody Creek asserts that it reasonably expected the phrase "right of access" to mean a permanent right of access, that expectation doesn't defeat the plain and ordinary meaning of unambiguous policy language.[241]

Professor Palomar makes the further assertion that "[t]he majority rule is that lack of access makes title unmarketable."[242] The professor's claimed "majority rule" is supported by only one

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[238] *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209, 1214 (10th Cir. (Colo.) 2016)

[239] It quoted the definition of "right" found in Black's Law Dictionary (10th ed. 2014) (definition 5), which is "The interest, claim, or ownership that one has in tangible or intangible property," and of "access," which is defined as "A right, opportunity, or ability to enter, approach, pass to and from, or communicate with."

[240] 830 F.3d at 1213.

[241] 830 F.3d at 1214. The court held that the doctrine of reasonable expectations did not apply, because the right of access coverage was not ambiguous.

[242] See Joyce D. Palomar, *Title Insurance Law*, 2013-2014 Edition, § 5:8, p. 280, footnote 19, West/Thomson

decision and her own treatise.[243] Her "majority rule" statement was accepted as true by one court, without further analysis.[244]

Despite the professor's proclaimed "majority rule," many courts have held that a lack of a right of access to the property does not render its title unmarketable.[245]

Further, the professor's statement was rejected and refuted in *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*.[246] The Tenth Circuit Court of Appeals noted that the insurer questioned the "majority rule" statement, and had produced three decisions from Colorado alone holding "that even a complete lack of access doesn't render title unmarketable in Colorado."[247] The

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Reuters.

[243] The professor supports her assertion with two decisions—*Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996), and *Regan v. Lanze*, 40 N.Y.2d 475, 387 N.Y.S.2d 79, 354 N.E.2d 818 (1976)—and her own treatise, Palomar and Patton on Land Titles. *West* held that a parcel's landlocked condition rendered title unmarketable because the owners would have to bring a lawsuit in order to establish an easement by necessity in order to gain a right of access. However, again, title is only unmarketable if the title is subject to attack by someone else in court, not if the owner of the property might have the ability to obtain a new right through a lawsuit. Also, a property owner may face the risk of a lawsuit about building code violations, but the possibility of that litigation would not render the title unmarketable because the building code violation does not affect title. Further, *Regan* does not say that the lack of a right of access makes title unmarketable. In that case, the buyer contended that a deed that described the parcel by a call to an adjoining road was potentially confusing, because the road had just been relocated and it was not clear if the reference was to the new or old location. However, the court concluded that it was clear which road location was intended, the description was not ambiguous, and title *was* marketable. The decision did not hold that the parcel was landlocked, or that if it had been that fact would have rendered its title unmarketable.

[244] In *Perry v. Fidelity Nat'l Title Ins. Co*., 48 N.E.3d 1168, 2015 IL App (2d) 150168, 2015 WL 6859167 (Ill.App. 2 Dist. 2015), the court held that a title insurer must defend its insureds in a lawsuit brought to block the insureds from paving their easement path, despite the fact that the neighbors acknowledged that the easement grant was valid and gave a right to travel across their land. The court based its ruling on the professor's "majority rule" assertion.

[245] At least six decisions, two from state supreme courts, have held that a lack of or limitation on access does not render title unmarketable. In *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209 (10th Cir. (Colo.) 2016), the Tenth Circuit Court of Appeals held that access via a license only did not render its title unmarketable. Colorado and Utah have held that even a complete lack of access does not make title unmarketable. See *Campbell v. Summit Plaza Associates*, 192 P.3d 465 (Colo.App. 2008), and *Mostrong v. Jackson*, 866 P.2d 573 (Utah App. 1993). The Wyoming Supreme Court said that the insured's title was marketable despite her allegedly iffy access right, in *Haines v. Old Republic Nat'l Title Ins. Co.*, 2008 WY 31, 178 P.3d 1086 (Wyo. 2008), and specifically rejected the *West* analysis. In *Riordan v. Lawyers Title Ins. Corp*., 393 F.Supp.2d. 1100 (D.N.M. 2005), a New Mexico court held that title to the property was not rendered unmarketable due to the fact that its access right was limited to hiking or horseback over a trail in a federal forest. In *Sinks v. Karleskint*, 130 Ill.App.3d 527, 85 Ill.Dec. 807, 474 N.E.2d 767 (Ill.App. 5 Dist. 1985), the court rejected the argument that a lack of access caused the seller to breach the covenant of quiet enjoyment, and also refused to find that a lack of access rendered title unmarketable. In *Lauritzen v. First American Title Ins. Co*., 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the court approved *Mostrong* and *Sinks* and concluded that "the holding of *Mostrong* is entirely in line with the narrow conception of 'marketability of title' shared by the vast majority of courts to discuss the issue." The *Lauritzen* court said that marketability is attacked only if the owner's title or right to possess the property is challenged by another party.

[246] 830 F.3d 1209 (10th Cir. (Colo.) 2016).

[247] The decisions cited by Fidelity and the court were *Edwards v. St. Paul Title Ins. Co*., 39 Colo.App. 235, 563 P.2d

court said that the professor had confused marketability of title with a physical condition that affects the market value of the property:

> We read these cases as strongly supporting Fidelity's position that a lack of legal access to property isn't the type of defect that renders a title unmarketable. Significantly, while both *Edwards* and *Knight* suggest that the hazard of future litigation might affect marketability, both cases also employ limiting language to explain that the litigation referred to involves challenges affecting the right of possession and quiet enjoyment of the property. This limitation is consistent with the majority view, which "emphasize[s] the differences between marketability of title and marketability of land."[248]

The court followed with a long discussion of the numerous decisions that have ruled that a title insurance policy does not protect against physical conditions and other matters that affect market value but not the marketability of the title. It noted that "at least one jurisdiction has applied the distinction between economic marketability and title marketability in the lack-of-access context."[249] The court reached this conclusion as to the marketability argument:

> As we've discussed, Fidelity's procurement of a 30-year right-of-way provided Woody Creek with a right of access to the remote parcel even if it wasn't the type of access Woody Creek desired. In essence, Woody Creek's complaint here is that the lack of permanent access lessens the economic marketability of its property. But the weight of authority recognizes that a lack of economic marketability doesn't equate to nonmarketable title.[250]

It is fortunate for property owners that the "majority rule" statement has been debunked. If it were true that a property without access had unmarketable title, the owner of property having lesser access would not be able to buy a standard title insurance policy, and any potential buyer or lender would be permitted to reject title as being unmarketable.

The following is a review of the types of access rights that different classes of property owners are customarily willing to grant. This serves as a partial guide to the nature and quality of access rights available over such classes of neighboring land.

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979 (1977); *Campbell v. Summit Plaza Associates*, 192 P.3d 465 (Colo.App. 2008); and *Knight v. Devonshire Co.*, 736 P.2d 1223 (Colo.App. 1986). The most directly applicable decision was *Campbell*, which ruled that a grantor had not breached the covenant against encumbrances in a general warranty deed when it conveyed a landlocked parcel of property to the purchaser. *Campbell* relied on *Mostrong v. Jackson*, 866 P.2d 573 (Utah App. 1993) and *Sinks v. Karleskint*, 130 Ill.App.3d 527, 85 Ill.Dec. 807, 474 N.E.2d 767 (1985) in reaching that conclusion.

[248] 830 F.3d at 1217.

[249] The court cited *Riordan v. Lawyers Title Ins. Corp.*, 393 F.Supp.2d. 1100 (D.N.M. 2005).

[250] 830 F.3d at 1218.

Some parcels' sole means of access is across a railroad right-of-way. Railroads have the ever-present concern that a grant of the right to travel over their tracks will lead to a death or serious injury, or the loss of property. As a result, a railroad typically will grant, at most, a revocable license that is limited to a certain class of traffic. In some jurisdictions, railroads are barred by law from offering more expansive rights to cross their operational trackage, because the regulator also has a concern about public safety.[251] A railroad typically will not grant a license if by doing so there will be a significant increase in traffic over the right-of-way, particularly residential traffic and children. A parcel served by a farm crossing, which permits occasional traversing of the right-of-way by a farmer owner, may not be developed into a subdivision, but has a right of access nonetheless. If a railroad agrees to grant a new license, it typically will require the licensee to pay the full cost of installing safety equipment at the crossing, which can be quite expensive. A railroad license may require the consent of more than one railroad that has trackage rights over the right-of-way, and may also require the consent of a state office.

There are many thousands of privately-owned parcels lying inside state and national forests and parks, or that have their access over land managed by the Bureau of Land Management.[252] Many of those parcels formerly had access over private land, but the private land was bought or condemned by the government, landlocking the remaining private parcels except to the extend the government is willing to grant access rights.[253] It can be expensive and time-consuming to obtain a

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[251] The Federal Railroad Administration keeps statistics on crossing accidents and deaths. It reports that, in 2013, there were 2,087 vehicle-train collisions that caused 251 fatalities and 929 serious injuries. See http://oli.org/about-us/news/collisions-casulties.

[252] The BLM alone manages more than 245 million acres of public land. See http://www.blm.gov/wo/st/en.html. Under the Wilderness Act, the BLM is responsible for 221 Wilderness Areas with 8.7 million acres in 10 western states. It also manages the National Conservation Lands, also known as the National Landscape Conservation System, which includes 877 federally recognized areas and approximately 30 million acres of National Monuments, National Conservation Areas, Wilderness Areas, Wilderness Study Areas, Wild and Scenic Rivers, National Scenic and Historic Trails and Conservation Lands of the California Desert. The BLM's charge is to preserve these lands, which militates against the granting of permanent driveways. The Federal Land Policy and Management Act of 1976, Public Law 94-579, is found at 43 U.S.C. §§1701 *et seq.*, and instructs the BLM that the public lands "be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use… ." Section 501 of the Act (43 U.S.C. §1761) describes the conditions under which a right-of-way of some kind may be granted across national forest lands (other than wilderness land).

[253] See, for example, *National Ass'n of Property Owners v. U. S.*, 499 F.Supp. 1223 (1980), which describes the way in which Congress landlocked resorts, cabins and other privately-owned parcels in Minnesota by passage of the Boundary Waters Canoe Area Wilderness Act, Pub.L. No. 95-495, 92 Stat. 1649 (October 21, 1978). Congress thus decreed that those private parcels were to be deprived of the vehicular access that they had enjoyed before the federal government bought or condemned the encircling parcels. That law produced decades of litigation over access rights, including the claim that the Act violated the constitutional rights of handicapped persons by limiting access and travel to those parcels to walking or by boats without motors. An advocacy group was still seeking to shut down all motorized boats and vehicles within the Boundary Waters Wilderness as of 1992. See *Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (1992).

grant of a right to cross land owned by the federal government.[254] In every case, there is a significant limit to the right that can be obtained, if any.[255] The federal Park Service, Forest Service or the BLM are typically only willing (or statutorily permitted) to grant a license or permit to use trails or fire lanes they maintain.[256] In some cases, the sole right of access is created by the act of Congress that created the park or forest, in which case the private owner cannot obtain a separate recordable grant.[257]

Some parcels are surrounded by tracts of privately-owned timber or mining land, or farms, ranches or preserves. In such cases, access is typically via roads maintained by the neighboring private owner or owners. Even when those owners have given permission to cross their land, they are often unwilling to grant a written access right. In the author's experience, most owners of such land will not grant any right greater than a revocable license or permit. The policy's access coverage is satisfied if the insured land has the benefit of such a license or permit, or the insured has no reason to expect that a request for such a right would be denied.[258]

Some parcels obtain access via a road built on land owned by the Bureau of Indian Affairs, in trust for a Native American tribe, or over reservation land ceded to the Native American tribe. A BIA road is typically open to the public, although a BIA road's status is sometimes hotly contested.[259] The BIA's authority in the issuance of easements is limited to 50-year grants. In most

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[254] In *Grill v. Ticor Title Ins. Co*., 2017 WL 344326 (Cal.App. 3 Dist.) (unpublished), the title insurer obtained a ten-year access license for the insured, which later expired. The court did not affirmatively rule that the license was a qualifying right of access, because it dismissed the case based on a statute of limitations. The court observed, however, that the insured could apply for an access license under the Alaska National Interest Lands Conservation Act (16 U.S.C.A. §3210), because landlocked private holdings within the National Forest System boundaries "have a statutory right to reasonable access, subject to conditions determined by the Forest Service."

[255] As examples of litigation with the Forest Service over its decisions to issue or refuse access easements or licenses to the owners whose parcels have been landlocked by the creation of federal forests and parks, see *United States v. Jenks*, 22 F.3d 1513 (10th Cir. (N.M.) 1994); and *Montana Wilderness Ass'n, Nine Quarter Circle Ranch v. United States*, 655 F.2d 951 (9th Cir. (Mont.) 1981).

[256] In *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209 (10th Cir. (Colo.) 2016), the court found that the insured held a qualifying access right over federal land based on a revocable license with a thirty-year term, and thus the title insurer that obtained the license had fulfilled its policy duties. The title insurer had obtained the broadest right that the federal government was willing to grant. The insured was aware when it bought the property that access ran across the federal land.

[257] In *Riordan v. Lawyers Title Ins. Corp.*, 393 F.Supp.2d. 1100 (D.N.M. 2005), the court held that the policy coverage was not invoked when the insured was limited to hiking or horseback travel to his property via a trail in a federal forest, which "right of access was mandated by federal law." It cited 16 U.S.C. § 3210(a) as the authority for that access right, as granted to the public and owners of adjoining land. Former public roads that led to the property had been closed. Also see the Boundary Waters Canoe Area Wilderness Act, Pub.L. No. 95-495, 92 Stat. 1649 (October 21, 1978).

[258] See *United Bank v. Chicago Title Ins. Co*., 168 F.3d 37 (1st Cir. (Me.) 1999), in which the former owners had once held licenses to travel over the logging roads that led to the parcel and, although one license had expired, the insured had never been denied the use of the roads.

[259] In *Northern New Mexicans Protecting Land, Water and Rights v. United States*, 704 Fed.Appx. 723, 2017 WL 3081630 (10th Cir. (N.M.)) (unpublished), the court admitted that there had been a festering dispute over the public's

cases, the tribe must approve the grant, the applicant must deliver an appraisal to the BIA, the tribe may demand more money than the appraised value, and the process can take several years. A tribal road may be restricted to use by the members of the tribe, by tribal ordinance. A California court found that, when access was via a road crossing Native American reservation lands, and the parties stipulated that the BIA had not approved the road easement, the land had the same value as other similarly-affected parcels. The property was not rendered valueless, as the insured claimed.[260]

When the land lying between the insured parcel and the nearest public road is privately owned, a right of access is typically obtained, if at all, by one of three methods—a voluntary grant, the imposition of an easement as a matter of law based on a recognized legal doctrine, or by private condemnation (in those jurisdictions that so permit). Private condemnation is a creature of statute.[261] An access right may be granted voluntarily in a variety of ways, including a revocable license, a perpetual easement or an easement that expires at the end of a fixed term.[262] The policy is satisfied by a writing that grants a right of some sort, even if that right is of a lesser quality than what the insured would consider to be "legal" or "deeded" access.[263] The assurance of a right of access does

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right to use county roads that cross BIA land since 1965, and that the BIA brought the matter to a head by reversing positions and claiming that the roads were a trespass. However, the court ruled that members of the public were not entitled to sue to quiet title over BIA land and their claims were not "ripe" in any event.

[260] *Kaufer v. Chicago Title Ins. Co.*, 2002 WL 1651341 (Cal.App. 2 Dist. 2002) (unpublished).

[261] The claim administrator must consult state law to see if this remedy is available. There is a good discussion of several state laws in John N. Iurino and Sivan R. Korn, *You Can't Get There From Here (or Can You?): A Road Map to Public Access*, in *Probate & Property*, May/June 2014, at p. 13. For example, Minnesota Statute Section 164.08, subdivision 2(a), permits a private landowner to petition a town board for an access path termed a "cartway" to be run over neighboring land to provide access to a public road. That statute was construed in *Watson v. Bd. of Supervisors of Town*, 239 N.W. 913 (Minn. 1931) and *Cich v. Bay Lake Township*, 2018 WL 5915444 (Minn.App.) (unpublished).

[262] In *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209 (10th Cir. (Colo.) 2016), the court found that the insured held a qualifying access right over federal land based on a revocable license with a thirty-year term, and thus the title insurer that obtained the license had fulfilled its policy duties. The title insurer had obtained the broadest right that the federal government was willing to grant. The insured was aware when it bought the property that access ran across the federal land. In *Community Credit Union v. AmeriTitle & Abstract, Inc.*, 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished), the court held that the expiration of an insured five-year access easement after the policy date did not invoke the access coverage, and the post-policy exclusion applied, because there was a right of access to the property on the date of policy, and that limited-term grant qualified as a "right of access." In *Perry v. Fidelity Nat'l Title Ins. Co*., 48 N.E.3d 1168, 2015 IL App (2d) 150168, 2015 WL 6859167 (Ill.App. 2 Dist. 2015), the court held that a title insurer must defend its insureds in a lawsuit brought to block the insureds from paving their easement path, despite the fact that the neighbors acknowledged that the easement grant was valid and gave a right to travel across their land.

[263] In *James v. Chicago Title Ins. Co*., 2014 MT 325, 339 P.3d 420 (Mont. 2014), the insureds' attorney argued that, "[t]o have legal access to property, there needs to be some piece of paper of record that provides access." The court said this was not necessarily so in order to meet the fairly modest type of right that satisfies the policy's generic coverage. It said that the insureds were confusing "legal access" with a "right of access" as insured by the policy. In *James*, the insureds did have the benefit of a recorded easement (albeit one that did not describe or depict the path of the drive), which the court held to satisfy the policy coverage. In *United Bank v. Chicago Title Ins. Co.*, 168 F.3d 37 (1st Cir. (Me.) 1999), the purchaser at a private auction claimed that he had been promised "deeded access" by the owner and United Bank, which had obtained a title commitment for the sale. "Deeded access" presumably meant an easement. The court

not imply that there must be a piece of paper conferring that right.[264] The standard policy access coverage does not assure a right of vehicular access.[265] An easement granted or imposed by law, such as an easement by necessity, may or may not qualify as a right of access, depending mainly on whether the right is automatic or must be established in litigation.[266]

A parcel may also abut a road used by the public but whose status is less than obvious. In all or most states, some roads are considered to be public but are maintained by the adjoining property owners. The standard policy access coverage does not contain the assurance that the property is served by a road that is publicly maintained, although the ALTA 17 access endorsement provides that assurance when it is a true statement. Thus, a right of access via a long-established road that is

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found that, no matter what might have been promised the bidder, the policy made no such assurance: "The Chicago Title insurance policy nowhere provides any assurance of deeded access. All that is protected is a "right of access," which could be secured in a variety of ways. No doubt deeded access--e.g., a perpetual easement granted in a deed by the owner of the intervening property--would be more valuable than, say, an easement by necessity under state law or a year to year license for a fee, such as that originally secured by Caliendo but allowed to lapse. Read according to its terms, the policy does not cover a lawsuit whose gravamen is the promise of something different from and more valuable than a generic right of access." In *Coles v. Lawyers Title Ins. Corp.*, 2006-Ohio-4802, 2006 WL 2640266 (Ohio App. 6 Dist.) (unpublished), the court held that "a right of access is all that is necessary to fulfill [the insurer's] contractual obligation, even if that access is not ideal."

[264] In *James v. Chicago Title Ins. Co*., 2014 MT 325, 339 P.3d 420 (Mont. 2014), the insureds' attorney argued that, "[t]o have legal access to property, there needs to be some piece of paper of record that provides access." The court said this was not necessarily so in order to meet the fairly modest type of right that satisfies the policy's generic coverage. It said that the insureds were confusing "legal access" with a "right of access" as insured by the policy.

[265] See *Riordan v. Lawyers Title Ins. Corp.*, 393 F.Supp.2d. 1100 (D.N.M. 2005), which held that the policy coverage was not invoked when the insured was limited to hiking or horseback travel to the property, and that the reasonable expectations doctrine could not be used to expand the unambiguous coverage.

[266] The claim administrator should carefully examine the statutes or case law in the jurisdiction establishing the conditions under which an access easement is imposed by law, to determine if the easement is automatically imposed and how its path is determined, and compare the law to the facts of the claim at hand. The most common form of such an easement is an easement by necessity, which in most states is imposed when land is divided, cutting one resultant parcel off from an existing access right. In *Rio Mesa Holdings, LLC v. Fidelity Nat'l Title Ins. Co*., 2019 WL 4639103 (Cal.App. 5 Dist.) (unpublished), the court held that the insured parcels had the benefit of an easement by necessity, and that such right was sufficient to qualify under the standard access coverage granted in the policy. The appeals court remanded on the question of whether or not the easement by necessity satisfied the allegedly expanded access coverage given by "custom" access and contiguity endorsements. In *BJD Properties, LLC v. Stewart Title Guar. Co*., 2017 WL 2640777 (W.D.La.) (unpublished); findings adopted in 2017 WL 2625411 (W.D.La.) (unpublished), the court held that, although the Louisiana code imposes an easement by necessity (what that state calls a gratuitous right of passage) when a landlocked parcel is created by the division of a parcel, that access right was not so clear and definite under the facts of the particular parcel that it supported a motion to dismiss the insured's policy coverage lawsuit. The court noted that the access path is automatically set when the larger parcel is divided only if that pathway had been in use before the land division; otherwise, the parties must agree on the path or have it set by a court. In this case, it was not clear if an access path was in use before the parcel was divided. In *United Bank v. Chicago Title Ins. Co.*, 168 F.3d 37 (1st Cir. (Me.) 1999), the court referred to an easement by necessity as a means of access but did not make a determination that such an easement always satisfies the access coverage. In *Stewart Title Guar. Co. v. West*, 110 Md.App. 114, 676 A.2d 953 (1996), the court held that title was unmarketable because, in Missouri, the court believed that an owner would have to bring a lawsuit in order to establish an easement by necessity.

not maintained by the government and that may have been established under the doctrine of highway by user qualifies as a right of access.[267] Courts disagree as to whether or not the policy assurance is met by proof that the owner has enjoyed continuous and unblocked travel to the insured parcel over a public or private right-of-way, without more.[268]

A parcel located on mainland may or may not have an access right that meets the policy standard if the sole means of travel is by water.[269] However, every parcel located on an island requires travel by bridge, tunnel, boat or airplane to get to the island. On larger islands, the secondary access question is travel from the shore, harbor or airport to the insured parcel. Manhattan is an island, yet is more accessible than many rural areas. Other islands, however, have no roads. The standard for a qualifying right of access as to an island parcel thus depends on the size of the island and its physical attributes.

The right of access coverage is not invoked if the parcel abuts a public road or has an access easement but there is a physical impediment to travel from the road to the insured parcel, such as a change in grade or a barrier, whether natural or man-made. Thus, a parcel has a right of access if it abuts a public street, even if the grade of the street is so different from that of the parcel that it is

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[267] In *Haines v. Old Republic Nat'l Title Ins. Co.*, 2008 WY 31, 178 P.3d 1086 (Wyo. 2008), the Wyoming Supreme Court ruled that an insurer was not required to obtain a recorded easement for the insured to give her a better access right than the property has ever enjoyed, when access was via a long-established road and the insured had not been barred from using the road to travel to her property.

[268] In *United Bank v. Chicago Title Ins. Co*., 168 F.3d 37 (1st Cir. (Me.) 1999), the property, a resort, obtained its access via 17 miles of logging roads. The former owner had obtained a license to travel over 11 miles of the roads at a cost of $100 per year, and the logging company would have given a license over the remaining property if asked. Compare *United Bank* to *Guenther v. Old Republic Nat'l Title Ins. Co*., 2013 WL 5424004 (D. Idaho) (unpublished), which held that the assurance of a "right of access" requires evidence that the insured parcel is benefited from the grant of a right of some kind, although not necessarily a public road, and is not satisfied by a showing that there is a road whose use has never been interrupted, since the insureds had asserted that a recorded road dedication might have reverted. The *Guenther* court said that the insurer would be required at trial to prove that some right of access had been granted to the insured parcel, and was not entitled to summary judgment based only on its proof that there had been uninterrupted access to the parcel and others along the road for decades. It said: "Alas, the Policy does not define 'right of access.' … Had the Policy insured against losses incurred by reason of, simply, 'no access' to the Property, Old Republic's argument would have more persuasive sway. But it doesn't. The Policy adds the term 'right of' to modify the word 'access' which must provide substantive meaning that Old Republic's interpretation of the Policy does not address, beyond equating it to physical access. Therefore, while Old Republic's reading of the Policy might be a reasonable one, so is Plaintiffs' retort that coverage applies when there is no legal access to the Property, identifying the term 'right of' as meaning 'legal.'… Given these conflicting interpretations, the Policy is ambiguous regarding coverage. … As a result, this Court determines that the Policy provides coverage in instances where no right of access—*legal* access—exists to and from the Property."

[269] In *United Bank v. Chicago Title Ins. Co*., 168 F.3d 37 (1st Cir. (Me.) 1999), the appeals court sent the case back on remand to determine if water access alone should be deemed sufficient to qualify as a "right of access." In *Riffle v. United General Title Ins. Co.*, 64 Ark.App. 185, 984 S.W.2d 47 (1998), all overland access rights were invalid, but the hunting land abutted water and could be reached by boat. The court rejected the insureds' demand for policy limits, finding that the property was not valueless since the owners could get there by boat and their intended use was recreational and not commercial.

very difficult to travel from the street to the useable area in the insured parcel.[270] Likewise, the access coverage is not invoked if the insured possesses a valid access grant, but the easement path is over harsh terrain that makes travel difficult or impossible.[271] Thus, in *Gates v. Chicago Title Ins. Co.*,[272] when one access right failed, the remaining access route was found sufficient even though it is only passable on foot or by horse (in the insured's words, a "goat path"), and was twice the distance from the nearest highway as the access route preferred by the insured. In finding that coverage was not invoked, the *Gates* court relied on the fact that the policy excepted matters that would be disclosed by inspection:

> It is true that the western road, the route by which plaintiff Gates had a right of access, was a difficult one and, in its present condition, of only limited usefulness, but if plaintiff had a right of access, even though over a rough and nearly impassable route, he makes no case under his title insurance policy. A title insurance company may not be expected to investigate the physical condition of a way of legal access to the insured property to determine if it is passable. In fact, the insurance policy expressly excludes from coverage "loss or damage by reason of... (3) Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate survey and inspection of the premises."[273]

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[270] In *43 Park Owners Group, LLC v. Commonwealth Land Title Ins. Co*., 121 A.D.3d 937, 995 N.Y.S.2d 148, 2014 N.Y. Slip Op. 07120 (N.Y.A.D. 2 Dept. 2014), the policy access coverage was not triggered when the insured parcel abutted a public street, but the surface of the ground on the insured parcel was between four and 30 feet below street level, and the city owned and maintained a retaining wall running along the street boundary. The court affirmed the crucial distinction that the policy indemnifies if there is no *right* of access, but "does not cover claims concerning lack of an existing means of physical access." It cited a number of cases that have so held, from New York and other states. It said that Stewart Title had proven that the parcel has "a legal right of access because the subject property abuts a public street… ." In *Green v. First American Title Ins. Co.*, 2005 WL 2249760 (Cal.App. 4 Dist. 2005) (unpublished), the court held that the access coverage was not triggered by the fact that the property was fenced off from and not at grade with the adjoining street.

[271] In *Emmert v. Stewart Title Guar. Co*., 2012 WL 2117036 (D.Or.) (unpublished), recommendations adopted in 2012 WL 2117632 (D.Or.) (unpublished), the insured used an access route that was different from the path of the easement insured in the policy because there was a creek in the way, and there was no bridge in that location. The insured attempted to sell the property. The buyer demanded a new easement grant for the path actually used. The court found that this demand did not trigger policy coverage, particularly because the easement grant had no defect. The court said: "Emmert may question the quality of the Parcel IV easement, but that does not entitle him to pursue a claim for damages against Stewart Title based on the lack of a legal right to that easement." In *Perry v. Fidelity Nat'l Title Ins. Co*., 48 N.E.3d 1168, 2015 IL App (2d) 150168, 2015 WL 6859167 (Ill.App. 2 Dist. 2015), the court held that a title insurer must defend its insureds in a lawsuit brought to block the insureds from paving their easement path, despite the fact that the neighbors acknowledged that the easement grant was valid and gave a right to travel across their land.

[272] *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo.App. 1991).

[273] 813 S.W.2d at 11-12.

9.7.2 Effect Of Private And Public Restrictions On Right Of Access

Absent a specific affirmative access coverage, the ALTA policies do not indemnify the insured against any limitation on the right of access by ordinances or permit powers regulating an adjacent street, or a private restriction on the use of the street.[274] For example, a municipality's refusal to issue a driveway permit to the insured was an exercise of the police power. The police power exclusion thus places an implicit limit on the scope of the access coverage.[275] Also, private restrictions that prevented the insured from building a driveway did not cause it to lose its right of access to the adjacent street.[276]

Despite the above, one court observed that an access easement limiting the right to travel over the encumbered land solely for "farming and ranching purposes," which limitation was not disclosed in the title policy, "may" have triggered a covered claim if the easement had been the sole means of access, which was not the case.[277] The policy may protect against restricted access to the property, if the policy fails to recite a recorded instrument imposing that restriction, but the insured must still prove that the restricted access caused a loss.[278]

The policy does not assure that the access right is exclusive or without restrictions as to its use. When an access easement is an insured parcel, the policy does not assure that the insured is the sole party entitled to use the access drive.[279] Also, the insurer is not liable if the insured merely fails

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[274] In *Chudy v. William Raveis Real Estate, Inc.*, 2010 WL 5188445 (Conn.Super.) (unpublished), a notice approving a new subdivision's use of the same public street that provided the insured's access did not invoke the access coverage, particularly since the conditions imposed on the neighboring subdivision owner had apparently been met and the notice was excepted in the policy. The case illustrates the general principle that the government's power to regulate public streets does not invoke the access covered risk. In *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), the court held that any claimed interference with the insured's repairs of a public right of way was governmental action under its police powers, and did not interfere with his right of access or invoke policy coverage.

[275] *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975), aff'ming 23 N.C.App. 377, 209 S.E.2d 423 (1974).

[276] *Lincoln Sav. & Loan Ass'n v. Title Ins. & Trust Co.*, 46 Cal.App.3d 493, 120 Cal.Rptr. 219 (Cal.App. 2 Dist. 1975).

[277] In *Hulse v. First American Title Ins. Co.*, 2001 WY 95, 33 P.3d 122 (Wyo. 2001), reh.den., the court observed: "had we determined that the Neiman restricted easement provided the only access to the Tumbling T, because a restriction on use is a defect, and as this defect was well established in the public record, First American may have been liable under its policy."

[278] In *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal.App.2d 116, 331 P.2d 742 (Cal.App. 1 Dist. 1958), the insured alleged that the only access to the insured gas station was via a service road rather than directly to the highway. However, the insured failed to allege or prove any loss in value. The court reasoned that the fact that the highway had restricted access might actually increase the value of the insured land, by encouraging traffic and limiting competing businesses.

[279] *Bailey v. State Farm Ins. Co.*, 810 F.Supp. 267 (N.D.Cal. 1992). In that case, the recital of the easement in Schedule A referred to it as "a right-of-way (not to be exclusive)." The insurer was found not responsible for defending against a claim by an adjoiner to use the easement area, based on prescription, estoppel and other theories. In *Fekade v. First American Title Ins. Co.*, 2011 WL 4906818 (Cal.App. 6 Dist.) (unpublished), the court held that the insurance of an access easement was not the assurance that the insured had exclusive use thereof.

to obtain the desired direct access onto a highway.[280] However, when a condemnation suit was pending at the policy date, the effect of which was to take away the insured's right of access, the court found that the coverage would have been breached if the policy had not excepted the action.[281]

9.7.3 Legal Status Of Adjacent Street

FORM 24, Appendix A
Adjacent street not insured as public and open

Courts have uniformly held that the policy does not assure that an adjacent street is a public road.[282] The right of access coverage also does not impliedly assure that the location of a private drive will be depicted on the land division map that created the insured parcel, or some other public map.[283] However, in one case it was found that an affirmative assurance about a survey had the effect of insuring that the roadway shown on the survey was in fact public.[284] A policy reference to a survey may also take away coverage, however. In *Murray v. Title Ins. & Trust Co.*, the policy's affirmative assurance of "ordinary rights" in adjacent public streets was negated by the attachment to

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[280] *Phrazer Co., Inc. v. Lawyers Title Ins. Corp.*, 508 So.2d 731 (Fla.App. 1987). However, because the insurer also acted as escrowee and was aware of the purchaser's intent to obtain access onto the highway, the court remanded to allow the insured to sue for breach of escrow duties. See §13.8 regarding the escrowee's duty to close according to the terms of the purchase agreement.

[281] *Livingston v. Title Ins. Co. of Minn.*, 373 F.Supp. 1185 (E.D.Mo. 1974), aff'd, 504 F.2d 1110 (8th Cir. 1974) (exception for condemnation action put insured on notice of restriction of access resulting from same condemnation suit).

[282] *Rialto Building & Loan Ass'n v. Commonwealth Title Co.*, 327 Pa. 93, 192 A. 635 (1937) (street not open and dedicated as an easement, not in fee; policy made exception for "Streets not physically opened;" policy did not insure dedication to public); *Shaver v. Title Guar. & Trust Co.*, 163 Tenn. 232, 43 S.W.2d 212 (1931) (description referring to road was not assurance that road existed or was open; in fact, abutting land was privately owned and use was later halted, but no claim payable); *J & S Building Co., Inc. v. Columbian Title & Trust Co.*, 1 Kan.App.2d 228, 563 P.2d 1086 (1977) (attempted reservation of reversionary rights in dedicated streets was ineffective; insured's title to street on vacation not defective or unmarketable because of invalid reversion right).

[283] In *James v. Chicago Title Ins. Co*., 2014 MT 325, 339 P.3d 420 (Mont. 2014), the Montana Supreme Court held that the generic access coverage was not invoked due to the fact that the access right was granted by an easement that said the path of the public roads in the subdivision would be set as the streets were laid, because of the terrain, and the subdivision plat that created the lots also did not depict the streets. The court said, despite the insureds' protests, that they "clearly had a right of access under the declaration of easements," which their neighbors had confirmed in documents the insurer recorded. The court said that the access rights that the insureds claimed they "expected" were not reasonable, and "Courts will not act to distort policy language in the face of a reasonable interpretation of the policy provision."

[284] In *MacBean v. St. Paul Title Ins. Corp.*, 169 N.J.Super. 502, 405 A.2d 405 (N.J.Super. A.D. 1979), the survey showed "Delaware Ave." as a public street abutting the property. In fact, "Delaware Ave." was a privately-owned lot which was later improved with a house. The court held that the notation "shows clear" was an assurance that "Delaware Ave." was a public street. The court distinguished the contrary cases because in those cases, the insurer had not given any affirmative assurances.

the policy of a map on which the adjoining street was marked "abandoned."[285]

9.7.4 Physical Status Of Adjacent Street

Courts also agree that the policy does not insure that an abutting "public" street is open, improved or at a grade which will permit the insured to build a connecting driveway.[286] In *Title & Trust Co. of Fla. v. Barrows*,[287] the insured land abutted a platted street which was "merely a continuation of a sandy beach" and covered by high tide in the spring and fall. However, the court ruled that the insured had a right of legal access and the policy did not insure "against physical infirmities of the platted street." The court based its decision on the fact that the "restriction" on access would be clearly visible on inspection, which is the insured's duty, but invisible from an inspection of the records, which is the limit of the insurer's duty. The court summed up that:

> title insurance does not insure against defects in the physical condition of the land or against infirmities in legal right of access not shown by the public record. See Pierson v. Bill, 138 Fla. 104, 189 So. 679 (1939). [The insurer and title association] argue that defects in the physical condition of the land such as are involved here are not covered by title insurance. We agree. Title insurance only insures against title defects.[288]

In *Hocking v. Title Ins. & Trust Co.*,[289] a plat was recorded but the streets were not constructed. In fact, the entire subdivision was mere desert. The court found it "elementary" that the insured's problem was the condition of the improvements on the land, not the title to same, and thus not covered by the policy. Also, in *Hulse v. First American Title Ins. Co.*,[290] the insured parcel abutted a

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[285] 250 Cal.App.2d 248, 58 Cal.Rptr. 273 (Cal.App. 2 Dist. 1967).

[286] *Green v. First American Title Ins. Co.*, 2005 WL 2249760 (Cal.App. 4 Dist. 2005) (unpublished) (access coverage not triggered by fact that property was fenced off from and not at grade with adjoining street). In *Kimble v. Land Concepts, Inc*., 2012 WI App 132, 345 Wis.2d 60, 823 N.W.2d 839 (Table), 2012 WL 4815574 (Wis.App.) (unpublished), the court refused to consider, as sufficiently undeveloped on appeal, the issue of whether or not a parcel lacked access when it abutted a dedicated but unbuilt public road. In *Northern California Community Development Corp. v. First American Title Ins. Co.*, 2019 WL 1397040 (Cal.App. 3 Dist.) (unpublished), roads were platted but never dedicated to the public or constructed. The court held nonetheless that the platted streets were available for ingress and egress by the lot owners, who held easement rights in the streets.

[287] 381 So.2d 1088 (Fla.App. 1979).

[288] *Title & Trust Co. of Fla. v. Barrows*, 381 So.2d at 1090. The *Barrows* court cited *McDaniel v. Lawyers' Title Guar. Fund*, 327 So.2d 852 (Fla.App. 2 Dist. 1976) and quoted *Mafetone v. Forest Manor Homes, Inc.* 34 A.D.2d 566, 310 N.Y.S.2d 17 (N.Y. 1970): "The title company is not responsible to plaintiffs for the damages incurred by reason of the change in elevating the abutting street to its legal grade, since the provisions of the standard title insurance policy here in question are concerned with matters affecting title to property and do not concern themselves with physical conditions of the abutting property absent a specific request by the person ordering a title report and policy."

[289] 37 Cal.2d 644, 234 P.2d 625, 40 A.L.R.2d 1238 (Cal. 1951).

[290] 2001 WY 95, 33 P.3d 122 (Wyo. 2001), reh.den.

public road that was not maintained. The insurer established that an attempted vacation of the road had not occurred. The court found that there was a right of access to the property, and no valid claim under the policy.[291] Similarly, the insured had not proven that it lacked a right of access because it would take a large amount of fill for ordinary autos to be able to drive onto the property.[292] Again the court noted that "the physical condition of the existing access was easily ascertainable by a simple inspection of the site by the purchasers."[293]

The policy does not obligate the insurer to protect the insured against disputes with other parties over the use of the easement path, its maintenance, gates, blockading of the access route and other disputes that are not challenges to the right of access.[294]

Several cases have held that the policy does not insure against a map or other action to change the grade of the adjacent street, even when such a map is filed or available for review.[295]

9.8 Marketability Of Title

Most policies indemnify the insured in the event that title is not marketable as shown.[296] If the policy does not contain a marketability coverage, it is not implied from other coverages.[297] The preamble to the Covered Risks states that coverage is invoked only if the matter is "not excluded or excepted from coverage." Thus, there is no marketability coverage for a matter excepted in the policy, no matter how grave its effect.

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[291] "The Hulses maintained, and continue to maintain, legally enforceable unrestricted access across the Neiman property by way of this road. While its physical condition may not be satisfactory to them, the policy does not insure the physical condition of the roadway, but rather whether it provides a legal right of access. Only defects shown in the public record relating to a legal right of access are covered under the policy." 2001 WY at 14.

[292] *Krause v. Title & Trust Co. of Florida,* 390 So.2d 805 (Fla.App. 1980).

[293] Id. at 806.

[294] In *Thurlow v. Ticor Title Ins. Co.*, 2009 WL 2358307 (Conn.Super.) (unpublished), a title insurer was found not to be required to prosecute the insured's lawsuit against his neighbor, whom the insured claimed had "physically blocked and prevented the [p]laintiffs' free access over, to and from the premises and its use." The court ruled that the policy does not obligate the insurer to bring an action to clear title, because the neighbor had not attacked the validity of the access right. In *Fekade v. First American Title Ins. Co.,* 2011 WL 4906818 (Cal.App. 6 Dist.) (unpublished), the policy's insurance of an access easement did not obligate the insurer to protect the insured against the burdened land owner's demand that he remove a gate at the end of the drive that was located outside the easement path. In *CH Properties, Inc. v. First American Title Ins. Co*., 43 F.Supp.3d 83 (D. Puerto Rico 2014), recons.den. 2014 WL 7140507 (D. Puerto Rico, Dec. 15, 2014), the court held that the insurer had no duty to clear trespassing protesters off the insured land, under the guise that they were blocking the insured's "right of access." This was particularly so because the protesters first occupied the property years after the policy date, invoking the post-policy exclusion also. However, in *Perry v. Fidelity Nat'l Title Ins. Co*., 48 N.E.3d 1168, 2015 IL App (2d) 150168, 2015 WL 6859167 (Ill.App. 2 Dist. 2015), the court held that a title insurer must defend its insureds in a lawsuit brought to block the insureds from paving their easement path, despite the fact that the neighbors acknowledged that the easement grant was valid and gave a right to travel across their land.

[295] *Sperling v. Title Guarantee & Trust Co.*, 227 App. Div. 5, 236 N.Y.S. 553 (1929); *Mafetone v. Forest Manor Homes, Inc.*, 34 App.Div.2d 566, 310 N.Y.S.2d 17 (1970).

[296] See Condition 1(k) of the 2006 ALTA policies. A very similar definition is found in Conditions & Stipulations

Condition 1(k) of the 2006 ALTA policies defines "Unmarketable Title" as:

> Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

One must look to state law to determine whether or not the claimed defect in title would be one which would allow a purchaser to be released from the obligation to buy. State law controls and should be consulted as to the definition of marketability of title. Many states have adopted one or more of the following definitions:

> Title is marketable if it is free from reasonable doubt and is a title which a reasonable, well informed buyer would be willing to accept.[298]

> A marketable title is one which not only enables the holder to hold the land, but to hold it in peace, and if there is a wish to sell, "to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."[299]

> … a title legally free from doubt, or free from the threat of potential litigation.[300]

The policy coverage is invoked only if a third party rejects title as being unmarketable. See §3.2.3.1.6 for a complete discussion of the conditions for recovery under the marketability coverage and how marketability claims are administered.

One common principle is that title is unmarketable if it is doubtful, clouded or open to dispute.[301] A South Carolina case gave that state's definition of a cloud on title: "a claim which on its

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1(g) of the 1992 ALTA policies. The ALTA Residential policy contains a marketability assurance as Covered Risk 11. The ALTA Homeowner's policy contains a nearly-identical coverage as Covered Risk 29. Some earlier policy forms did not contain a marketability coverage, such as the 1970 ALTA Form A Owner's policy.

[297] *Blessing v. American Title & Ins. Co.*, 121 So.2d 455 (Fla.App. 1960). However, when a policy does not include marketability coverage, that fact does not limit the other coverages of the policy. When the policy omitted a restriction, it was no defense to argue that the insured was vested in title, and the restriction claim merely affected marketability, which was not insured. *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (Fla.App. 1979). See also Annotation, *Defects Affecting Marketability of Title Within Meaning of Title Insurance Policy*, 18 ALR4th 1311.

[298] *Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co*., 706 F.Supp. 477 (S.D.Miss. 1988).

[299] *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839, 850 (Mo.App. 1987); *Forty Bon, Inc. v. St. Louis Investment Properties, Inc.*, 965 S.W.2d 471 (Mo.App.E.D. 1998).

[300] Annotation, *Defects affecting marketability of title within meaning of title insurance policy*, 18 A.L.R.4th 1311.

[301] See *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839 (Mo.App. 1987).

face appears valid, but resort to extrinsic evidence will show its invalidity."[302] The policy marketability definition corresponds to this principle, by stating that coverage can be triggered by an "alleged or apparent" defect.[303] As one court stated it:

> [T]he analysis of Willow Ridge's unmarketability claim is similar to that for its claim of a lien defect. One notable difference, however, is that as to Willow Ridge's claim that a lien defect caused its loss, an issue arises as to the validity of the liens and the policy requires a determination of validity before the duty to pay arises. With reference to unmarketability, the mere existence of the liens, whether valid or not, is sufficient to render title unmarketable.[304]

The insurer may wish to take action to clear title when it determines that there is a substantial cloud on title. However, many matters that relate to ownership of land are not even clouds on title.[305] In addition, most states have adopted laws that cure clouds on title. Statutes of limitation and marketable title acts remove, or render unenforceable, a plethora of such matters, as discussed at §3.1. Flyspeck "defects" in title are discussed at §11.4.3.

An encumbrance does not render title unmarketable, because such a holding would render the titles to millions of parcels unmarketable.[306] Invalid or doubtful claims of ownership do not make

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[302] *Wilson v. Moseley*, 327 S.C. 144, 488 S.E.2d 862 (S.C. 1997).

[303] In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co*., 883 F.3d 1038 (8th Cir. (Mo.) 2018), the court noted the "alleged or apparent matter" phrase, saying that the policy "thus does not limit coverage to perfected liens, and an inchoate lien could meet the definition of 'an alleged or apparent matter affecting the title to the land.'" However, the court said that the insured had not proven that mechanic's liens filed long after the policy date were inchoate rights on the policy date that rendered title unmarketable. Although such liens fall under the relation-back doctrine, the later filed liens were for work that was performed after the policy date, and the lien holders had not even begun work at the property on the policy date.

[304] *Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co.*, 706 F.Supp. 477, 487 (S.D.Miss. 1988).

[305] For example, the fact that the seller was a debtor-in-possession under a Chapter 11 bankruptcy did not made title unmarketable. *Booth v. Attorneys' Title Guar. Fund, Inc.*, 2001 UT 13, 20 P.3d 319 (Utah 2001). In *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the court rejected the insured's claim that title to all five subdivision lots insured in the policy was unmarketable because of an overlap of the subdivision plat with an adjoiner that affected only one of the platted lots. The court said the recorder's "rejection" of the plat when submitted for recording was not a "rejection" of the title to the lots. In *JBGR LLC v. Chicago Title Ins. Co*., 88 N.Y.S.3d 806, 62 Misc.3d 313, 2018 N.Y. Slip Op. 28357 (Suffolk Cty. 2018), the court found that a limitation on the number of buildable lots in a development, adopted as a condition to the rezoning of the property, was excluded from coverage under Exclusion 1(a). The court said the zoning restriction did not render title unmarketable.

[306] See *Osprey Landing, LLC v. First American Title Ins. Co.*, 157 A.3d 247, 2017 ME 46 (Maine 2017). The Maine Supreme Court ruled that a claimed prescriptive easement did not render title unmarketable. It said: "If we were to hold that a title becomes unmarketable merely because there is a possibility that a claim for an easement could be brought in the future, an untold quantity of titles across the state would subsequently become unmarketable, resulting in uncertainty of ownership and a profusion of litigation." In *Chesapeake Land Development Company LLC v. Chicago Title Ins. Co.*, 2017 WL 5930295 (W.D.Okla.) (unpublished), the court held that a use restriction does not make title unmarketable and that, if the restriction has outlawed under the marketable record title act, it is no longer an encumbrance. See also *Fidelity*

title unmarketable.[307] An inchoate or potential right in property does not render title unmarketable.[308] However, a claim of title being litigated may make title unmarketable even though there has not yet been a final determination by a court adverse to the title as insured.[309]

The issue of whether or not a lack of a right of access to the parcel renders its title unmarketable is thoroughly discussed at §9.7.1. See §9.8.6 below regarding the insurer's rights, including the right to cure title. See §3.2.3.1.6 for an analysis of how to resolve a claim based on the assertion that the insured's title is unmarketable.

9.8.1 Marketable Title Versus Insurable Title

As is frequently stated, marketable title and insurable title are not the same. Insurers will ignore certain defects in title for a number of reasons, which is what title underwriting is all about. Thus, the test of marketability is not that a reputable title insurer has issued a policy free of the defect in question.[310] Title also is not rendered marketable by the insurer's willingness to issue a new

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Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC, 830 F.3d 1209 (10th Cir. (Colo.) 2016); *Pavilion Park, LLC v. First Am. Title Ins. Co*., 2011 WL 43222 (W.D.Ky. 2011); *McGonagle v. Stewart Title Guar. Co*., 432 S.W.3d 535 (Tex.App. 2014); *Camp v. Commonwealth Land Title Ins. Co*., 787 F.2d 1258, 1261 (8th Cir. 1986); and *JBGR LLC v. Chicago Title Ins. Co*., 88 N.Y.S.3d 806, 62 Misc.3d 313, 2018 N.Y. Slip Op. 28357 (Suffolk Cty. 2018).

[307] *Native Sun Investment Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (Cal.App. 4 Dist. 1987). In *CH Properties, Inc. v. First American Title Ins. Co*., 43 F.Supp.3d 83 (D. Puerto Rico 2014), recons.den. 2014 WL 7140507 (D. Puerto Rico, Dec. 15, 2014), the court rejected the insured's mushy assertion that certain claims had "diminished" its title. The insured pulled the word "diminished" from the statement that an insured is entitled "to compensation for either a complete failure of title or a diminished title," found in Joyce D. Palomar, *Title Insurance Law*, 2013-14 Edition, § 5:4, West/Thomson Reuters. The court said the alleged issues about title did not render it unmarketable and thus did not invoke the Covered Risk.

[308] In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co*., 883 F.3d 1038 (8th Cir. (Mo.) 2018), the court noted that the policy defined "unmarketability of title" as "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest... to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." It said that the policy "thus does not limit coverage to perfected liens, and an inchoate lien could meet the definition of 'an alleged or apparent matter affecting the title to the land.'" However, the court said that the insured had not proven that the liens filed long after the policy date were inchoate rights on the policy date that rendered title unmarketable. Despite the relation-back doctrine, the later filed liens were for work that was performed after the policy date, and the lien holders had not even begun work on the policy date.

[309] See §3.4.5 concerning the final determination provision. In *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839 (Mo.App. 1987), the court noted that the provision is intended to apply in those cases where the insurer has assumed a defense or exercised its right to clear title. In the *Davis* case, the insurer had refused to clear title. As a result, "The insurer neither removed the defect nor was in the process of the litigation of the defect at the time Davis filed the suit on the policy--thus, neither condition limited the right of the insured to remedy under the policy."

[310] In *Willow Ridge Ltd. Partnership v. Stewart Title Guar. Co.*, 706 F.Supp. 477 (S.D.Miss. 1988), the court stated: "The court observes that the fact that a title insurance company, reputable or not, would agree to insure a title has little bearing on the marketability of that title. If this were a criterion for marketability, nothing would be gained by insuring against unmarketability since marketability would be determined by the mere issuance of the policy. The insured would need no protection against unmarketability and a provision purporting to cover unmarketability would be superfluous. See *Kipahulu Inv. Co. v. Seltzer Partnership*, 4 Haw.App. 625, 675 P.2d 778, 781 (1983) (existence of title insurance did

policy to a purchaser from the insured.[311] However, an insurer's willingness to insure the title is often used as a litmus test of its marketability.[312]

Conversely, an insurer will not always be willing, and is not obligated, to insure every title that may be considered to be marketable. This is true even if the title's marketability has been determined by court order.[313] In some cases, the means or procedure by which the party acquired title to the property is so inherently subject to attack that prudent insurers decline to insure. An insurer's refusal to insure does not make title unmarketable.[314]

The insurer's business is a private enterprise. Title insurers are not obligated to insure the title to land which may be subject to attack. There is no constitutional right to the issuance of a title insurance policy.[315] A common example of title that an insurer is reluctant to insure is that obtained

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not satisfy requirement of marketable title)."

[311] *House v. First American Title Ins. Co.*, 883 N.E.2d 197 (Ind.App. 2008) (insured rejected offer to insure over on new sale; court construed this as a question of mitigation of damages); *Shada v. Title & Trust Co. of Fla.*, 457 So.2d 553 (Fla.App. 1984); *Forty Bon, Inc. v. St. Louis Investment Properties, Inc*., 965 S.W.2d 471 (Mo.App.E.D. 1998) (action on purchase contract; title was unmarketable because of encroachment; insurer's willingness to insure over not found to make title marketable). In *Nebo v. Transamerica Title Ins. Co.*, 21 Cal.App. 3d 222, 98 Cal.Rptr. 237 (Cal.App. 4 Dist. 1971), the court felt that the insurer only issued the policy in question because it wanted to avoid an immediate claim on a previous policy showing title in the same state. The court found the insurer's willingness to take yet another risk on the same property to be strictly for the insurer's own benefit. Such may have been the motivation in *Nebo*, but is not always so. The insurer's willingness to insure the risk again is, in the author's experience, normally to help the insured close a pending sale with the least delay and inconvenience. The insurer typically is proceeding concurrently to remove the title defect, and does not want the insured to have to wait the months it will take to resolve it before closing the sale. In *Latter & Blum, Inc. v. Ditta*, 223 So.3d 54 (La.App. 4 Cir. 2017), the court found that an encroaching fence made title unmarketable, excusing the buyer from the obligation to purchase, and a title insurer's willingness to issue a policy protecting against the encroachment did not cure the marketability issue. The court discussed the difference between marketable title and insurable title in some detail.

[312] See *Donaghy v. Roudebush*, 614 F.Supp. 585 (D.N.J. 1985).

[313] *Title Guarantee & Trust Co. v. Rudershausen*, 164 N.Y.S. 15 (Sup.Ct.App. Term 1917).

[314] *Wilson v. Pacific Coast Title Ins. Co.*, 106 Cal.App.2d 599, 235 P.2d 431 (Cal.App. 4 Dist. 1951). A court may find perplexing an insurer's judgment as to what is and is not a good underwriting risk. See *Mathews v. Moore*, 1997 WL 241741 (Wash.App.Div. 1) (unpublished), in which the court found it a "mystery" that title insurers would rely on a private trustee's sale to remove liens against the borrower, but not a lis pendens filed in a judicial foreclosure. Nonetheless, it is exclusively within the insurer's province to decide what risks it will assume.

[315] In *Hanie v. Atlanta Title & Trust Co.*, 45 Ga.App. 26, 163 S.E. 515 (1932), for example, the insurer refused to insure title to land which it had previously insured. The owner sued for damages. The appellate court upheld a demurrer, holding that "the policy does not obligate the title company to insure the title to the property at a later date." However, a U.S. District Court held that, in Kansas, an insurer has a duty of "reasonable performance" in its role as abstracter of title, and may not refuse to insure title if title is marketable under those standards. In *In re Lisa, Inc.*, 224 B.R. 173 (D.C.D.Kan. 1998), the title agent had refused to remove liens from Schedule B based on a bankruptcy order for sale free and clear. The state title standards said that such an order effectively removes such liens. The court stated: "Ford [the title agent] next argues that a title insurance company is free to impose any conditions it wants in the insurance policy. The Trustee argues that only reasonable conditions consistent with general title standards may be imposed. The Trustee argued Ford violated a duty of good faith and fair dealing when it refused to issue a policy without the exception. … The Trustee cited the Kansas Title Standards Handbook as evidence that Ford's refusal was inconsistent with general title

through tax foreclosure.[316] In a California suit, *Quelimane Co., Inc. v. Stewart Title Guar. Co.*, the plaintiffs alleged that members of the title industry conspired to deny title policies to purchasers of tax titles. The Supreme Court overturned a lower court order striking causes of action based on tortious interference with contract and state unfair competition and restraint of trade laws.[317] The court held that the insurers were permitted to introduce evidence at trial that the refusal to insure was based on legitimate business concerns, including risk. See §12.7.6 for a discussion of the related topic of the insurer's lack of a duty to remove an exception for a defect, lien or encumbrance, or to explain to the proposed insured how such a matter might be resolved.

9.8.2 Effect On Marketability Of Insuring Over Defect

The title insurance policy does not assure that the title as stated in Schedules A and B will be considered acceptable to a proposed purchaser or lender. Thus, the policy does not insure that title is marketable in the absolute. Rather, it insures against unmarketability of the title as shown in the policy, subject to the exceptions contained in Schedule B.

An insurer will sometimes agree to insure over a title defect, lien or encumbrance, particularly when it is in the process of seeking to clear title, as further discussed at §3.4.4.[318] The insurer's willingness to insure against the matter does not cure or remove it, as fully discussed at §9.8.1. It is a common industry underwriting standard to disclose and insure over an item rather than to delete it as an exception in Schedule B. Certain states prohibit the insuring over of recorded liens. See §15.12.

One court found that the disclosure of a defect to the insured by a separate letter agreement was not sufficient to establish that title was marketable as shown in the policy, when the item was

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standards. The bankruptcy court agreed with the Trustee, and relying on the handbook as evidence of what constitutes reasonable performance, concluded Ford had breached its duties under the contract when it refused to issue a policy without the exclusion. This court agrees with the bankruptcy court's analysis." The *Lisa* court distinguished several cases on the basis that those cases involved claims under the policy while, in *Lisa*, the trustee was pursuing a tort claim for abstractor negligence. The distinguished cases were *Gilchrest House, Inc. v. Guaranteed Title & Mortgage Co.*, 277 A.D. 788, 97 N.Y.S.2d 226 (N.Y.A.D. 1950), affirmed, 302 N.Y. 852, 100 N.E.2d 46 (1951) and *Aronoff v. Lenkin Co.*, 618 A.2d 669 (D.C.App.1992), in which the court held: "We think a title insurer has an unqualified right to select the risks it is willing to underwrite ... . Unless it is otherwise bound by law or contract, it may refuse to insure for any reason, sound or not, or for no reason at all." 618 A.2d at 686. However, as the *Lisa* court pointed out, the *Aronoff* court had declined to decide whether or not a seller may hold a title company liable for negligence in performing a title search.

[316] For a good example as to why insurers are reluctant to insure title derived from a tax sale, see *Nourachi v. First American Title Ins. Co.*, 44 So.3d 602 (Fla.App. 5 Dist. 2010), in which the county mistakenly sold property for non-payment of taxes although it had been conveyed to the federal government decades earlier. The insured's tax deed was thus void *ab initio*.

[317] *Quelimane Co., Inc. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 960 P.2d 513 (Cal. 1998).

[318] See *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.*, 883 F.3d 1038 (8th Cir. (Mo.) 2018), in which the insured sought to sell property while the insurer was paying to resolve filed mechanic's liens. The insured asked the insurer to insure over those liens, despite the seeming lack of coverage for them. The insured terminated the purchase contract before the insurer made a decision on the request. The court refused to find that title was rendered unmarketable due to the fact that the insurer did not instantly agree to insure over the liens.

not excepted in the policy.[319] The insurer omitted an oil pipeline easement in hopes that it could be released. Seller, insured and insurer were equally knowledgeable of the easement's existence. The insurer agreed by letter that it would also issue future policies not showing the easement. Later, a prospective buyer objected to the easement. The insured sued on marketability. The insurer posited that the coverage had been limited by the letter so that its only obligation was to issue further policies in the same condition. The court found that the letter could not be read as part of the insurance contract, and therefore was not a limitation on coverage. Rather, it considered the letter agreement to be an additional undertaking or obligation of the insurer.

The value of insurance over a title defect sometimes hinges on the insurer's willingness to give the same coverage to a future owner or lender. On occasion, the insured obtains an endorsement by which the insurer commits to give the same assurance again in the future. The insurer has a right to put limits on such endorsements, for example to limit the coverage to the current policy amount.[320] However, a court may find that a defect in title is not cured by the insurer's present willingness to insure over the defect and its commitment to give the same coverage in the future.[321]

When a lien is excepted in the policy and insured over, the marketability coverage does not protect against any claim that the matter that is excepted renders title unmarketable. In *Humphries v. West End Terrace, Inc.*,[322] the insureds argued that title was unmarketable because of a blanket mortgage shown in the policy but protected against based on a letter of credit. The claim was not provoked by the lender's attempt to foreclose the lien. Rather, the unit owners sued:

> after one of the plaintiffs attempted to sell a unit. It was at this point that the plaintiffs allegedly first learned that the underlying indebtedness made the property unmarketable.[323]

The insureds argued that the marketability coverage overrode the specific assurance as to the mortgage:

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[319] *Bozeman v. Commonwealth Land Title Ins. Co.*, 470 So.2d 465 (La.App. 1 Cir. 1985). The measure of damages was derived from a sale by the insured conducted two days before trial on the coverage case. Although the sale price was greater than the purchase price, the court measured damages as the interest paid on the loan the entire time the insured was in title. One must conclude that the court was in a punishing mood.

[320] Future coverage limitations were the issue in *TC X Incorporated v. Commonwealth Land Title Ins. Co.*, 86 F.3d 1152 (Table), 1996 WL 271450 (4th Cir. (S.C.) 1996) (unpublished), discussed at §9.11.

[321] In *Nelson v. Anderson*, 221 Ill.Dec. 932, 676 N.E.2d 735 (Ill.App. 5 Dist. 1997), the insurer was willing to protect against the violation of a restriction setback line. The buyer still balked. The insurer then agreed to give future coverage, and the seller claimed that this cured the marketability flaw. The court disagreed, stating: "We need not discuss the degree of risk of litigation posed nor the magnitude of the decrease in market value caused by the title defect. We simply find that the title at issue was clouded by the violation of a restrictive covenant such that a reasonable person could fear both the threat of future litigation and an unfavorable effect on the market value of the property. We deem such title to be unmerchantable."

[322] 795 S.W. 2d 128 (Tenn.App. 1990).

[323] Id. at 131.

> Plaintiffs assert that Ticor's commitment to insure against loss occasioned by the enforcement or attempted enforcement of this underlying indebtedness amounted to insurance against lack of marketability. Plaintiffs assert that legal marketability was insured because Ticor did not "re-except" marketability from its commitment to affirmatively insure against loss occasioned by enforcement of the indebtedness.[324]

The court rejected the argument, saying:

> [T]he plaintiffs received the coverage of title insurance exactly as stated in the policy. Ticor insured against unmarketability except if it arose as a result of the underlying indebtedness. With respect to that indebtedness, Ticor agreed to reimburse the plaintiffs for any loss suffered by them as a result of the enforcement or attempted enforcement of the mortgages, liens and other instruments comprising it. There are no allegations in the complaint that any agent or employee of Ticor led the plaintiffs to believe they would receive anything other than what they actually did receive. The complaint makes no claim against Ticor for losses from enforcement of the indebtedness and states no claim against Ticor with respect to unmarketability of the property.[325]

Thus, while most titles can be insured, if a serious title issue exists, the insurer will commonly wish to give notice of the matter to the proposed insured, to allow that party to determine for itself if it will accept title with the defect in existence.

Older versions of the Texas policy did not contain an assurance as to marketability of title.[326] In addition, earlier versions of the Texas policy permitted the insurer to resolve a title defect by issuing a new policy without exception for the title defect, or by indemnifying another insurer to induce it to do the same.[327]

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[324] Id.

[325] Id.

[326] The T-1 policy currently in use is modeled after the 2006 ALTA policy, and contains the same marketability coverage as does the ALTA policy. In an earlier version of the T-1 policy, the marketability coverage was replaced by an assurance against "Lack of good and indefeasible title."

[327] Paragraph 3 of the Conditions and Stipulations of the earlier version of the T-1 policy provided, in pertinent part: "If the Company concludes that the lien, encumbrance, adverse claim or defect is not covered by this policy, or was otherwise addressed in the closing of the transaction in connection with which this policy was issued, the Company shall specifically advise the insured of the reasons for its determination. If the Company concludes that the lien, encumbrance, adverse claim or defect is valid, the Company shall take one of the following actions: ... (iii) upon payment of appropriate premium and charges therefor, issue to the insured claimant or to a subsequent owner, mortgagee or holder of the estate or interest in the land insured by this policy, a policy of title insurance without exception for the lien, encumbrance, adverse claim or defect, said policy to be in an amount equal to the current value of the property or, if a mortgagee policy, the amount of the loan; (iv) indemnify another title insurance company in connection with its issuance of a policy(ies) of title insurance without exception for the lien, encumbrance, adverse claim or defect ... ."

9.8.3 Marketable Title Versus Physical Conditions And Market Value

FORM 25, Appendix A
Marketability of title not same as "salability" of property

There are many matters that can reduce the market value of a parcel without affecting the marketability of its title. This section discusses the effect, if any, on marketability of title due to physical conditions on the property, such as contaminated material, encroaching structures, flooding, and lot size and shape. This section also discusses the various types of issues that might affect the property's market value or appeal (salability), which are often presented as if they affected the marketability of its title.

The lack of paved and graded streets was found to be a physical condition that did not make title unmarketable, in the seminal decision on the physical condition distinction, *Hocking v. Title Ins. & Trust Co.*[328] The court stated:

> It is defendants' position that plaintiff confuses title with physical condition of the property she purchased and of the adjacent streets, and that one can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable. … It appears to be the condition of her land in respect to improvements related thereto (graded and paved streets), rather than the condition of her title to the land, which is different from what she expected to get.[329]

A limitation on the right of access to a parcel has been found not to trigger the marketability of title coverage, by courts that have "recognized a distinction between 'economic lack of marketability, which relates to physical conditions affecting the use of the property, and title marketability, which relates to defects affecting legally recognized rights and incidents of ownership.'"[330]

Courts have repeatedly held that a problem with a physical aspect of the property may reduce its market value, but does not render title unmarketable.[331] Thus, title to property can be marketable

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[328] 37 Cal.2d 644, 234 P.2d 625 (Cal. 1951).

[329] Id. at 651.

[330] *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209, 1218 (10th Cir. (Colo.) 2016), quoting from *Riordan v. Lawyers Title Ins. Corp.*, 393 F.Supp.2d. 1100, 1105 (D.N.M. 2005). Those decisions are fully discussed at §9.7.1.

[331] In *Farina v. Conestoga Title Ins. Co.*, 2006 WL 4663420 (Pa.Com.Pl.), 81 Pa. D.&C.4th 548 (2006), aff'd per curiam 945 A.2d 774 (Table) (Super.Ct. 2007), app.den. 600 Pa. 746, 964 A.2d 895 (Table) (Sup.Ct. 2008), the existence of an abandoned septic tank on the property was found to be a physical condition that did not affect title. In *Hanson Business Park, L.P. v. Fidelity Nat'l Title Ins. Co.*, 209 S.W.3d 867 (Tex.App.-Dallas 2006), the court explained: "The cases' discussions of 'marketable title' actually address whether the property can be sold at all, not whether the property will fetch a lesser price because of some condition on the land. … The cases cited by appellant establish that the concept of 'title' speaks to ownership of rights in property, not to the condition or value of the property. Thus, a defect in, or encumbrance on, title (such as would trigger coverage under a title insurance policy) must involve a flaw in the

although the property contains a structure that violates a restriction,[332] or the lot is smaller than represented.[333] A neighbor's creation of a party wall, and subsequent refusal to pay for the privilege, does not render title to the land unmarketable.[334] The flooding of the insured property also does not affect its title.[335] Also, title was not rendered unmarketable due to the existence of an abandoned

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ownership rights in the property. … We conclude the flood-plain status of that property is a defect, if at all, only in the condition of the property. We refuse to equate a defect in the condition of the property with a defect in title to the property." In *MGD Partners Limited Liability Co. v. First American Title Ins. Co.*, 2011 WL 3962568 (5th Cir. (La.)) (unpublished), the court found that bombs dropped on the property when it was used as a bombing range during World War II, which caused the parish to refuse a residential subdivision permit, were a physical condition that did not affect title or render it unmarketable, and thus did not invoke coverage. The razing of the building on the property after closing but before the insured mortgage was recorded did not make title unmarketable. *Lakeside National, LLC v. Chicago Title Ins. Co*., 2011 WL 3420431 (D.Md.) (unpublished). In *Trinder v. Connecticut Attorneys Title Ins. Co.*, 2011 VT 46, 22 A.3d 493 (Vt. 2011), the encroachment of the insured's septic system onto neighboring land was deemed a physical condition that did not affect its title, and the court found that the insured's allegation that the encroachment made the property less valuable was not the equivalent of rendering its title unmarketable. In *Furey v. Chicago Title Ins. Co*., 2012 IL App (2d) 120203-U, 2012 WL 6968946 (Ill.App. 2 Dist.) (unpublished), flood damage to the insured's house was caused by the overflowing of a river, not a drainage easement that was not excepted in Schedule B; therefore, the insurer was not required to pay for the flood repairs. In *Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209, 1218 (10th Cir. (Colo.) 2016), the court held that a limited right of access might affect market value but did not make title unmarketable, citing numerous decisions described in this passage. In *Wade v. Stewart Title Guar. Co*., 82 N.E.3d 763, 2017 IL App (1st) 161765, 415 Ill.Dec. 559 (Ill.App. 1 Dist. 2017), the court held that the policy did not protect against the defects in the building that led to its condemnation and demolition, which issues did not concern the title to the land. In *Sullivan v. Chicago Title Ins. Co*., 2017 WL 3494216 (D.Mont.) (unpublished), the court held that "criminal activities" the insured alleged to have occurred on the property that were somehow related to an easement did not affect title to the land. In *Vos v. First American Title Ins. Co*., 2017 WL 1476148 (E.D.Cal.) (unpublished), the court held that the fact that a parcel's physical conditions might be regulated by federal laws, such as the Antiquities Act of 1906 or the Historic Sites Act of 1953, did not affect its title. In *Lauritzen v. First American Title Ins. Co.*, 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), the court cited with approval *Woody Creek*, *Hocking* and other decisions that have made the distinction between physical conditions affecting value and matters that render title unmarketable, in order to conclude that subdivision ordinances and conditions placed on a subdivision map did not render title to the subdivided lots unmarketable.

[332] *Camp v. Commonwealth Land Title Ins. Co.*, 787 F.2d 1258 (8th Cir. 1986). See further discussion in §9.8.4.

[333] In *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771 (1994), various improvements built for the property were found not to be located on the insured land. The court found that title to the land insured was still marketable: "Indeed, the problem is that plaintiffs desired to obtain a greater amount of land than they purchased and which had been accurately described in their deed, albeit to satisfy their reasonable expectations at the time of purchase. Plaintiffs thus have confused title with the physical condition or value of the property they purchased." 33 Cal.Rptr.2d at 776.

[334] *Thomas v. Tradesmen's Trust & Savings Fund Co.*, 21 Pa.C.C. 151, 7 Pa.D. 375, 1898 WL 3681 (Pa.Com.Pl. 1898).

[335] *Dyer & Moody, Inc. v. Dynamic Constructors, Inc.*, 357 So.2d 615 (La.App. 1978) (flooding caused by blocking of nearby drainage ditch); *Witkowski v. Richard W. Endlar Ins. Agency, Inc*., 81 Mass.App.Ct. 785, 968 N.E.2d 922 (Mass.App. 2012) (destruction of insured condominium unit by flood and fact that insured could not get financing to rebuild because he could not get federal flood insurance was a physical condition that did not render title defective).

septic tank on the land.[336] Title was not affected by the existence of underground pits in which tree stumps had been buried, which caused newly-built houses to settle.[337] Faulty construction of recent improvements on the land do not affect its title.[338] Title was not made unmarketable due to the fact that certain equipment was permanently installed in the building that was owned by someone other than the real estate title holder.[339] An injunction requiring the property owner to disconnect from a common septic system was not a defect or encumbrance on title, and therefore the policy did not protect against its effect.[340] Title is not rendered unmarketable if the parcel or building is considered to be stigmatized as having been the scene of a serious crime, a notorious event or paranormal activity.[341] The lack of building permits or a certificate of occupancy does not affect title to the parcel.[342] Title was not rendered unmarketable by the fact that the property was part of a failed development, the only economic solution for which was to conduct a partition sale and divide the proceeds between the owners.[343]

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[336] The court held that, "while [Rood's] property may be unmarketable due to the existence of the septic tank, the title to the property is not." *Rood v. Commonwealth Land Title Ins. Co*., 936 A.2d 488, 2007 PA Super 315 (Pa.Super. 2007).

[337] "The waste disposal areas at issue constitute a physical condition of the property which does not affect the title of the Property. There is nothing in the Policy to support the Plaintiff's contention that the Policy insured the Plaintiff against loss resulting from undisclosed waste disposal areas or any other sub-surface condition. Indeed, it appears that coverage for such conditions is specifically excluded. The Policy at issue is a policy insuring legal title and does not purport to insure for the physical conditions of the property." *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co*., 2007 WL 3334210 (W.D.N.C.) (unpublished).

[338] *Culley v. Bank of America, N.A.*, ___ F.Supp.3d ___, 2019 WL 1430124 (D.Mass. 2019) (permanent citation not yet available).

[339] *Geo Finance, LLC v. University Square 2751, LLC*, 2014 WL 7369940 (E.D.Mich. 2014) (unpublished) (geothermal water system installed but still owned by the installer).

[340] *House v. First American Title Ins. Co*., 858 N.E.2d 640 (Ind.App. 2006).

[341] The subject of stigmatized property has received its due share of scholarly treatment. See Marc Ben-Ezra and Asher Perlin, *Stigma Busters: A Primer on Selling Haunted Houses and Other Stigmatized Property*, 19 Probate & Property Number 3, p. 59 (2005); Warner, *Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Haunted Houses and Ghosts*, 28 Valparaiso U.L. Rev. 207 (1993); McEvoy, *Stigmatized Property: What a Buyer Should Know*, 48 J. of Missouri Bar 57 (Jan.-Feb. 1992); and Eisenberg, *Ghosts, Murders, and Stigmatized Real Estate: Shall We Tell the Buyer That Freddy Lives Here on Elm Street?*, The Exchange, Chicago Area Real Estate Exchangers, Volume 2, No. 3 (June-July, 1994). The reduction in property value caused by stigma, and the causes of action that have been recognized or asserted in attempts to recover for such loss of value, are analyzed in Vale and Cline, *Stigma and Property Contamination--Damnum Absque Injuria*, 33 ABA Tort & Insurance Law Journal 835 (1998).

[342] *Culley v. Bank of America, N.A.*, ___ F.Supp.3d ___, 2019 WL 1430124 (D.Mass. 2019) (permanent citation not yet available) (no septic system permit and no certificate of occupancy).

[343] *Northern California Community Development Corp. v. First American Title Ins. Co.*, 2019 WL 1397040 (Cal.App. 3 Dist.) (unpublished) (citing and discussing *Hocking* in finding that the property was essentially worthless, though its title was fine).

Encroachments have been held to render title unmarketable.[344] *Kayfirst Corp. v. Washington Terminal Co.*[345] held that an encroachment was an encumbrance, and was so substantial that it rendered title unmarketable. Similarly, in *Rackouski v. Dobson*,[346] a barn encroached onto the neighboring property. The court held:

> We find that the encroachment in this case renders the appellants' title unmarketable in that such an encroachment brings a likelihood of litigation, and "... persons of reasonable prudence and intelligence, guided by competent legal advice, would [not] be willing to take and pay the fair value of the land ... ."[347]

However, not every encroachment makes title unmarketable.[348] In *Denny's v. Security Union Title Ins. Co.*,[349] the appeals court said the insured could conduct a trial on its claim that a parking lot encroachment made title unmarketable, but it gave this admonition:

> We observe, however, that although resale value is almost always detrimentally affected by unmarketability, it does not necessarily follow that when the resale value of property drops because of the physical condition of the land, the land is unmarketable. In other words, a distinction exists between marketability and merchantability. [citing *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*, 283 Cal.Rptr. 231 (App. 1991) and *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951)] Under some circumstances, encroachments onto adjoining land may affect the marketability of title. *Brown v. Herman*, 75 Wash.2d 816, 823-24, 454 P.2d 212 (1969) (finding sidewalks encroaching 5 feet onto public way were not encroachments that would render title unmarketable because of long-standing permission to allow the encroachment and unlikelihood of future removal).[350]

The existence of hazardous materials on the property is also a physical condition that does not affect the title to the property, and therefore does not invoke policy coverage.[351] The cases

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[344] *Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC*, 573 F.Supp.2d 1152 (E.D.Ark. 2008) (building encroaching into public street above surface and without right made title unmarketable).

[345] 813 F.Supp. 67 (D.D.C. 1993).

[346] 634 N.E.2d 1229 (Ill.App. 3 Dist. 1994).

[347] Id. at 1232 (citations omitted).

[348] See *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006), holding that a structure on the insured parcel must encroach substantially onto adjoining property in order to render title unmarketable.

[349] 859 P.2d 619 (Wash.App.Div. 1 1993).

[350] 859 P.2d at 629.

[351] *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*, 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist.

concerning coverage for hazardous waste rely on the *Hocking* rationale recited above. In one such case, *Lick Mill Creek Apts. v. Chicago Title Ins. Co.*,[352] the court held that an insured does not bootstrap into unmarketability coverage for hazardous waste by obtaining extended coverage (removal of the survey and possession exceptions). The insured's theory was that the coverage of certain off-record risks also extends the marketability coverage to encompass physical defects. The court rejected the argument:

> The definition of this term is not dependent upon the type of title insurance policy in which it appears. ... Because marketability of title and the market value of the land itself are separate and distinct, plaintiffs cannot claim coverage for the property's physical condition under this clause of the insurance policies.[353]

In *Chicago Title Ins. Co. v. Kumar*, the court held:

> ...the defendant confuses economic lack of marketability, which relates to physical conditions affecting the use of the property, with title marketability, which relates to defects affecting legally recognized rights and incidents of ownership ... . The presence of hazardous material may affect the market value of the defendant's land, but, on the present record, it does not affect the title to the land.[354]

However, a jury found title to be "defective" when there was a recorded notice advising that oil had leaked into the groundwater, and the appeals court affirmed the verdict.[355] The environmental cases are further discussed in the context of the environmental lien exclusion, at §11.1.4.

A decline in the property's market value does not indicate that its title is unmarketable, without more. The title insurance policy does not insure that the land is worth the policy amount or

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1991); *Chicago Title Ins. Co. v. Kumar*, 506 N.E.2d 154 (Mass.App. 1987); *South Shore Bank v. Stewart Title Guar. Co.*, 688 F.Supp. 883 (D.Mass. 1988). In *Pavilion Park, LLC v. First American Title Ins. Co.*, 2011 WL 43222 (W.D. Ky.) (unpublished), the court ruled that a recorded covenant making owners of the property responsible for any future cleanup of a remediated waste disposal site was a physical condition that did not affect title, citing *Somerset Savings Bank v. Chicago Title Ins. Co.,* 420 Mass. 422, 649 N.E.2d 1123 (1995).

[352] 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991).

[353] 283 Cal.Rptr. at 236.

[354] *Chicago Title Ins. Co. v. Kumar*, 24 Mass.App.Ct. 53, 506 N.E.2d 154 (Mass.App. 1987).

[355] *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC,* ___ Ga.App. ___, 835 S.E.2d 21 (Ga.App. 2019). The title agent testified at trial that the notice of contamination "should have been included in the coverage exceptions, but was erroneously omitted." The court found an ambiguity in the policy because the terms "defect" and "encumbrance" were not defined. The court refused to follow the numerous prior decisions holding that environmental contamination is a physical condition that does not affect title, finding this case distinguishable because of the recorded notice that was not excepted. It also observed that, in those decisions, the insured sought coverage based on the marketability coverage, whereas in this case the court had determined that the notice was a defect in title and an encumbrance.

purchase price. For example, *Denny's v. Security Union Title Ins. Co.*[356] involved a parking lot encroachment. The court allowed the insured to pursue a claim based on marketability of title, but said:

> We observe, however, that although resale value is almost always detrimentally affected by unmarketability, it does not necessarily follow that when the resale value of property drops because of the physical condition of the land, the land is unmarketable. In other words, a distinction exists between marketability and merchantability.[357]

Similarly, when a purchaser of timber rights was prevented by local law from cutting timber, but there was no defect in the title to its timber rights, the court rejected the insured's argument that economic loss equaled unmarketable title:

> Such an argument presumes that the inability to cut and remove timber, rendering it valueless to Haw River Timber, is the equivalent of unmarketable title. This conceptual merger of marketable title with marketable property does not, however, have support in the law.
>
> Title refers to the legal ownership of a property interest so that one having title to a property interest can withstand the assertion of others claiming a right to that ownership. But title to property does not characterize the property itself as valuable, merchantable, or even usable. ... Thus, while title to property may be unassailable, the property itself may have no value and may even constitute a burden to its owner. For these reasons, an insurance policy insuring legal title covers only the right of the owner to assert ownership against others claiming ownership or an interest in that ownership. And marketable title is one which is "'free from reasonable doubt in law or fact as to its validity.'"[358]

Similarly, a zoning ordinance was found not to render title unmarketable, and the court found that the insured was confusing marketability of title and salability of the property. [359] See §3.4.9.5 for a complete discussion of the cases in which the insured has argued that a decline in the property's market value was a compensable loss under the policy.

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[356] 859 P.2d 619 (Wash.App.Div. 1 1993).

[357] 859 P.2d at 629 (citing *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*, 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991) and *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (Cal. 1951)).

[358] *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. (N.C.) 1998).

[359] *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999) ("... the [zoning ordinance] does not constitute a lien upon the subject property. Nor does it constitute a defect that would cloud the title to the property. Plaintiff has confused marketability of title with marketability of land.").

However, a California court held that, when the physical condition of the property and its title are both at issue, the confluence of the two does not negate policy coverage. In *Mellinger v. Ticor Title Ins. Co.*,[360] Treat Boulevard was built on a portion of the insured land. The municipality, perhaps aware that it lacked a legal right on the property, demanded that the insured deed over the road in order to get a zoning variance. The insurer responded to the insured's claim by asserting that the municipality had no legal right in the property. The appeals court overturned a summary judgment in the insurer's favor based on *Lick Mill* and *Hocking*. The higher court said:

> The instant case is distinguishable from *Lick Mill*, in which there was no allegation of a possible third-party claim to an interest in the plaintiffs' property. Instead, the plaintiffs discovered hazardous substances on their property and incurred costs to remove them. They then sought indemnity from their title insurer for the cleanup costs. ... The Court of Appeals noted the plaintiffs had pled facts relating to marketability of the land rather than marketability of title. ... The hazardous substances merely affected the physical condition of the property and not title; therefore, there was no coverage under the insuring clause for unmarketability of title.

In *Mellinger*, the insurer argued that the roadway was merely a physical intrusion because the city had no valid claim of an interest in the property. The court rejected this seeming extension of *Lick Mill*:

> [T]he fact the City of Concord apparently did not have title to any part of plaintiffs' property does not resolve the question of marketability. ... TICOR argues and the trial court found the Treat Boulevard encroachment merely affected market value, not marketability of title. It is undisputed that there is no coverage for physical conditions of property that merely affect land value. ... The Treat Boulevard encroachment represented both a physical condition and possible interest in plaintiffs' property. To the extent it was a road that crossed a portion of plaintiffs' property, it might have affected the market value of the property. But it also had the potential to affect plaintiffs' ownership or title to a portion of the property.

The *Mellinger* decision seems to be internally inconsistent. In the above quote, the court first conceded that the City of Concord had no right in the property, and in effect trespassed by placing Treat Boulevard on the insured property. The city tacitly admitted as much by asking the insured to deed the right-of-way. This would support the insurer's conclusion that the only issue was the physical condition of the concrete within the boundary, not a claim of ownership. However, the court concluded that there was the possibility of coverage, by asserting that the city had a "possible interest" in the property, with the potential to "affect plaintiffs' ownership or title." *Mellinger* did not rule that there was coverage, but merely rejected a summary judgment that there was no coverage.

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[360] 93 Cal.App.4th 691, 113 Cal.Rptr.2d 357 (Cal.App. 1 Dist. 2001).

The court was concerned that the city could be found to have a right based on continued use of the road rather than a written grant.[361] The decision can be reconciled with existing law by interpreting it to mean that coverage may not be decided until there is a determination on whether or not there is an adverse claim of title to the insured property.[362] If the city was a trespasser, there would presumably be no coverage. Claims concerning trespassers are addressed at §12.2.2.

9.8.4 Effect Of Recorded Instruments On Marketability

This section discusses the claimed effect on the marketability of title caused by its location within a certain district, zone or classification; problems with its legal description; instruments that are recorded but that do not affect title; and instruments or issues that are linked in a general way to ownership, but that do not rise to the level of encumbrances, liens or defects in title.

Most districts, zones or classifications that may be imposed against a parcel do not affect its title, or render the title unmarketable. Thus, the mere fact that property was located in a special taxing zone did not make title unmarketable, when no tax lien existed on date of policy.[363] However, when such a district had assessed the property for a tax, the assessment created doubt as to the title, even though the assessment was not confirmed until after date of policy.[364] On the other hand, an exception that incorrectly stated that the property was in an irrigation district did not make title unmarketable.[365] A notice advising that a building had been placed on a registry of historic structures did not encumber its title or render it unmarketable.[366] A restriction on property's use caused by its inclusion in a specially-regulated district or zone does not render its title unmarketable.[367] Similarly,

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[361] "We are not inclined to find as matter of law that the Treat Boulevard encroachment was insignificant, or that the City of Concord would have had no right to assert continued use, if not ownership, of a portion of plaintiffs' property ..." [reciting authority]. ... TICOR has not shown, factually or legally, that a claim by the City of Concord to an interest in plaintiffs' property would have had no merit. Of course there are certain exceptions and exclusions in the policy that may apply unless the Treat Boulevard encroachment was reflected in the public records. [footnote omitted] Plaintiffs had an expert witness who opined the encroachment was reflected in the public records. TICOR stated it had an expert who would testify to the contrary. A jury will need to resolve the question."

[362] The court said "*Native Sun* …might be instructive once the underlying factual issues are resolved in this case… ."*Native Sun* was argued by the insurer as authority that the city's rights, if any, were excepted by the parties in possession and survey exceptions. See the discussion of *Mellinger* as to those exceptions at §12.3.17.1.

[363] *Edwards v. St. Paul Title Ins. Co.*, 39 Colo.App. 235, 563 P.2d 979 (1977). Policy coverage concerning real estate taxes is fully discussed at §9.4.

[364] *Bel-Air Motel Corp. v. Title Ins. Corp. of Pennsylvania*, 183 N.J.Super. 551, 444 A.2d 1119 (1981).

[365] In *Coleman v. Security Title Ins. Co.*, 218 Cal.App.2d 444, 32 Cal.Rptr. 575 (Cal.App. 4 Dist. 1963), the property would have had more value if it had been in an irrigation district. The court noted that the policy made no such promise of water rights. Schedule B excepted "…water rights, claims or title to water."

[366] In *McGonagle v. Stewart Title Guar. Co*., 432 S.W.3d 535 (Tex.App.-Dallas 2014), the court found that a recorded instrument instructing the owner that a house on the property was historic and would have to be moved rather than torn down was not an encumbrance on title. Thus, the removal of an exception for restrictive covenants of record did not create coverage for the effect of that instrument. However, the policy apparently did not contain Covered Risk 5, and the court did not discuss the exception to Exclusion 1 as found in the 1992 ALTA policy.

the appointment of a building administrator to collect rent and cure building code violations was not a defect in or lien or encumbrance on title, although a lis pendens had been recorded for the action to appoint the administrator. The court noted that such an administrator or receiver might affect the salability of the property, but did not encumber its title.[368] Nonetheless, a later decision found the appointment of such an administrator to be "squarely within" the coverage of a loan policy, apparently because of some underwriting decisions made in issuing that policy.[369]

The fact that land is located in a flood plain zone is not a defect in title and does not render title unmarketable.[370] In rejecting the argument that a flood plain designation rendered title unmarketable, a Georgia court also distinguished between economic value and marketability of title: "[a]lthough location of part of the property in a flood plain may affect its market value, it does not affect the marketability of title to the property."[371] In *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*,[372] some of the property was within a flood plain buffer zone next to a river in which timber harvesting was prohibited, negating the insured's ability to exercise its timber rights on the land. The court acknowledged the economic effect on the insured, but found that the ordinance did not impair title:

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[367] *Dave Robbins Construction, LLC v. First American Title Ins. Co.*, 158 Wash.App. 895, 249 P.3d 625 (Wash.App. Div. 1 2010) (historical district designation did not make title unmarketable; Washington heritage register records were not "public records" as defined in policy).

[368] In *Zev Cohen, LLC v. Fidelity Nat'l Title Ins. Co.*, 15 Misc.3d 798, 831 N.Y.S.2d 689 (N.Y.Sup. 2007), the court said that "[t]he appointment of a 7-A Administrator deals with a statutory managing agent, charged with the duty to collect rents and improve the property. It is not a judicial lien charging the land with a debt. The appointment of a 7-A Administrator is not a 'defect in or lien or encumbrance on the title.' While the appointment of a 7-A Administrator does create a special lien, it is a lien that is not required to be listed in a title report." 831 N.Y.S.2d at 694.

[369] In *Federal Deposit Ins. Corp. v. Commonwealth Land Title Ins. Co*., 902 F.Supp.2d 1048 (N.D. Ohio 2012), the court distinguished *Zev Cohen* because that policy had contained a parties in possession exception, and the court had found the administrator was a party in possession. The loan policy in the *FDIC* case did not contain a possession exception. Also, *Zev Cohen* involved an owner's policy, which the court found to be different for reasons not articulated. Further, the *Zev Cohen* policy contained no exception for the administrator, while the *FDIC* title commitment issued on this property "identifies two valid lis pendens that relate directly to the appointment of the 7–A administrator, both of which were in effect at the time the policy was issued." The court said those exceptions somehow led to more coverage rather than less. The case was decided by a judge in Ohio seeking to interpret New York law, involving a loan held by the FDIC, which might explain why the decision is so difficult to reconcile with *Zev Cohen*.

[370] *Cowart v. Northwest Title Agency of Ohio and Michigan, Inc*., 2008-Ohio-9, 2008 WL 53292 (Ohio App. 6 Dist.) (unpublished) (property's designation as being within flood plain not covered by policy); *Chicago Title Ins. Co. v. Investguard Ltd.*, 449 S.E.2d 681, 683 (Ga.App. 1994) ("Although location of part of the property in a flood plain may affect its market value, it does not affect the marketability of title to the property"); *Hanson Business Park, L.P. v. Fidelity Nat'l Title Ins. Co.*, 209 S.W.3d 867 (Tex.App.-Dallas 2006) (property's designation as being in flood plain was physical condition, not defect in title, and therefore not covered by policy); *Layman v. Friedlander*, 2003 WL 1958692 (Va.Cir.Ct.) (unpublished) (alleged failure to make exception for flood plain designation in commitment not actionable; title not unmarketable); *Owings v. Abdelhak*, 2003 WL 22438320 (Tex.App.-San Antonio 2003) (unpublished) (insurer had no duty to advise purchasers that property was located in flood plain).

[371] *Chicago Title Ins. Co. v. Investguard Ltd.*, 449 S.E.2d 681, 683 (Ga.App. 1994).

[372] 152 F.3d 275 (4th Cir. (N.C.) 1998).

> While it is true that the ... ordinances have effectively frustrated [timbering], thereby substantially reducing the economic value of the interest purchased, Haw River Timber raises no issue about whether it received legal title to the timber from the grantors. And the Lawyers Title policy insuring marketable title under the timber deed only guarantees Haw River Timber a title that could be enforced in a suit for specific performance, not the economic value of the timber purchased. Indeed, the explicit definition of marketable title provided in the policy limits any more expansive notion by insuring against only those title defects that would entitle a purchaser "to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." The ordinances on which Haw River relies as a title defect do not impair the grantor's ability to convey a timber deed.[373]

The *Haw River* court held that the distinction between unmarketability of title and restrictions on its use is reinforced by the governmental use regulation exclusion.[374] In reaching that conclusion, the court relied on and quoted from *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*,[375] which held that an ordinance prohibiting a curb cut onto the adjacent street did not render title unmarketable because it did not render the deed "void or voidable."

The designation of property as wetlands also does not affect its title or the marketability of title. In *Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc.*,[376] the Army Corps of Engineers had issued a fill permit because it considered the property to be wetlands. The permit was not recorded and the insured purchaser was not aware of it at time of purchase. The wetlands designation was found not to affect the marketability of title, even though it affected "the market value of the property."[377] The *Bear Fritz* court also found that the wetlands designation and permit were not an encumbrance on title.[378]

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[373] Id. at 4 (quoting from the policy definition of marketability).

[374] *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*, 152 F.3d 275 (4th Cir. (N.C.) 1998).

[375] 23 N.C. App. 377, 209 S.E.2d 423, 429 (1974).

[376] 920 P.2d 759 (Ala. 1996).

[377] Id. at 761.

[378] Id. at 762. The court cited *Domer v. Sleeper*, 533 P.2d 9 (Ala. 1975) and *Hebb v. Severson*, 32 Wash.2d 159, 201 P.2d 156 (1948) for the following definition of "encumbrance": "any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistent with the passing of the fee; and, also, a burden upon the land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee." Under that definition, the court held, "the wetlands designation here is not an encumbrance: it does not give any third person a right to or interest in the property, nor does it burden the property with a lien, interest or servitude." Id. The court also cited *Frimberger v. Anzellotti*, 25 Conn.App. 401, 594 A.2d 1029 (Conn.App. 1991), a Connecticut decision which held that a wetlands designation does not affect marketability of title or create an encumbrance. Compare the New York decision of *In re Rodolitz*, 232 B.R. 573 (E.D.N.Y. 1999), in which a bulkhead projected seven feet beyond the bulkhead line set by the

A deficiency in a parcel's legal description may render its title unmarketable, but only if that defect is profound. A legal description that is so bad that the property cannot be located with certainty can render the title unmarketable.[379]

Many classes of recorded instruments do not affect title or render title unmarketable.[380] Most encumbrances do not render title unmarketable; nor is title typically rendered unmarketable due to a violation of an encumbrance. For example, the violation of a restrictive covenant setting the maximum height of the residence was found not to render title unmarketable.[381] However, under certain circumstances, use restrictions can make title unmarketable, despite the fact that such restrictions exist to benefit and protect the value of property.[382] Also, one court found that an oil pipeline easement rendered title to the burdened parcel unmarketable, although the encumbrance more accurately had an effect on market value rather than the marketability of the title.[383] See §9.12 for a complete discussion of the classes of instruments that are recorded but that do not affect title.

A pending dispute about the real estate or its title may render title unmarketable, if the controversy casts legitimate doubt on the property's ownership or would make a reasonable person believe that a purchaser would be likely to become embroiled in litigation over the title. The assertion of a meritless claim of title does not render title unmarketable.[384] A recorded notice of default of a first deed of trust did not create a lien or encumbrance on the insured third deed of trust's title, and did not make the title unmarketable.[385] Also, following an Exclusion 3(a) rationale, an

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Army Corps of Engineers in the Dutch Kills basin adjoining the East River. The court found that the encroachment rendered title to the property unmarketable. It rejected the seller's argument that the encroachment "did not affect marketability because violations of laws do not affect marketability of title; [and] no violation of record was shown... ." The court noted that a New York commentator opined that title which was unmarketable because of an encroachment onto government property was not "rendered marketable" merely because the government had not demanded the removal of the encroachment.

[379] *Hedgecock v. Stewart Title Guar. Co.*, 676 P.2d 1208 (Colo.App. 1983); *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012).

[380] *Veeder v. Old Republic Nat'l Title Ins. Co*., 88 Mass.App.Ct. 1104, 36 N.E.3d 79 (Table), 2015 WL 5102856 (Mass.App. 2015) (unpublished) (recorded conservation commission order of conditions "places a restriction on the use of the land," but "does not create a restriction on the title to the property," and thus is not an encumbrance on title and does not render title unmarketable).

[381] *Camp v. Commonwealth Land Title Ins. Co.*, 787 F.2d 1258 (8th Cir. 1986). The court stated that the fact that the house was built below the flood plain elevation "undoubtedly affects the value of the land, and interferes with its salability, it is not as a result of any doubt as to who holds title to the property." 787 F.2d at 1261.

[382] *Tamiami Abstract & Title Co. v. Malanka*, 185 So.2d 493 (Fla.App. 1966).

[383] *Bozeman v. Commonwealth Land Title Ins. Co.*, 470 So.2d 465 (La.App. 1985). The insurer was aware of the easement when the policy was issued, but insured the title on the assumption that it would be released or extinguished. See further discussion of this case and the effect of "insuring over" defects in §9.8.2 below.

[384] *Native Sun Investment Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (Cal.App. 4 Dist. 1987). The insurer accepted a tender of the defense, however.

[385] *Glavinich v. Commonwealth Land Title Ins. Co.*, 163 Cal.App.3d 263, 209 Cal.Rptr. 266 (Cal.App. 4 Dist. 1984).

insured was found to have no claim for a lender's refusal to lend when the defect was the foreclosure of a mortgage made by the insured.[386] The fact that a seller is a debtor-in-possession under a Chapter 11 bankruptcy does not, by itself, make the title to its property unmarketable.[387]

There are also many instruments and other issues that are linked in a general way to the ownership of property, but that do not rise to the level of encumbrances, liens or defects in title, or render title unmarketable. Although one court found that the lack of a right of access rendered the title to the parcel unmarketable, the great bulk of decisions on the issue have ruled to the contrary.[388] The use of an assumed name by the owner-mortgagor did not render title unmarketable.[389] The failure to obtain all permits for a subdivision of land likewise does not render title to the lots unmarketable.[390] A "Notice of Disqualification for Future Federal Disaster Assistance" recorded in the "public records" did not make title unmarketable, and therefore the lack of an exception for such a notice in a policy did not make the title insurer liable to the insured.[391]

9.8.5 Marketability Claims Affecting Condominiums

When a project or development is a condominium, cooperative or has a similar private governance structure or a sophisticated web of restrictions and easements, a party may claim that poor drafting of the governing documents renders title to a unit or parcel unmarketable. There may be numerous aspects of a condominium regime or other private governance structure that make the project undesirable. However, such issues only very rarely render title unmarketable.[392] In *United*

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[386] *Buffington v. Atlanta Title & Trust Co.*, 43 Ga.App. 444, 159 S.E. 297 (Ga.App. 1931).

[387] *Booth v. Attorneys' Title Guar. Fund, Inc*., 2001 UT 13, 20 P.3d 319 (Utah 2001).

[388] See the complete discussion of the issue at §9.7.1.

[389] *Scott v. Pennsylvania Title Ins. Co.*, 48 Berks 239, 10 Pa. D. & C.2d 129, 1957 WL 6485 (Pa.Com.Pl. 1956).

[390] *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d 596 (Cal.App. 6 Dist. 2011) (notice of merger of seven parcels into one recorded by city was pursuant to land division regulation powers and did not render title unmarketable even though a buyer rejected the contract due to the notice); *Security Service Federal Credit Union v. First American Title Ins. Co*., 585 Fed.Appx. 591, 2014 WL 5438805 (9th Cir. (Cal.) 2014) (unpublished) (lots sold without "final public report" approving subdivision did not have unmarketable title, although they might be less valuable as a result). In *Whaley v. First American Title Co. of the Mid-West*, 2004 WL 316978 (Tenn.App. 2004) (unpublished), the court said "[t]he lower court found that the improper subdivision does not constitute a defect in title or an unmarketable title, because those concepts concern issues of legal ownership, while an improper subdivision pertains to the value of property. We agree."

[391] *Lemon-Pittman v. Commonwealth Land Title Ins. Co.*, 2014 WL 3498323 (E.D.La. 2014) (unpublished).

[392] See, for example, *Greenberg v. Stewart Title Guar. Co.*, 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992), in which the condominium declaration contained numerous provisions that were found not to render title unmarketable or to trigger the marketability coverage of the policy. In *Lennen v. Marriott Ownership Resorts, Inc*., ___ F.Supp.3d ___, 2019 WL 1440092 (M.D.Fla. 2019) (permanent citation not yet available), appeal filed August 21, 2019, the insureds bought interests in timeshare condominiums. They alleged that there were numerous deficiencies in the complicated and multi-leveled ownership regime. The court disposed of a number of their complaints on a motion to dismiss, but said that other claimed deficiencies would require further analysis.

States v. Marlatt,[393] the insurer removed liens from a condominium that failed principally due to mismanagement. The insured unit owners sued under the policy marketability provision, on the theory that title must still be defective because their units still would not sell. The court rejected the argument, saying:

> The purchasers were not happy. The resort had closed, and for this and perhaps other reasons their condos were worthless, however spic and span the titles to them. ... We do not know the cause of the loss of which the purchasers complained. It may have been a collapse of the local recreational real estate market, business mistakes by the defendant, some unrelated fraud by the defendant, or a completely extraneous event. All we know for sure is that the loss in value was not caused by the defective titles. For after the defects were removed, the loss remained. The fact that the purchasers would not have purchased the time shares had it not been for the title insurance policies issued by Ticor would not make Ticor an insurer against a drop in the real estate market.[394]

In *Humphries v. West End Terrace, Inc.*,[395] title to condominium units was found to be marketable, despite the fact that the units had little market value due in part to the fact that the property was sold subject to a large blanket mortgage. The mortgage, however, had been excepted on Schedule B of the policies and insured over, meaning that title was marketable as shown in the policies.

Allison v. Ticor Title Ins. Co.[396] also involved a condominium regime. The court found that the insurer was not responsible for depreciation in value unrelated to a defect in title. In that case, ski lodge time-share unit owners had entered into a rental pooling agreement and management contract. The manager-developer filed bankruptcy and the trustee threatened to have the unit owners declared to be "merely either equity investors in the [ski lodge] and/or mortgage holders on said equity investment," on the theory that the unit owners' interests were not leases but investment contracts sold as unregistered securities. The trustee's theory was found to be unsound because the sale of an unregistered investment contract gives the buyer a right of rescission, but does not void the buyer's title.[397] Thus, the allegations did not make title unmarketable.[398]

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[393] 24 F.3d 1005 (7th Cir. 1994).

[394] Id. at 1007.

[395] 795 S.W.2d 128 (Tenn.App. 1990).

[396] 907 F.2d 645 (7th Cir. 1990); later decision 979 F.2d 1187 (7th Cir. 1992).

[397] In this respect, the *Allison* case is very similar to *Nishiyama v. Safeco Title Ins. Co.*, 85 Cal.App.3d Supp. 1, 149 Cal.Rptr. 355 (A.D.Sup.Ct. 1978). In *Nishiyama*, a purchaser of a lot claimed that the subdivision plat had not been filed. This made the conveyance to the insured voidable at the purchaser's option, just as with an unregistered security. The *Nishiyama* court held, as in *Allison*, that the insured's right to void the transaction did not render the insured's title unmarketable.

[398] The Seventh Circuit confirmed that a leasehold interest may also be an investment contract under securities laws, but that fact "does not make the leasehold any less an interest in real property." The sale of unregistered securities merely

Similarly, in *First United, Inc. v. Chicago Title Ins. Co.*,[399] a judgment was obtained by time share interval owners to compensate them for the loss of the right to use certain amenities when a mixed-use development failed and was split up. The judgment would be imposed against the insured lender when it took title to one of the properties through foreclosure. The judgment was found not to be a defect in title compensable under the loan policy, because it was an incident of ownership.[400]

However, defects in the regime documents can render title unmarketable when they create a dispute about the vesting of title.[401] Thus, when the declaration labeled certain land as common elements, but an amendment to the declaration later relabeled the area as expansion land and yet another amendment created units in that area and sold, the dispute between the association and the unit buyers over ownership of the building was found to render title unmarketable, and to invoke policy coverage.[402]

9.8.6 Making Title Marketable By Removing Defect or Encumbrance

The insurer usually has several possible means of solving a claim, including the right to clear title. See Chapter 3 for an explanation of the insurer's options in resolving a covered claim. The curing of title is one such option. See §3.4 regarding the insurer's right to clear title. The insurer will sometimes be willing to issue a policy to a purchaser or lender while it is in the process of seeking to clear title, as discussed at §3.4.4.

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results in a right in the purchaser to void the sale, but does not void the title interest the purchaser obtains. *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. (Wis.) 1990).

[399] 366 Ark. 508, 237 S.W.3d 15 (Ark. 2006).

[400] The court quoted from and analogized to *Hocking* and *Kumar*, saying: "Similarly, the appellant here appears to possess fee simple title to the land, whatever it might be worth, and we agree that it is possible to hold perfect title to land that is valueless. The appellant has failed to appreciate the distinction between land that is unmarketable and title that is unmarketable, and its arguments emphasize factors that relate to the lack of economic value of the land itself, rather than to a title that is unmarketable. The appellant is free to possess and control the land, or to sell it to whatever purchaser desires to buy it. Accordingly, we hold that the judgment in this case does not make title to the land unmarketable. Because we conclude that the judgment is not covered by the policy, which insures against defects in title and unmarketability of title, as opposed to the unmarketability of the property itself, we need not address the additional questions raised by the appellant of whether specific exclusions within the policy apply to the judgment."

[401] In *Commonwealth Land Title Ins. Co. v. IDC Properties, Inc.*, 547 F.3d 15 (1st Cir. (R.I.) 2008), aff'g 524 F.Supp.2d 155 (D.R.I. 2007), an amendment to a condominium declaration adding expansion lands to the project was unenforceable because the statutory time period for expansion had expired. This rendered the declarations of units in the expansion areas void. Nonetheless, the risk was not assumed by the insurer, because the insured failed to disclose material facts about the expansion issue to the insurer. However, in *IDC Properties, Inc. v. Chicago Title Ins. Co*., 974 F.Supp.2d 87 (D.R.I. 2013), involving the same condominium, the court found that a different policy provided protection against the same invalid amendments.

[402] *C.R.C. Unit Owners Ass'n, Inc. v. Schaeffer*, 1993 WL 313579, 1993 Ohio App. LEXIS 4000 (Ohio App. 6 Dist.) (unpublished), jurisdictional motion overruled by 68 Ohio St.3d 1430, 624 N.E.2d 1067 (Table).

9.9 2006 ALTA Policy Covered Risks

The American Land Title Association adopted new policy forms on June 17, 2006.[403] The 1992 ALTA policy forms were decertified on June 17, 2007. This section discusses several coverages found in the 2006 policy forms that were not contained in earlier ALTA policies.

9.9.1 Survey Matters Coverage

Covered Risk 2(c) of the 2006 ALTA policies provides indemnity as to matters that would be shown on an accurate survey, a subject otherwise found in the policy only as a standard Schedule B exception to coverage. Covered Risk 2(c) indemnifies against "[a]ny defect in or lien or encumbrance on the Title" caused by an:

> encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

This language is lifted from the ALTA Short Form Residential Loan Policy. As ALTA's own commentary states, the insured now has "survey" coverage for the first time, "absent a survey exception in Schedule B." The drafters clearly contemplated that the survey coverage of the policy may be removed by an exception or endorsement.[404] When the policy contains a survey exception as well as Covered Risk 2(c), the Covered Risk limits the scope of the survey exception.[405]

The survey coverage uses certain words not defined in the policy: "encroachment," "encumbrance," "violation," "variation," and "adverse circumstance." Other than "encroachment," these words are rarely, if ever, made a part of the typical survey exception. The official ALTA comments do not discuss the issue. The word "encumbrance" could be read to expand the standard coverage against encumbrances to include matters which encumber title, but which would only be discoverable with a survey. There is no direct explanation as to what type of "violation" might be

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[403] The policy forms were described in some depth in Clifford L. Morgan, *ALTA Adopts New Policies*, <u>Title News</u>, September/October 2006. Mr. Morgan then served as chair of the ALTA Forms Committee. See also J. Bushnell Nielsen, *2006 Policy Forms Analyzed*, <u>The Title Insurance Law Newsletter</u>, September, 2006, p. 3; and Richard F. Bales, *The ALTA 2006 Title Insurance Policies and the Issuance of Survey Coverage*, <u>The Title Insurance Law Newsletter</u>, November 2006, p. 5.

[404] Comments on proposed underwriting standards are found in Richard F. Bales, *The ALTA 2006 Title Insurance Policies and the Issuance of Survey Coverage*, <u>The Title Insurance Law Newsletter</u>, November 2006, p. 5, now published by American Land Title Association.

[405] In *Developer Finance Corp. v. Chicago Title Ins. Co.*, 2012 WL 777460 (D.N.H.), 2012 DNH 050 (unpublished), because the Covered Risk protected against "adverse circumstances" that would be disclosed by an accurate survey, but the survey exception excluded matters that would be shown on an accurate survey "*and* which are not shown by the public records," the insured established coverage, and that the exception did not apply, by showing that an accurate survey would disclose the circumstance (an ancient road depicted as running through the insured parcel on a very old map) and that it was referenced in a recorded instrument (the map).

covered. It may refer to the violation of a setback line revealed by the survey which locates the improvements. The word "variation" could be construed as a reference to those situations in which the recorded distance or area is at variance with that measured in the field. Such claims are not covered under the 1992 and earlier ALTA policy forms.[406] The phrase "adverse circumstance" is not common to title and conveyancing law. A survey may reveal "adverse circumstances" that do not affect title, such as a flood plain line or the existence of a toxic waste dump on the property. Neither circumstance is protected against by the policy. See §§9.6 and 9.8.3.

However, the terms used in the Covered Risk do not create coverage for a matter that does not affect title. Covered Risk 2 begins with the statement that it indemnifies the insured against a "defect in the Title." The phrase "affecting the Title" is repeated within the coverage. This makes it clear that the Covered Risk is limited to title matters, and not issues of area, physical condition or salability.[407] In *New South Federal Savings Bank v. Commonwealth Land Title Ins. Co.*,[408] the insured lender took a mortgage on a vacant parcel rather than the borrower's residence. The court found that the insured did not bootstrap into coverage through the survey risk because, while the error would have been disclosed by a survey, it did not affect title:

> A survey likely would have revealed the errors in both the mortgage and the insurance. In fact, it was a survey that ultimately revealed the error. However, the applicable affirmative assurance provides that the policy provides coverage losses/damages stemming from "any violation, variation, encroachment, or adverse circumstances *affecting the title*" that would have been disclosed through a survey. (Emphasis added.) While the course of events in this case is not fully explained in the record, the problems associated with the varying property descriptions do not affect the "title" of either parcel of property. Thus, per the terms of the contract, there is no coverage for the inability to foreclose on the Willis Flat Road property.[409]

A second facet of Covered Risk 2(c) has to do with the type of survey referenced by the coverage. The scope of the coverage is determined by reference to those matters that would be shown by a survey. The same principle is true of the survey exception. The Covered Risk refers to matters that would be disclosed by an "accurate and complete land survey." The phrase "land

[406] See §12.3.7 regarding shortages in area and §12.3.8 regarding shortages in distance.

[407] In *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195 (10th Cir. (Utah) 2016), the court rejected the argument that Covered Risk 2 evidenced the intent to expand policy coverage to include matters that do not affect title. It held that Covered Risk 2 did not provide an affirmative assurance against the existence of a taxing district, which was not a lien on the title. In *Developer Finance Corp. v. Chicago Title Ins. Co.*, 2012 WL 777460 (D.N.H.), 2012 DNH 050 (unpublished), the court found that the possible existence of an ancient road running through the insured parcel might not be an encumbrance on title, but was an "adverse circumstance" that affected the property. It did not provide the further analysis that this "adverse circumstance" affected the title to the property, although that might be a fair assessment of the issue.

[408] 940 So.2d 739 (La.App. 3 Cir. 2006).

[409] 940 So.2d at 744.

survey" may be intended to codify the holding of *State Farm Ins. Co's v. Peda*,[410] which held that a "survey" means a full boundary survey, not a mortgage inspection report. The phrase "accurate and complete" may also be intended as a clarification, because it is not uncommon for a survey to be accurate and yet not complete. If this phrase were inserted in a survey exception, it would take away coverage. However, because this phrase appears in a Covered Risk, its effect is likely to broaden coverage rather than to narrow it. When the policy contains a survey exception, the policy covers only those matters that would *not* be shown on a survey. The broader the range of survey matters, the less coverage exists. In *Peda*, for example, the claimant argued that an encroachment was not shown on a survey, and therefore there was coverage. The insurer defeated the argument by showing that the encroachment *would* be shown on a more accurate survey. By moving the exception to the Covered Risks, however, the equation is reversed: the more survey matters which would be shown on an "accurate and complete" survey, the greater the scope of the coverage.

There are also certain terms commonly used in survey exceptions that are not found in Covered Risk 2. These include "overlaps" and "shortages in area." Because these terms are not recited in the Covered Risk, there may or may not be any affirmative protection against such issues.

9.9.2 Notice Of Enforcement Coverages

The 2006 ALTA policies were the first to include Covered Risks 5 through 8. In earlier ALTA policy forms, these assurances appeared as exceptions to Exclusion 1, concerning governmental regulation of the use of the property, and Exclusion 2, for rights of eminent domain. Exclusions 1 and 2 and the evolution of the policies leading to the adoption of Covered Risks 5 through 8 are discussed in §11.1. That passage also combines a discussion of the cases that have construed these covered risks with those that have construed Exclusions 1 and 2, since they are two parts of the same subject. However, a few representative decisions are listed below.

Covered Risk 5 indemnifies against loss caused by a "violation or enforcement of any law, ordinance, permit, or governmental regulation" relating to zoning, building codes, subdivision and environmental protection, if "a notice, describing any part of the Land, is recorded in the Public Records… ." The covered risk is only invoked if a notice of enforcement of a zoning, building code, subdivision or environmental protection law or regulation has been recorded, as of the date of policy, in those records that impart notice to buyers of real estate.[411]

Designation that the property is in a special district is not a notice of enforcement.[412] *Dave*

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[410] 2003-Ohio-1092, 2003 WL 943884 (Ohio App. 11 Dist.) (unpublished).

[411] See *First American Title Ins. Co. v. McGonigle*, 2013 WL 1087353 (D.Kan.) (unpublished); 2013 WL 1092893 (D.Kan.) (unpublished) (recorded agreement to repair dam, though binding on subsequent owners, was not a notice of violation of a Kansas Division of Water Resources regulation); *Stockton Mortgage, Inc. v. Tope*, 233 Cal.App.4th 437, 183 Cal.Rptr.3d 186 (Cal.App. 3 Dist. 2014), reh.den. (Jan. 13, 2015), rev.den. (March 25, 2015) (recorded notice of abatement identifying various building code violations was not a lien or encumbrance on title, and lack of exception in policy did not obligate insurer to pay to bring property up to code; recitation of notice in preliminary title report with requirement that it be released was not a promise by insurer or its agent to obtain that release at their expense).

[412] In *McGonagle v. Stewart Title Guar. Co*., 432 S.W.3d 535 (Tex.App.-Dallas 2014), the court found that a recorded instrument instructing the owner that a house on the property was historic and would have to be moved rather than torn down was not an encumbrance on title. Thus, the removal of an exception for restrictive covenants of record

Robbins Construction, LLC v. First American Title Ins. Co.[413] held that Covered Risk 5 was not invoked by the fact that the property had been placed on a historical register, in a set of heritage registry records promulgated by law. The insured received a stop-work order when he began construction, and archeological artifacts were discovered on the property, which delayed construction. The insured argued that the covered risk was invoked because "the stop-work order amounts to enforcement of governmental regulations." The court said that interpretation would unfasten the covered risk from its mooring to matters affecting the title to the property:

> …[C]overage exists for damage from regulation enforcement only "if a notice, describing any part of the Land, is recorded in the Public Records setting forth the ... intention to enforce[.]" Here, … there were no notices of violation or intent to take enforcement action recorded with the county auditor.
>
> DRC claims no such notices need be recorded with the county recorder, because the term "Public Records" as used in the policy includes all records on file with all governmental agencies, including the list of properties kept in the Washington heritage register… . We disagree. … Contrary to DRC's argument, there is nothing in RCW 27.34 declaring the purpose of the Washington heritage register is to impart constructive notice of matters relating to real property to potential purchasers… .[414]

Covered Risk 6, similarly, provides coverage for "[a]n enforcement action based on the exercise of a governmental police power" if a notice has been recorded on the policy date. Covered Risk 7 provides the identical coverage as to the exercise of the right of eminent domain. Covered Risk 8 protects against governmental takings. The 2006 policies contain exclusions for governmental regulation, police power and eminent domain. The exclusions now say that they do not modify or limit the coverages provided by the corresponding covered risks. See §11.1.5 for a discussion of the police power and eminent domain exclusions and covered risks.

9.9.3 Creditors' Rights Coverage

The 2006 ALTA policies contain an affirmative creditors' rights coverage, which is another of the former exceptions to exclusions (Exclusion 4 in the 2006 ALTA Owner's policy and Exclusion 6 in 2006 ALTA Loan policy). This assurance is found in Covered Risk 9 of the owner's policy and Covered Risk 13 of the loan policy. The coverage protects against avoidance of the insured conveyance instrument due to the overturning of a prior conveyance as a fraudulent transfer or preference.[415] It also protects against avoidance of the insured instrument as a preference, but only

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did not create coverage for the effect of that instrument. However, the policy apparently did not contain Covered Risk 5, and the court did not discuss the exception to Exclusion 1 as found in the 1992 ALTA policy.

[413] 158 Wash.App. 895, 249 P.3d 625 (Wash.App. Div. 1 2010).

[414] 158 Wash.App. at 904, 249 P.3d at 628-9.

[415] In *Concept Dorssers v. Pacific Northwest Title Ins. Co., Inc.*, 2010 WL 1141462 (W.D.Wash.) (permanent citation not yet available), the policy was found not to obligate the insurer to protect an insured holder of a deed of trust against a

if such a preference claim is based on untimely recording or the insured deed or mortgage's failure "to impart notice of its existence to a purchaser for value or to a judgment or lien creditor." The subject of creditors' rights is fully discussed at §11.8.

9.9.4 Recording Gap Coverage

The 2006 ALTA policies also contain a recording gap coverage.[416] This states that the policy protects against title interests, liens and encumbrances that are recorded in the period of time from the policy date to the date on which the insured instrument was recorded, if that deed or mortgage was recorded after the policy date.

This is truly future coverage. It essentially negates the post-policy exclusion as to any time elapsed from policy date to date of recording, which small time gap has resulted in several publicized decisions discussed at §11.5.

However, this coverage is very narrow. It is industry custom to date a policy a few minutes or hours *after* the recording of the insured instrument. When the policy is so dated, the coverage is not invoked, because there will be no such gap. The covered risk may only be triggered if the policy date is short of the date of recording for some reason, and an interest in the title is recorded or comes into being in that interval of time. In addition, the 2006 ALTA policy adds an exclusion for taxes and assessments imposed during this gap period (Exclusion 5 in the owner's policy and Exclusion 7 in the loan policy).

The recording gap that is typically discussed as being a concern to buyers of title insurance is that interval of time between the commitment's last effective date and the date on which the insured deed or mortgage is recorded. There are several means by which an insurer can protect the insured against matters appearing in that broader recording gap, as discussed in §6.7. An escrowee can assume a duty as to matters that fall within the recording gap, as discussed in §13.6.

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bankruptcy trustee's claim that prior transfers were in fraud of creditors, because the trustee also asserted that the insured deed of trust was a fraud on creditors and not for value. The court found that the trustee would be unable to attack the insured deed of trust unless it, too, was a fraud on creditors. The allegations against the insured's interest triggered Exclusion 6, and negated any duty to defend or indemnify.

[416] In *Lucas v. Kensington Abstract, LLC*, 20 Misc.3d 1135(A), 872 N.Y.S.2d 691 (Table), 2008 WL 3823776 (N.Y.Sup.), 2008 N.Y. Slip Op. 51734(U) (unpublished), the insurer was sued in negligence because its agent took two years to record the insured mortgage. The court dismissed the claim, but noted that the 2006 ALTA policy at issue contained the gap coverage, and remarked that the lender might have a claim under that coverage as to six intervening liens recorded between the closing date and the recording of the insured mortgage.

9.10 Loan Policy Coverages

FORM 32, Appendix A
Loan policy does not insure debt, repayment of debt or value of land

FORM 87, Appendix A
Mortgage invalid for lack of debt

The American Land Title Association has produced several policy forms that insure a lender that holds a security instrument that encumbers the title to real estate.[417] Section 9.14.3 discusses the special terms of the ALTA Short Form Residential Loan Policy. Section 9.14.4 discusses the special terms of the ALTA Residential Limited Coverage Junior Loan Policy. The term loan policy is a misnomer, because the policy does not insure a loan, but a lien that secures a loan. The only sense in which the loan is related to the loan policy is in the manner in which the policy permits for successor owners of the loan to become successor insureds under the policy before the lender takes title to the property, as discussed at §7.4. The Texas T-2 Mortgagee policy thus bears a more descriptive name.

Most versions of the ALTA loan policy contain four coverages in addition to those found in the owner's policy. The Covered Risk concerning construction liens is discussed in Chapter 10. The covered risks discussed in this section are the protections against the invalidity or unenforceability of the lien of the insured mortgage (Covered Risk 9 of the 2006 ALTA Loan policy; Covered Risk 5 of the 1992 ALTA Loan policy), priority over liens and encumbrances not excepted in Schedule B (Covered Risk 10 of the 2006 ALTA Loan policy; Covered Risk 6 of the 1992 ALTA Loan policy), and against the invalidity or unenforceability of any assignment of the mortgage recited in Schedule A of the policy (Covered Risk 12 of the 2006 ALTA Loan policy; Covered Risk 8 of the 1992 ALTA Loan policy). These coverages are not found in the ALTA Residential Limited Coverage Junior Loan Policy.

The enforceability coverage indemnifies the insured in the event it is unable to obtain title to the property by foreclosure or trustee's sale. The enforceability coverage is limited by Exclusion 4 of the 2006 ALTA Loan Policy, which negates the Covered Risk if the lien cannot be enforced solely because the insured is not qualified to do business in the jurisdiction. See §11.9 regarding that exclusion. Also excluded is any claim that the insured mortgage is invalid or unenforceable "based upon usury or any consumer credit protection or truth in lending law" (Exclusion 5), discussed at §11.7. The measure of loss under a loan policy is discussed at §3.2.4.

A mortgage may be found invalid or unenforceable for a number of reasons, most of which also apply to deeds vesting title. Forgery, fraud and incapacity of the mortgagor are discussed above at §9.2. See other sections in this chapter discussing liens and encumbrances on title.

In other cases, a mortgage may be invalid or unenforceable because of a defect in the insured mortgage. A mortgage may be invalid because it was not executed by the owner of the property[418] or

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[417] The lender's security instrument may be denominated by state law and custom as a mortgage, deed of trust, trust deed, deed to secure debt, security deed or other name. This book refers to all such security instruments as mortgages.

[418] *Henningsen v. Title & Trust Co.*, 151 Or. 318, 49 P.2d 458 (1935).

was not signed by both tenants by the entireties.[419] The policy has been held to protect against a claim that the mortgage is invalid as a bankruptcy preference.[420] However, when the bankruptcy court declared the mortgage debt extinguished because other property had been sold to satisfy the debt, the policy was extinguished and no loss was payable.[421]

The policy does not assure that the insured mortgage will impart notice to subsequent purchasers, or that the insured's loan will be paid off when the property is sold.[422] Thus, when the mortgage was a valid debt and duly recorded, but failed to impart constructive notice solely because the lender recited the borrower's name incorrectly on the instrument, the court found that this error was "created" by the insured and was not covered by the policy.[423]

The loan policy also does not insure the validity of the debt, or against the inability to enforce the lien of the mortgage if it is found not to secure a valid debt.[424] There is no coverage if the

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[419] *Narbeth Building & Loan Ass'n v. Bryn Mawr Trust Co.*, 126 Pa.Super. 74, 190 A.149 (1937).

[420] *First Nat'l Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 171 Misc. 854, 12 N.Y.S.2d 703 (Sup. Ct. 1939) (preference) (see further discussion of this case at §11.2.6).

[421] *McClellan Realty Corp. v. Institutional Investors Trust*, 714 F. Supp. 733 (M.D. Pa. 1988), aff'd without opinion at 879 F.2d 858 (3rd Cir. (Pa.) 1989).

[422] *GRK Holdings, Inc. v. First American Title Ins. Co.*, 2010 WL 3940575 (D.Ariz.) (unpublished) (when issuing later policies, insurer had no affirmative duty to inform subsequent buyers of insured deed of trust or to make sure lender was paid off).

[423] *First Merit Bank, NA v. Guarantee Title & Trust Co.*, 2006 WL 1791148, 2006-Ohio-3333 (Ohio App. 9 Dist. 2006) (unpublished).

[424] "[A] mortgage lien and a mortgage debt are two entirely different ... species ... . [A] guarantee of the validity of the mortgage lien cannot and should not be construed as guaranteeing that the insurer has made a careful investigation of the origin of the mortgage debt and guarantees its payment or validity." *Bank of Miami Beach v. Fidelity & Casualty Co. of New York*., 239 So.2d 97, 99 (Fla.1970). "As has been recognized elsewhere, 'failure of consideration is not a covered loss' under the policy language at issue here." *Gerrold v. Penn Title Ins. Co*., 271 N.J.Super. 50, 637 A.2d 1293, 1295 (N.J.Super.Ct.A.D. 1994). *Bank of Miami Beach* and *Gerrold* were relied on in *Pacific American Construction v. Security Union Title Ins. Co.*, 377 Utah Adv.Rep. 22, 1999 UT 87, 987 P.2d 45 (1999), which found that the policy did not protect against invalidity of the mortgage resulting from the lender's delivery of the loan funds to a party other than the borrower, causing the mortgage to be void for lack of consideration. "Generally stated, the provision [at issue here] insures against defects in the mortgage itself, but not against problems arising from or related to the underlying debt…. In conclusion, we find that the insuring clauses of the Policy do not cover losses arising, as here, from a failure of the debt underlying the mortgage." *Lawyers Title Ins. Corp. v. JDC (America) Corp*., 52 F.3d 1575, 1583 (11th Cir.1995) stated: "a title policy insuring a mortgagee insures only the title to the land securing his debt and not the debt." See also 60 A.L.R.2d 972, 976 (1958); and *Fidelity Nat'l Title Ins. Co. of N.Y. v. Consumer Home Mortgage, Inc.*, 272 A.D.2d 512, 708 N.Y.S.2d 445, 2000 N.Y. Slip.Op. 05066 (N.Y.A.D. 2 Dept. 2000) (when lender's closing agent stole the loan funds, the debt was invalid and the policy void and exclusion 3(a) also applied); *Bank of Miami Beach v. Lawyers Title Guar. Fund*, 214 So.2d 95 (Fla.App. 1968) (policy does not protect against forgery of note, and does not guarantee repayment of debt); *Narberth Building & Loan Ass'n v. Bryn Mawr Trust Co.*, 126 Pa.Super. 74, 190 A. 149 (1937) (policy neither makes insurer "a surety for the mortgaged debt, nor a guarantor of its payment. The defendant did not undertake to insure that the property mortgaged was a sufficient security for the debt."). In *Miller v. Commercial Standard Ins. Co.*, 248 So.2d 675 (Fla.App. 1971), when the lender discovered a title defect, it demanded that the insurer buy the loan, which was already in default. The court rejected that claimed duty, saying: "[t]he title insurance contract is not a continuing obligation to purchase a mortgage which goes sour, as plaintiffs seem to think, but rather to defend the

mortgage is unenforceable because the debt is invalid due to the failure of the lender or its agent to fund the loan to the borrower,[425] the lender that funded the loan fails to obtain the promissory note and the loan is sold to a different party,[426] or the loan is unenforceable due to violation of the usury laws.[427] However, when the title insurer is the only party attacking the validity of the mortgage due to the claimed lack of a valid debt, the insurer must prove the lack of a debt.[428] When both the note and the insured mortgage are forged, the insurer may insist that the true source of the lender's loss is the lack of a valid debt, while the insured argues that the forged mortgage establishes that the loss is covered by the policy.[429] When a lender was sued under various theories, including RICO, based on

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title insured against a claim of its invalidity. The option to pay the owners of the mortgage and succeed to their interest is the insurer's." In *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012), the court ruled that the policy does not insure the debt or the failure of the mortgage because there was no debt, caused by the bank's closing agent's theft of the money; therefore, there was no policy coverage. In *First American Title Ins. Co. v. XWarehouse Lending Corp*., 177 Cal.App.4th 106, 98 Cal.Rptr.3d 801, 09 Cal. Daily Op. Serv. 11,201 (Cal.App. 1 Dist. 2009), the originating lender stole all of the loan funds delivered by the funding lender and failed to pay off the prior loan. The borrowers also claimed that the note secured by the insured deed of trust was forged. The court held there was no valid debt. Rather than hold simply that this voided the policy, the court ruled that the lack of a debt meant that the loan assignee did not qualify as a successor insured, because it was not a successor holder of a valid indebtedness.

[425] *Fidelity Nat'l Title Ins. Co. of New York v. Consumer Home Mortgage, Inc.*, 272 A.D.2d 512, 708 N.Y.S.2d 445, 2000 N.Y. Slip.Op. 05066 (N.Y.A.D. 2 Dept. 2000) (when lender's closing agent stole the loan funds, the debt was invalid and the policy void; exclusion 3(a) also applied); *Pacific American Construction v. Security Union Title Ins. Co.*, 377 Utah Adv.Rep. 22, 1999 UT 87, 987 P.2d 45 (1999) (policy does not cover invalidity of mortgage caused by lender's delivery of loan funds to a party other than the mortgagor, as a result of which there was no consideration given to the borrower for the mortgage).

[426] *Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.*, 862 So.2d 793, 28 Fla. L. Weekly D2746 (Fla.App. 4 Dist. 2003), reh.den. (Jan 28, 2004) (lender funded loan, but rejected it after closing when it detected falsified paperwork; loan broker cancelled assignment of mortgage to lender, sold loan to another party, but never repaid the lender; lender was denied foreclosure, and court found no coverage under policy).

[427] For example, in *Lawyers Title Ins. Corp. v. Wells*, 881 So.2d 668 (Fla.App. 5 Dist. 2004), the court held: "[b]ecause the Wellses did not have a lawful interest in the loan, they had no insurable interest. An unenforceable usurious loan cannot give rise to an insurable interest. Without an insurable interest in the loan, the Wellses could not enforce the title policy". The policy contains a specific exclusion for invalidity of the insured mortgage due to violation of usury laws, which exclusion is discussed at §11.7.

[428] In *Levi v. Commonwealth Land Title Ins. Co.*, 2011 WL 4542904 (S.D.N.Y.) (unpublished), the court held that the insurer did not prove the lack of an underlying debt, despite a number of unusual circumstances concerning the loan. No other party alleged that the debt was invalid.

[429] In *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 2713973 (D.Ariz.) (unpublished), the court took the lender's view that the loss was due to the forged mortgage rather than the forged note, even while admitting that the forged note limited the lender's recovery to the property, increasing its loss: "[h]ad the lien been valid, plaintiff might have collected all the money it was owed, and not suffered any damages. However, the lien was not enforceable against any party because it was obtained through forgery. Having made a loan for $171,000 and lacking a valid note, plaintiff's recourse was to sell the property for as much as it could, which resulted in a loss." In *Wright*, the borrower claimed that his identity had been stolen and that he was not aware that the land had been bought in his name and a deed of trust granted. He thus did not resist the trustee's sale of the property, and the lender later resold the property without incident. Most of its loss was due to plunging real estate values in Phoenix at the time. In *First American Title Ins. Co. v. XWarehouse*

alleged forgeries and alterations to loan documents, the court found that the complaints "do not question either the validity or enforceability of the mortgages, and do not assert title defects."[430]

The policy does not indemnify the insured lender against the borrower's failure to repay the debt.[431] As one court explained,

> A mortgagee title insurance policy does not guarantee the mortgagee that the mortgagor will make the mortgage payments. See *Narbeth Bldg. & Loan Ass'n v. Bryn Mawr Trust Co.*, 126 Pa.Super. 74, 190 A. 149, 151 (1937) ("The provisions of [a mortgagee title policy] did not constitute the [title insurance] company a surety for the mortgaged debt, nor a guarantor of its payment.") All a policy of that kind does is insure the adequacy of the title to the mortgaged property. … The lender, and not the title insurer, shoulders the credit risk in a real estate loan.[432]

The title insurance policy also does not assure that the loan can be sold.[433]

Likewise, the policy does not indemnify the insured in the event the property encumbered by the insured mortgage is worth less than the amount of the debt.[434] Rather, if the value of the property is less than the debt, loss payable under the policy is limited to the property value or the policy amount, whichever is less. See §3.2.4 regarding the measurement of loss payable under a loan policy.

Lending Corp., 177 Cal.App.4th 106, 98 Cal.Rptr.3d 801, 09 Cal. Daily Op. Serv. 11,201 (Cal.App. 1 Dist. 2009), both mortgage and note were forged, and the court found no liability under the policy. However, its ruling was based on the fact that the claimant was an assignee of the originating lender and, without a valid debt that could be assigned, the court held that the assignee was not an insured under the policy.

[430] *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916, 922 (S.C.App. 1994).

[431] *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*, 793 F. Supp. 265 (D. Colo. 1992); aff'd 19 F.3d 528 (10th Cir. 1994); *Bank of Miami Beach v. Fidelity & Casualty Co. of New York*, 239 So.2d 97 (Fla. 1970); *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis.2d 68, 423 N.W.2d 521 (1988). In *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), in which the court held that, because a title insurer is not a guarantor of the loan, the loss payable due to total failure of title was not the loan amount but the value of the land, up to policy limits.

[432] *First Federal Savings Bank v. Stewart Title Guar. Co.*, 451 S.E.2d 916, 922 (S.C.App. 1994).

[433] *Glavinich v. Commonwealth Land Title Ins. Co.*, 163 Cal.App.3d 263, 209 Cal.Rptr. 266 (Cal.App. 4 Dist. 1984) (notice of default affected resale value of loan, but not the validity of the lien); *First Nat'l Bank of Jeanerette v. Lawyers Title Ins. Corp.*, 2010 WL 3734056 (W.D.La.) (unpublished), findings adopted in 2010 WL 3734020 (W.D.La.) (unpublished) (no loss payable to lender because it was unable to sell loan, and no evidence that lender lost any money as a result).

[434] *Demopoulos v. The Title Ins. Co.*, 61 N.M. 254, 298 P.2d 938 (1956); *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 52 F.3d 1575 (11th Cir. 1995); Couch on Insurance, §§ 57:189, 205. In *Lakeside National, LLC v. Chicago Title Ins. Co.*, 2011 WL 3420431 (D.Md.) (unpublished), the building on the insured parcel was razed after the policy date. The court found no coverage, and held that "the fact that an intervening event may deprive the property of value, even if it means that the lien-holder may ultimately be unable to recover his debt, does not affect the legal status of the lien."

Several decisions held that, when the mortgage lien was invalid on the day it was signed, the insurer was not entitled to resolve the claim by tendering title to the property to the lender. The rationale was that the lender would not have made the loan "but for" the assurance of the lien's validity. Later cases rejected this rationale, as discussed at §3.4.6.

In almost all types of title insurance policies, the Covered Risks assure that the mortgage is prior to any lien other than those excepted in Schedule B. Real estate tax liens are analyzed at §9.4. Construction liens are discussed in Chapter 10. Other liens are discussed at §9.5.

The policy does not assure the insured that the mortgage is an enforceable lien against land that is not listed in Schedule A (or C) of the policy as an insured parcel. Thus, when the insured mortgage was also supposed to encumber real estate other than the parcels described in the policy but did not, the insurer had no liability.[435]

The covered risks also assure the validity of any assignment shown in Schedule A, and protect against any lien on or pledge of the mortgage. This coverage only applies to assignments of the insured mortgage specifically recited in Schedule A. If a party purchases the indebtedness and takes an assignment of the mortgage, that party automatically becomes an insured. However, unless the assignment is shown in Schedule A, the party must establish its ownership of the debt in order to pursue a claim on the policy.[436] An assignee named on Schedule A is not required to prove that it is an insured, but may still be required to prove that it remains the owner of the debt on the date on which the claim is made. See §7.3 regarding the definition of insured under the loan policy.

Policy exclusions may, in most cases, be asserted against a loan assignee successor insured. The assignor's acts or knowledge are imputed to the assignee on proof that a principal-agent or other relationship exists between the two entities, but not otherwise. See §7.10 for further discussion of this subject, and §11.3.5 as to the effect of under Exclusion 3(b) concerning the lender's knowledge of fraud or forgery by the borrower.

9.11 Coverages Granted By Endorsement

Coverages that augment those provided by the Covered Risks may be given by endorsement. There are hundreds of endorsements used by the industry, varying widely from state to state. They fall into two general categories: those that remove policy defenses or exceptions, and those giving affirmative assurances not found in the Covered Risks. Endorsements that remove exclusions and exceptions are discussed in connection with those provisions, in Chapters 11 and 12. This section will consider those endorsement coverages that give affirmative assurances going beyond the Covered Risks. The ALTA Homeowner's Policy incorporates a number of coverages commonly granted by endorsement. The coverage of that policy is discussed at §9.14.2.

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[435] In *Crupi v. Newell and Talarico Title Agency, Inc.*, 14 Misc.3d 1225(A), 2007 WL 292296 (N.Y.Sup.), 2007 N.Y. Slip Op. 50171(U) (unpublished), a title insurer was found not liable due to the failure to record an agreement "spreading" a mortgage onto a second parcel, the title to which was not insured. The insured lender was able to take title to the insured property in lieu of foreclosure. However, the court reserved the question of liability as to the title agent that had assumed the task of recording the spreader agreement.

[436] See *Southern Title Ins. Co. v. Crow*, 278 So.2d 294 (Fla.App. 1973), cert den. 284 So.2d 221 (Fla. 1973); *First Financial Savings & Loan Ass'n v. Title Ins. Co. of Minn.*, 557 F.Supp. 654 (N.D.Ga. 1982). The issue of successor insureds under the loan policy is fully discussed at §7.4.

9.11.1 Rules Of Interpretation For Endorsements

An endorsement becomes part of the integrated insurance contract. The endorsement language must be construed together with the other provisions of the policy, except to the extent that it specifically alters those terms:

> Endorsements or riders on a policy become a part of the policy, and must be construed with it. Such provisions in the body of the policy are not to be abrogated, waived, limited, or modified by the provisions of an endorsement or rider unless expressly stated therein that such provisions are substituted for those in the body of the policy, or unless the provisions in the policy proper and in the rider or endorsement are conflicting.[437]

This principle is codified by provisions found in both the policy and the endorsement. See §9.1.3.5 for a complete discussion of the integration provisions.

An affirmative assurance in an endorsement generally shifts that risk from the insured to the insurer. When the insurer consciously assumes a risk by the granting of an affirmative coverage, it may not deny liability on the basis that the insured was equally knowledgeable of the risk, or suffered, assumed or agreed to it.[438] However, as with other policy coverages, when an insured fails to disclose material facts about the risk when seeking an endorsement, the concealment is a misrepresentation that voids coverage.[439]

A clearly-worded endorsement is interpreted as having its plain meaning.[440] For example, an

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[437] 13A Appleman, *Insurance Law and Practice*, §7538, quoted with approval in *Pete Lien & Sons Inc. v. First American Title Ins. Co.*, 478 N.W.2d 824 (1991). See *380 Kings Highway, LLC v. Fidelity Nat'l Title Ins. Co.*, 2011 WL 6182117 (N.Y.Sup.), 2011 N.Y. Slip Op. 52223(U) (unpublished), which held that the terms stated in an endorsement controlled as to a conflicting more general term in the policy, effectively negating an exception for the type of lien at issue, because the endorsement contained the commonly-used statement that "[t]o the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement this endorsement controls."

[438] *Bozeman v. Commonwealth Land Title Ins. Co.*, 470 So.2d 465 (La.App. 1985) (easement deleted from policy); *First Nat'l Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 171 Misc. 854, 12 N.Y.S.2d 703 (Sup. Ct. 1939) (bankruptcy preference); *McLoughlin v. Bridgeport Land & Title Co.*, 99 Conn. 134, 121 A. 175 (Conn. 1923) (straw man transaction).

[439] *1200 Ashland, LLC v. Lawyers Title Ins. Corp.*, 2010 WL 5481800 (N.D. Ill.) (unpublished) (when insured requested zoning endorsement two years after closing and several months after receiving survey revealing that part of property was not zoned as stated on zoning endorsement issued to lender previously, insured's failure to disclose correct zoning classification to insurer voided endorsement). However, in *First American Title Ins. Co. v. Columbia Harbison LLC*, 2013 WL 1501702 (D.S.C.) (unpublished), in which the insured admitted that it knew of material facts about the risk of an enforced removal endorsement that it requested after closing, the court said the insured had no duty to disclose information learned after the policy date, because Exclusion 3(b) says it applies to matters known "prior to the date the Insured Claimant became an insured under this policy." The court ignored the rationale behind the duty to disclose a material risk, which is that an insured cannot obtain coverage for a risk while concealing material facts about that risk.

[440] *Humphries v. West End Terrace*, Inc., 795 S.W. 2d 128 (Tenn.App. 1990) (endorsement protecting against enforcement of mortgage not triggered when mortgage was not being enforced, and no claim existed that property was

endorsement committing to issue "the same affirmative coverage" against a Native American tribal claim in future policies was found not to obligate the insurer to issue a future policy in a larger amount. The policy to which the endorsement was attached was in the amount of $8.4 million. Later, the insurer declined to give the same assurance on a $50 million policy. The court concluded:

> Where a contract is not ambiguous and the intent is clear, a court cannot interpolate into the agreement conditions that are not there. … Here, the contract is not ambiguous--Commonwealth is obligated only to issue subsequent policies with the same affirmative coverage, which includes a limit on the face value of $8.4 million.[441]

On the other hand, an endorsement whose language is less than precise may be interpreted broadly in favor of the party that did not draft it.[442]

The insurer should receive a premium for granting affirmative coverage. The court should consider the amount of premium paid in order to construe the endorsement as granting a coverage commensurate with the premium.[443] The policy may not be reformed to add a coverage for which an endorsement may be purchased for an additional premium, when the insured neither requested the endorsement nor paid the premium for it. See §12.3.4 for cases adopting this rule as to the purchase of "extended coverage." Another aspect of the issue is that, if the insurer is asked to given an affirmative coverage, it will often require assurances or collateral to induce it to accept the risk. The insurer should make it clear to the parties what additional assurances it will require. However, when a seller gave the insurer both a premium and an indemnity as consideration for the assumption of a risk, the court found that the premium was adequate consideration for the risk, and voided the indemnity.[444]

Endorsement coverages often make reference to the policy's final determination clause, by limiting protection to loss resulting from a "final order of a court of competent jurisdiction." See §3.4.5 for a complete discussion of that policy provision. Some take the view that this type of phrase

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not "salable" as insured); *Pete Lien & Sons, Inc. v. First American Title Ins. Co*., 478 N.W.2d 824 (S.D. 1991) (endorsement coverage against damage to surface did not require insurer to defeat mineral interest properly excepted in Schedule B).

[441] *TC X Incorporated v. Commonwealth Land Title Ins. Co.*, 86 F.3d 1152 (Table), 1996 WL 271450 (4th Cir. (S.C.) 1996) (unpublished).

[442] *Eureka Investors Corp. N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932 (1984) (endorsement protecting against tenant rights resulting in coverage for delay caused by tenants' refusal to move out of condominium conversion project).

[443] See, for example, *Malkin v. Realty Title Ins. Co., Inc*., 244 Md. 112, 223 A.2d 155 (1966), in which the court held that the small premium paid for an encroachment endorsement did not commit the insurer to file an eviction action to oust the public that was using the encroaching street: "Nor do we think it likely either Mr. Malkin or his attorney thought that the appellee, for an additional $60, would undertake the obligation of evicting Montgomery County from its occupancy of part of the lot or, in the alternative, of paying the Malkins $2,500."

[444] *Jeter v. Title Ins. Co. of Minn.*, 424 S.W.2d 329 (Mo.App. 1967).

in an endorsement does not obligate the insurer to defend the insured in litigation over the risk. In *BancOhio Nat'l Bank, N.A. v. Security Union Title Ins. Co.*,[445] however, the court held that the "final order" assurance did not negate the duty to defend the insured. The *BancOhio* policy excepted an existing lawsuit affecting the property, but also contained an affirmative "note" assurance that used the "final order" wording. The court held that, while "this provision is exclusionary in part, it expressly provides coverage for any loss sustained by way of a final order" and, therefore, Security Union was obligated to defend BancOhio in the litigation.[446]

Many endorsements formerly contained the expression that they insured against loss or damage "by reason of any incorrectness in the assurance that," followed by a statement, such as "the property is zoned R-1." In *Alliance Mortgage Co. v. Rothwell*,[447] the policy contained a location endorsement that stated that there was a multifamily dwelling on the property, when in fact the improvement was a single family house. The California court held that this language might be considered to be a representation rather than an indemnification, which would run contrary to the fundamental premise that a title insurance policy is a contract of indemnity. The *Rothwell* decision was reversed on other grounds. However, as one commentator explains, "the CLTA was so concerned about the plaintiff's interpretation of [this language], that it revised this clause out of all of its endorsements."[448] The ALTA followed suit, revising a number of endorsement forms in October, 1998 to replace the "incorrectness" language.[449]

A lender is often able to obtain an affirmative assurance that the insurer will not offer on an owner's policy issued in the same overall transaction. This is because, as to many coverages, there is far greater risk in giving an assurance to the owner than to the lender.[450] However, an owner sometimes argues that the insurer either should have given the same coverage on the owner's policy as was found in the loan policy, or that he or she is a third party beneficiary of the lender's coverage. An owner is not an additional insured or beneficiary on endorsement coverages given to the lender, and the granting of such coverage to the owner would expand the insurer's risk. See §7.7. Also, this subject is discussed in the context of construction lien coverage, at §10.1.2.

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[445] 1993 WL 524890 (Ohio App. 10 Dist.) (unpublished).

[446] Id. at 1.

[447] 28 Cal.App.4th 1764, 34 Cal.Rptr.2d 700 (Cal.App. 1 Dist. 1994) (unpublished), formerly published at 28 Cal.App.4th 1764, 33 Cal.App.4th 1372, later decision at 10 Cal.4th 1226, 44 Cal.Rptr.2d 352 (Cal. 1995) (1995 Supreme Court decision did not review question of endorsement interpretation).

[448] Robert Bozarth, *Choosing a Title Insurance Policy Form*, in Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders, Practicing Law Institute N-448 1999, p. 33.

[449] Id. at p. 26.

[450] A primary reason is that the mere occurrence of the risk insured against causes the owner loss immediately; the lender suffers no loss unless the debt is not paid and the security for the loan is reduced by the covered title matter, as discussed further at §3.2.4. See *Marine Midland Bank v. Virginia Woods, Ltd.*, 151 Misc.2d 915, 574 N.Y.S.2d 485 (Putnam Cty.Sup.Ct. 1991), which stated that an affirmative coverage was given to a lender but not the owner and "represented the insurer's determination that the chance of forfeiture of title and consequent impairment of security represented an acceptable risk" to be taken on behalf of the lender only.

9.11.2 Endorsements Concerning Land, Improvements And Access

Various affirmative assurances may be given by endorsement concerning the identification of the land or improvements on it. These endorsement coverages include assurances that the land insured is the same parcel as shown on an identified survey, that the property has a certain street address or tax parcel associated with it, or that the insured parcel abuts a named street. Some endorsements protect against encroaching structures.[451]

The purpose of such endorsements is to make limited assurances that go beyond the description of the insured parcel in Schedule A of the policy. Some such endorsements were developed merely as reference pages, to allow the lender to easily match the policy to the real estate it has taken as collateral. For example, it is customary in many locales for a title insurance commitment to state on Schedule A the street address of the property and its tax parcel(s), but not to insert that same information in the policy.[452] The endorsements tie the policy to the address, tax parcel, or the survey obtained by the insured that is located in the lender's underwriting file.

The insured must prove that it relied on the assurance provided in an endorsement in order to establish a loss.[453] This is consistent with the principle that title insurance is a contract of indemnity that is invoked by "actual monetary loss or damage," as stated in Conditions 8 of the 2006 ALTA policies.

For example, when the lender did not make its decision to lend money based on the assumption that the assured matter or status was as stated in the endorsement, it does not suffer a loss if the matter or status is not accurate. In *First Nat'l Bank of Northbrook, N.A. v. Stewart Title Guar. Co.*,[454] the lender obtained a mortgage on only one of two parcels it had intended to mortgage.

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[451] In *Ben-Avraham v. Lawyers Title Ins. Corp*., 5 Misc.3d 791, 786 N.Y.S.2d 272 (N.Y. 2004), an owner's policy insuring a high rise condominium unit contained an endorsement protecting against "[a]ny obligation to remove any improvements which exist at Date of Policy because of any present encroachments or because of any future unintentional encroachments of the common elements upon any unit or of any unit upon the common elements or another unit." The insured was sued by a neighbor, who alleged that flue pipes, a ladder, wiring conduits, cable boxes and other parts of the building encroached on the adjoining property. The court found a duty to defend the insured, and said that the survey exception had not been invoked because the insurer had not "demonstrated that another survey would reveal the claimed encroachment 7 inches onto the adjoining property's air rights beginning 40 feet in the air."

[452] The ALTA 22-06 Location Endorsement, for example, "loss or damage sustained by the Insured by reason of the failure of a [description of building or improvement], known as [street address], to be located on the Land at Date of Policy." The ALTA 22.1-06 Location and Map Endorsement adds an assurance against loss or damage suffered if "the map, if any, attached to this policy to correctly show the location and dimensions of the Land according to the Public Records." The ALTA 25-06 Same as Survey Endorsement ties the policy to the land depicted on a survey, providing indemnity for loss suffered "by reason of the failure of the Land as described in Schedule A to be the same as that identified on the survey made by [surveyor's name] dated [date] and designated Job No. [job number]."

[453] In *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished), the court held that a lender had not established a loss under a zoning endorsement merely by proving that the property was subject to a zoning overlay district's regulations that were not referenced in the endorsement. The court held that the insurer was entitled to a trial on its claim that the no loss exclusion applied, because the lender did not rest its decision to make the loan on the assurance in the zoning endorsement.

[454] 279 Ill.App.3d 188, 664 N.E.2d 310, 215 Ill.Dec. 913 (Ill.App. 1 Dist. 1996), rev.den. October 2, 1996 (Table, no.

Schedule A of the policy also included only the mortgaged parcel. However, a "location note" endorsement was attached to the policy. That endorsement protected against:

> loss or damage which the insured shall sustain by reason of any inaccuracies in the following assurances: (A) That, according to the plat of subdivision, the subject land has a street frontage of 160 feet, [and] a depth of 298.71 feet ... .

The dimensions listed in the endorsement encompassed both parcels. After taking title by foreclosure, the lender sued the insurer and obtained a judgment for the difference between its bid price for the one parcel and the full amount of the debt. The judgment was premised solely on the location endorsement. The appellate court reversed, finding no compensable loss. The court quoted an Illinois commentary on the purpose of the location note:

> [The endorsement] allows the lender to verify that the property insured matches the lender's appraiser's report and legal description in the mortgage. These endorsements are generally used only in metropolitan areas where it is more difficult for a lender to verify this information for itself.[455]

In *Northbrook*, however, the lender did not look at the endorsement until after default. The court therefore concluded:

> But First National, indisputably, did not use the endorsement to verify the size, location, or improvements on the property. First National did not look at the endorsement until Grossman defaulted. The endorsement had nothing to do with the bank's decision to refinance the loan.
>
> Stewart did not make an empty or illusory promise to the bank. Stewart promised to compensate the bank for any losses resulting from reliance on the endorsement note. The bank paid a premium for that promise. The facts of this case do not suggest the promise was broken. The bank's loss was not sustained by reason of any inaccuracies in the location endorsement.[456]

A California court also found reliance to be a predicate for recovery on an endorsement assurance, in *Golden Security Thrift & Loan Ass'n v. First American Title Ins. Co.*[457] That case involved a CLTA 116 endorsement containing an assurance about "the correct location and dimensions" of the property. The endorsement had a map attached to it showing the property as

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81240).

[455] 664 N.E.2d at 313.

[456] Id. at 314.

[457] 53 Cal.App.4th 250, 61 Cal.Rptr.2d 442 (Cal.App. 4 Dist. 1997).

being "2.06 AC M/L." The lender, however, had an appraisal showing the property to be 1.36 acres. The court found that the lender "would have had a difficult time proving detrimental reliance on the map's inaccurate statement," given its possession of the accurate appraisal.[458]

Golden Security Thrift also presented a second issue, concerning the interpretation of the assurances in the CLTA 116 endorsement. That endorsement assures that the map attached to the endorsement "shows the correct location and dimensions of said land according to [the public] records." The lender asserted that "location and dimensions" encompassed area. The map attached to the endorsement recited acreage. The court ruled, however, that "area" is not a subset of either "location" or "dimensions." Therefore, the endorsement did not assure acreage. The court refused the insured's argument that, since the CLTA policy excepts "shortage of area," by implication the ALTA policy does not. The court said "[t]his attempt to achieve coverage through incorporation by reverse reference is an absurdity."[459]

ALTA has adopted the ALTA 19 series of endorsements to protect against any gaps or gores that might lie between parcels that the insured understands to be adjacent to each other.[460] This is commonly termed "gap or gore" coverage. The title insurance policy insures the title to the parcels described in Schedule A. If there is a parcel in between two parcels recited in the policy, the policy does not protect against an ownership claim by someone else as to that parcel. The contiguity endorsement indemnifies the insured in the event there is such a parcel, and that it is owned by someone other than the insured. The example often given to explain this endorsement is when the insured is conveyed the West 20 acres and also the East 20 acres of the same quarter-quarter-section. If the quarter-quarter-section contains 42 acres instead of the normative 40 acres, there will be a two-acre gap parcel lying between the two parcels. The contiguity endorsement indemnifies the insured in the event that some other party claims to own the gap parcel.[461] See § 12.3.6 for a discussion of

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[458] 61 Cal.Rptr.2d at 446.

[459] Id.

[460] ALTA Endorsement 19-06, adopted in 2006, is called the Contiguity - Multiple Parcels endorsement. The 19.1-06 endorsement is called the Contiguity - Single Parcel endorsement, and was also adopted in 2006. In 2015, ALTA adopted the 19.2-06 endorsement, entitled Contiguity - Specified Parcels. The ALTA 19 endorsement provides two coverages. The first is against the failure of a certain identified boundary line of one insured parcel "to be contiguous to" the identified boundary line of the second parcel insured in the policy and identified in the endorsement. The second coverage is for loss caused by "the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above." The two coverages are really simply two ways of stating the same assurance. The protection is against loss caused by ownership by someone other than the insured of any parcel lying between the two identified parcels. The ALTA 19.1 endorsement gives the same assurances, but is used when the contiguous boundary line is between an insured parcel and a parcel owned by the insured but not insured in the policy. The ALTA 19.2 endorsement simplifies the coverage given by the 19, by insuring against loss or damage caused "by reason of there being any gaps, strips, or gores lying within or between" several parcels identified by the labels given them in Schedule A or C of the policy. The 19.2 endorsement also contains a format for an exception to the coverage, "except as depicted on the survey made by __________ dated ________, and designated Job No. _________."

[461] In *Rio Mesa Holdings, LLC v. Fidelity Nat'l Title Ins. Co.*, 2019 WL 4639103 (Cal.App. 5 Dist.) (unpublished), the insured's counsel drafted a custom contiguity endorsement that he contended gave the assurance that there was "the ability to move freely among the parcels" described in the endorsement. However, there is no assurance of access from parcel to parcel in the ALTA 19 series endorsements.

gaps and gores in relation to the survey exception.

Various endorsements exist that provide additional assurances as to access rights. The most common variants are the California Land Title Association form 103.7 and the ALTA 17 series of endorsements. Those endorsements may include a number of assurances: that there is a public road adjoining the insured parcel having the name recited in the endorsement or that, if the insured parcel does not abut a public road, it has the benefit of an easement that leads to the named public street;[462] that the identified street is physically open (which typically is considered to mean that the roadway is improved to some degree, and passable); that the street will support vehicular traffic (which is not an assurance that the roadway is paved) and that vehicular travel is not banned by regulation; that the street is publicly maintained; and that the insured has the right to use any existing curb cuts on the insured property for access onto the street.[463] A title insurer gives such endorsements on payment of an additional premium, and only when the title examiner or underwriting personnel have determined that there is a sound basis on which to provide the assurances. If a particular assurance found in a standard form endorsement is not true as to the parcel to be insured, that assurance is removed from the endorsement. The additional assurances granted by an access endorsement are not fairly implied in the generic access coverage of the policy, which is discussed at §9.7.

9.11.3 Endorsements Concerning Liens And Encumbrances

A common subject of an endorsement, in many jurisdictions, is to protect against the enforcement of a lien or encumbrance. The subject of an assurance against loss caused by the forced removal of a structure is discussed at §3.2.3.1.7.

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[462] Access by easement is termed "indirect access." ALTA Endorsement 17-06 assures "direct" abutment on a public road. ALTA Endorsement 17.1-06, called the "Indirect Access and Entry" endorsement, is used to assure access by an easement that leads to a public road.

[463] In *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished), the property has access via five different roads. The policy contained an access endorsement that insured access by three identified roads, including Triumph Gulch Road. The endorsement assured that the roads were "physically open" streets. Another of the roads was described as "United States Forest Service and Bureau of Land Management Road known as Courier Gulch Road (Subject to the United States Forest Service and Bureau of Land Management regulation)... ." The listing of Triumph Gulch Road did not contain any corresponding qualification. Triumph Gulch Road is closed to vehicles every year from December 1 to April 30, under a 1982 Bureau of Land Management decision. The court agreed with the insured that the endorsement indemnified against loss sustained due to the closure of the road by the BLM order, because it gave the assurance that Triumph Gulch Road was "a physically open street." The endorsement qualified that assurance as to Courier Gulch Road, by saying that the use of that road was "subject to the United States Forest Service and Bureau of Land Management regulation," but provided no corresponding qualification as to Triumph Gulch Road, which was subject to the same limitations. However, the court said this ruling did not establish coverage with finality, because the insurer asserted that the insured had actual knowledge that the road was closed seasonally, and that same fact was *not* evident from any real estate record examined by the title insurer. In *Rio Mesa Holdings, LLC v. Fidelity Nat'l Title Ins. Co*., 2019 WL 4639103 (Cal.App. 5 Dist.) (unpublished), the insured's counsel drafted a "custom" access endorsement that he insisted assured not only that there was a right of access to the public streets named in the endorsement, but also the assurance that the insured or subsequent owners could travel from each of the four parcels insured in Schedule A to all other insured parcels. Two of the parcels were separated from the other two parcels by subdivided land not sold to the insured. The court held that there was a right to cross the non-insured subdivision roads for access. It remanded the case for the trial court to determine if the insured's contention about its custom access endorsement was accurate.

Endorsements protecting against liens or encumbrances do not create liability unless the triggering event occurs. When the policy protected against enforcement of a mortgage which had not been foreclosed, the insured was found not to have proven a loss.[464] When the coverage protected against "disruption of the lien" of the mortgage caused by bankruptcy proceedings, the mere imposition of the automatic stay in bankruptcy did not trigger loss.[465] Protection against disturbance of the surface by mineral owners was not invoked by assertion of mineral ownership without surface entry.[466] A CLTA 115.2 endorsement's protection against the priority of homeowner association liens was not invoked by an HOA lien with statutory super-priority over the insured deed of trust, because the lien was recorded after the policy date.[467]

Endorsements protecting against priority of taxes over the insured mortgage were found not to be invoked by the fact that the property fell within a special taxing district, when there was no specific tax assessment that was claimed to have priority over the mortgage. [468] A Standard New York Endorsement that added as a Covered Risk "[a]ny statutory lien for services, labor of materials furnished prior to the date hereof, and which has now gained or which may hereafter gain priority over the estate or interest of the insured as shown in Schedule A of this policy" was found to affirmatively protect against a municipal emergency repair lien for repairs done to a building.[469] The court reached this conclusion despite a specific exception in the policy for municipal repair liens, and even though the repairs achieved lien status only after the policy date. The court's ruling was based on the fact that the repair lien was a "statutory lien," against which the endorsement provides a form of prospective coverage.

9.11.4 Comprehensive, Zoning, Inflation And Other Endorsements

The ALTA 9 endorsement, now known as the Restrictions Encroachments Minerals endorsement, was formerly known as the comprehensive endorsement, because it includes

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[464] *Humphries v. West End Terrace, Inc.*, 795 S.W. 2d 128 (Tenn.App. 1990).

[465] *Gibraltar Savings v. Commonwealth Land Title Ins. Co.*, 905 F. 2d 1203 (8th Cir. 1990).

[466] *Pete Lien & Sons Inc. v. First American Title Ins. Co.*, 478 N.W.2d 824 (S.D. 1991).

[467] *Wells Fargo Bank, N.A. v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 2062947 (D.Nev. 2019) (permanent citation not yet available), appeal filed June 11, 2019.

[468] *Vestin Mortgage, Inc. v. First American Title Ins. Co*., 139 P.3d 1055, 553 Utah Adv. Rep. 3, 2006 UT 34 (Utah 2006). The policy contained two endorsements. The first was a CLTA 104, which indemnified against "loss or damage which such insured shall sustain by reason of … [t]he existence of any subsisting tax or assessment lien which is prior to the insured mortgage... [or] [t]he existence of other matters affecting the validity or priority of the lien of the insured mortgage, other than those shown in the policy... . The other endorsement was a F.A. Form 31, which protects against any loss incurred by reason of "Any incorrectness in the assurance which [First American] hereby gives: … That there are no covenants, conditions, or restrictions under which the lien of the mortgage referred to in Schedule A can be cut off, subordinated, or otherwise impaired...." The court noted that title insurance provides no future coverage, and the assessments at issue were levied after the policy date. Therefore, it held, the endorsement coverage was not invoked.

[469] *380 Kings Highway, LLC v. Fidelity Nat'l Title Ins. Co.*, 2011 WL 6182117 (N.Y.Sup.), 2011 N.Y. Slip Op. 52223(U) (unpublished).

assurances on a number of subjects. The endorsement provides assurances against restrictions that could extinguish, divest, subordinate or impair the validity, priority or enforceability of the insured mortgage; losses due to various kinds of encroachments; and certain violations of restrictions.[470] The endorsement also indemnifies the insured against loss due to "the existence, at Date of Policy, of" certain matters "unless expressly excepted in Schedule B," which is known as the "private rights" assurance.

The private rights assurance of the ALTA 9 endorsement was the subject of *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*,[471] in which a recorded declaration of restrictions reserved in the developer the right to approve buyers in the development. The policy excepted the declaration, but did not specifically identify the approval right in the exception. The ALTA 9 endorsement protected against loss caused by the existence of purchaser approval rights in "[a]ny instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land… [u]nless expressly excepted in Schedule B." The insurer argued that the exception for the declaration was sufficient. The Third Circuit reversed, holding that an exception for the purchaser approval rights in the declaration would be necessary to negate the coverage, because the endorsement protected against instruments excepted in Schedule B. On remand, the district court declared that the "plain reading" of the ALTA 9 endorsement is that it protects against *any loss* due to the existence of "an instrument referred to in Schedule B," if the excepted instrument contains restrictions and also includes private assessments, an option to purchase, right of first refusal or the right to approve future purchasers or occupants (the rights listed on the endorsement). The court said that "[a]ny loss arising as a result of any portion of that instrument--and not from any particular provision contained therein--falls within the scope of the ALTA 9 Endorsement coverage."[472] The insurer appealed again to the Third Circuit, which affirmed.[473] The American Land Title Association has since made considerable alterations to the ALTA 9 endorsement.[474]

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[470] In *Wells Fargo Bank, N.A. v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 2062947 (D.Nev. 2019) (permanent citation not yet available), appeal filed June 11, 2019, the court held that the coverage against "covenants, conditions or restrictions under which the lien of the Insured Mortgage can be cut off, subordinated, or otherwise impaired" did not protect against a homeowners' association lien filed after the policy date, merely because the association was authorized in a declaration that also contained covenants, conditions and restrictions.

[471] 579 F.3d 304 (3rd Cir. (Pa.) 2009), amended by 586 F.3d 1011 (3rd Cir. (Pa.) 2009).

[472] *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, 2011 WL 611802 (E.D.Pa.) (unpublished), motion to certify appeal granted, reconsideration denied by 2011 WL 1044864 (E.D.Pa.) (unpublished), subsequent order certifying question for interlocutory appeal, 2011 WL 1045124 (E.D.Pa.) (unpublished).

[473] *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, 687 F.3d 620 (3rd Cir. (Pa.) 2012). The court said: "[w]e … hold that the ALTA 9 Endorsement provides coverage to losses arising from entire instruments that fit within its plain language, not just the ¶ 1(b)(2) restrictions within those instruments that have not been expressly excepted." The court acknowledged in a footnote that its decisions have already provoked changes to the endorsement. "Both parties address recent proposed amendments to the ALTA 9 Endorsement, which will ensure that the effect of this court's decision will be limited to title insurance policies that were issued with the older version of the ALTA 9 Endorsement. Because the amendments show only that the ALTA 9 Endorsement was changed to reflect a recent relevant court opinion, the significance of the changes can only be determined through speculation."

[474] The one endorsement has been broken down into several, as of April 2, 2012. They are the ALTA 9-06

The ALTA 3 zoning endorsement indemnifies the insured in the event the property is not within the zoning classification recited in the endorsement.[475] Some versions of the endorsement contain additional assurances. When the insured property was rezoned after the date of the policy, the endorsement was found to protect the insured against the effect of the later rezoning, in *Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co.*[476] The court also refused to find that the endorsement required the insured to seek a conditional use permit, despite the statement in the endorsement that the insurer would have no liability due to the insured's "[l]ack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses." However, the court rejected the insured's argument that the loss determination provision should not apply to the zoning endorsement. The insured argued that, because a zoning endorsement concerns the use of property, not its title, loss should not be measured as it would be for a title issue. The court said that "[t]his logic is misguided because the zoning endorsement insures the value of the title in the event certain use is not allowed (here, multi-family housing), therefore the word 'use' is a necessary term in describing the coverage it provides. That does not transform it into stand-alone coverage insuring against any loss related to any use of the property apart from the value of the property's title." See §9.1.3.5 concerning the integration provisions of the policy and endorsement, which both say that an endorsement becomes part of the policy and modifies its terms only to the extent expressly stated in the endorsement.

Several types of endorsements increase the amount of insurance. The inflation protection endorsement adjusts the policy amount each January 1 based on the United States Department of Commerce Composite Construction Cost Index for the month of September immediately preceding the adjustment date. The maximum amount of insurance in force can never exceed 150% of the amount of insurance. The New York Title Insurance Rate Service Association market value rider must be offered to buyers of one-to-four family residences. That endorsement says that a loss is determined based on the market value of the property at the "time of loss," which is the date on which "the homeowner shall have actual knowledge of facts giving rise to a claim under the Policy." Market value is determined by three arbitrators, one chosen by the insured, another by the insurer and the third selected by the other two arbitrators. Value is not capped at a ratio above the policy

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Restrictions, Encroachments, Minerals – Loan Policy, the 9.1-06 Covenants, Conditions and Restrictions – Unimproved Land – Owner's Policy, the 9.2-06 Covenants, Conditions and Restrictions – Improved Land – Owner's Policy, the 9.3-06 Covenants, Conditions and Restrictions – Loan Policy, the 9.6-06 Private Rights – Loan Policy, the 9.7-06 Restrictions, Encroachments, Minerals – Land Under Development – Loan Policy, the 9.8-06 Covenants Conditions and Restrictions – Land Under Development – Owner's Policy, the 9.9-06 Private Right – Owner's Policy, and the 9.10-06 Restrictions, Encroachments, Minerals – Current Violations – Loan Policy.

[475] In *Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC*, 2015 WL 807055 (unpublished), the court held that a zoning endorsement protected the insured against the additional use limitations imposed by a zoning overlay district that was not referenced in the endorsement, although the primary zoning classifications were the ones stated in the endorsement. The overlay district was a second level of zoning regulation over the parcel.

[476] 706 F.3d 622 (5th Cir. (La.) 2013). The court's justification was that the later zoning change caused the zoning classification to revert to one that had existed before the policy date, which allowed the court to fashion a sort of relation-back coverage theory.

limit, like the inflation protection endorsement, but does "exclude the market value of any improvements made to the premises subsequent to the date of the Policy." In a case involving a policy that contained a New York market value rider, the insurer was found not entitled to summary judgment declaring that payment of policy limits would fully satisfy the claim, when the insured asserted that her diminution loss was greater than policy limits.[477] Also, the Homeowner's policy contains a form of "inflation" endorsement, because it states that the policy amount increases by 10% per year for the first five years after its issuance.

A number of endorsements indemnify against loss incurred due to the enforced removal of a structure. See the analysis of the enforced removal coverages in the ALTA Homeowner's policy at §9.14.2, and §3.2.3.1.7 for a discussion of the resolution of a claim invoking such a forced removal coverage.

An endorsement affirmatively insuring ownership of condominium declarant rights was construed in *RA Southeast Land Company LLC v. First American Title Ins. Co.*[478] The court held that the endorsement assured the insured that it owned those rights, which the insurer had acknowledged by defending them in litigation. The court held that the endorsement did not entitle the insured to a loss payment based on lost profit and carrying costs, but rather was subject to the final determination provision of the policy.[479]

In *Connecticut Attorneys Title Ins. Co. v. Casmat, LLC*,[480] the policy excepted several utility easements, but also contained the statement that the insurer would "affirmatively insure that the [NEC easements] do not interfere with the beneficial use of the property." The insured proposed to build a driveway across the easement paths, which the utility refused to allow. The insured demanded that the insurer pay the difference in value between the land as unimproved and as developed as it proposed. The court held that the endorsement provided a much more limited indemnity:

> The unambiguous language of the Policy states that [CATIC] agrees to insure that *NEC's use and operation* of its easement does not harm [Casmat's] ability to effectively utilize the property. In essence, [Casmat] argues that NEC is not allowing [it] to interfere with NEC's easement. The Policy does not insure against [Casmat's] inability to interfere with NEC easements. "An exception is an uninsured interest.... It is one that has been expressly written out of the policy during the underwriting process...." Barlow Burke, Law of Title Insurance § 9.01 (2010).[481]

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[477] *Appleby v. Chicago Title Ins. Co.*, 80 A.D.3d 546, 914 N.Y.S.2d 257, 2011 N.Y. Slip Op. 00170 (N.Y.A.D. 2 Dept. 2011).

[478] 2016 WL 4591740 (D.Nev.) (unpublished).

[479] The decision is further discussed at §3.4.5, which covers the final determination provision.

[480] 2012 WL 366521 (D.R.I.) (unpublished).

[481] 2012 WL at *5.

A title insurer can issue an endorsement in which it agrees to issue a policy to another party in the future giving a coverage found in the present policy. This is sometimes known as a future coverage endorsement. In issuing such an endorsement, the insurer does not agree to give different or expanded coverage to a future insured. Thus, an endorsement committing to issue "the same affirmative coverage" against a Native American tribal claim in future policies was found not to obligate the insurer to issue a future policy in a larger amount. The policy to which the endorsement was attached was in the amount of $8.4 million. Later, the insurer declined to give the same assurance on a $50 million policy. The court concluded:

> Where a contract is not ambiguous and the intent is clear, a court cannot interpolate into the agreement conditions that are not there. … Here, the contract is not ambiguous--Commonwealth is obligated only to issue subsequent policies with the same affirmative coverage, which includes a limit on the face value of $8.4 million.[482]

A future coverage endorsement is not an assurance given to the present insured against a future event, or the granting of any assurance found in the policy for the benefit of future owners of the property.[483] Such prospective coverage would be antithetical to the retrospective nature of the policy coverages.

9.12 Scope Of Policy Definition Of "Public Records" And Recorded Instruments That Do Not Affect Title

The ALTA policies contain a definition of "public records."[484] Some covered risks refer to public records as defined in the policy, while others do not. Most covered risks, however, indemnify only against matters that affect the title to the land.[485] Certain classes of recorded instruments do not invoke any Covered Risk because they do not affect or encumber title.

The claim administrator must carefully consider whether or not an instrument bearing recording data is actually a defect in, lien or encumbrance on title, or affects the marketability of, title to the insured property, or affects or limits its right of access.

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[482] *TC X Incorporated v. Commonwealth Land Title Ins. Co.*, 86 F.3d 1152 (Table), 1996 WL 271450 (4th Cir. (S.C.) 1996) (unpublished).

[483] In *Rio Mesa Holdings, LLC v. Fidelity Nat'l Title Ins. Co.*, 2019 WL 4639103 (Cal.App. 5 Dist.) (unpublished), the insured's position was that contiguity and access endorsements in its policy were intended to benefit future owners of the property, which the insured intended to convert to a large residential development. The appeals court made no ruling on that contention, and remanded the case to the trial court.

[484] The 2006 ALTA Owner's policy defines "Public Records" as "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 Covered Risk 5(d), 'Public Records' shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located."

[485] The 2006 ALTA policies also define "Title," although that definition is somewhat limited, referring only to "[t]he estate or interest described in Schedule A."

When the policy does not make exception for an instrument in the real estate records, and it appears that the instrument may or does not invoke a Covered Risk, the claim administrator will often obtain further information from underwriting personnel for that state to determine if there is a statute or decision that declares whether or not the instrument invokes a Covered Risk. If not, the appropriate response to a claim asserting the lack of an exception for the instrument is to advise the insured that no Covered Risk is invoked, and giving the authority for that statement, such as a court decision or statute.

Conversely, the policy will sometimes make exception for an instrument that does not affect title or otherwise invoke a Covered Risk. Sometimes, even when the insurer is satisfied that a class of instruments does not affect title, underwriting personnel issue standards informing title examiners to make exception for the instruments in order to avoid a claim that the policy indemnifies against the effect or subject of the instrument.

Even if it is customary in the jurisdiction to insert exceptions for such matters, no Covered Risk is invoked, and there is no loss payable, when the policy does not except a recorded instrument that does not constitute a lien or encumbrance on title.[486] See §9.6 for a discussion of cases holding that particular matters are or are not encumbrances on title. See §9.4 regarding taxes, including the lack of coverage when the policy does not make exception for the fact that the property lies in a special taxing district. Further, recorded instruments that concern the physical condition of the property do not encumber its title, as discussed at §9.8.3.

Some other instruments relate to governmental regulation of the property's use, such as building code ordinances or zoning ordinances. These classes of instruments often fall under an exclusion. See §11.1.1 regarding the exclusion for building code ordinances and §11.1.2 about the zoning exclusion. Some policies contain limited indemnification against recoded notices of violation or enforcement of such laws or ordinances, however. The claim administrator must determine if the recorded instrument is such a notice, and if a policy coverage is invoked. See §§3.2.3.1.9 and 3.2.3.1.10 concerning the handling of claims about the notice-of-enforcement Covered Risks, and §§9.9.1, 9.14.1 and 9.14.2 for a complete discussion of the Covered Risks.

Of the many classes of instruments that are recorded but that do not constitute liens or encumbrances on title, several decisions are representative. A recorded covenant giving notice of prior disposal of waste on property and advising that future owners will be responsible for the cost of any further clean-up was found not to be an encumbrance on title because it did not limit the transfer of the property.[487] Also, the court found that there was no covered loss due to a recorded notice of a person's claim to part of the proceeds from the sale of land:

[486] *Luboff v. Security Title & Guar. Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965) (no policy coverage as to developer agreement that was not a defect, lien or encumbrance); *Sala v. Security Title Ins. & Guarantee Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (Cal.App. 2 Dist. 1938); (no policy coverage as to lis pendens excepted, then removed as cloud on title); *Peterson v. Title & Trust Co. of Fla.*, 431 So.2d 311 (Fla.App. 1983) (no coverage as to applicability of restrictions not shown); *Laurence v. Kruckmeyer*, 124 Ariz. 488, 605 P.2d 466 (Ariz.App. 1979) (no coverage concerning statement that easement affected parcels it did not affect); *Commonwealth Land Title Ins. Co. v. Graoch Associates No. 73,* 2210 WL 1257748 (E.D.Ky. March 26, 2010) (unpublished) (possible future assessments not encumbrances because they "will not affect passing of title").

[487] *Pavilion Park, LLC v. First American Title Ins. Co.*, 2011 WL 43222 (W.D.Ky.) (unpublished), which relied on *Commonwealth Land Title Ins. Co. v. Graoch Associates No. 73,* 2010 WL 1257748 (E.D.Ky.) (unpublished).

> Put simply, the agreement here is not a title defect because it does not affect title. The agreement merely gives Herman Klickman a lien on one-third of the *proceeds* derived from a sale of the property in question. It does not give Herman Klickman any interest in the property, nor does it give him the right to disturb the buyers in their possession of the property. In short, the buyers could not possibly be affected by the terms of the agreement.[488]

Likewise, a covenant not to convey or encumber the property was not a lien against its title, and the insurer did not owe a duty to the lender that held the covenant to insist that the debt be paid at the time the property was transferred.[489] The appointment of a building administrator to collect rent and cure building code violations was not a defect in or lien or encumbrance on title, although a lis pendens had been recorded for the action to appoint the administrator.[490] A setback requirement imposed by a municipality on a lot in a subdivision, created in connection with a zoning variance, was found to be an excluded zoning matter, and not an "easement" under Covered Risk 2. The zoning exclusion thus applied, with the court ruling:

> The 45-foot setback was created by a resolution of a board of adjustment and was indicated on a subdivision plan that was never recorded or required to be recorded. Because this claim or loss arises out of the exercise of the police power..., the exclusion applies.[491]

Because the subdivision plat on which the setback line had been drawn had never been recorded, the restriction could only have been discovered by examining the municipality's zoning records, which is outside the scope of documents affecting title which are commonly searched. No Covered Risk is invoked by the fact that the property has been designated as wetland, even if the wetland designation appears in a recorded instrument.[492] Such a designation is not an encumbrance on title.

On occasion, a court will accept as evidence the practice of a title examiner in determining whether an instrument or class of documents affects title or the marketability of title. In *Radovanov v. Land Title Co. of America*,[493] the question was whether or not pending building code violation lawsuits were part of the public records ordinarily examined by purchasers of real estate. An expert

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[488] *Klickman v. Title Guar. Co. of Lewis County*, 105 Wash.2d 526, 528-9, 716 P.2d 840 (1986).

[489] *Titan Management, L.P. v. First American Title Ins. Co.,* 2006 WL 3732995 (N.J.Super.A.D.) (unpublished).

[490] *Zev Cohen, LLC v. Fidelity Nat'l Title Ins. Co.*, 15 Misc.3d 798, 831 N.Y.S.2d 689 (N.Y.Sup. 2007).

[491] *Aldrich v. Hawrylo,* 656 A.2d 1304, 1309 (N.J.Super. 1995).

[492] *Manley v. Cost Control Marketing & Management, Inc.*, 583 A. 2d 442 (Pa.Super. 1990); *Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc*., 920 P.2d 759 (Ala. 1996); *Frimberger v. Anzellotti*, 25 Conn.App. 401, 594 A.2d 1029 (1991).

[493] 545 N.E. 2d 351 (Ill.App. 1989).

testified that one title insurer routinely made exception for such lawsuits. This testimony led the court to find that such suits render title unmarketable, and that "the lawsuit in question could and should have been discovered by a routine title search." The court thus used the evidence of what a particular title insurer searches or indexes as proof of the records by which a purchaser is bound. This puts the cart before the horse. Rather, the insurer's searching practice should be dictated by the classes of records that impart constructive notice under state law. The fact that an insurer collects, indexes, searches and/or reports additional records should not have any bearing on the scope of constructive notice.

The *Radovanov* approach was rejected in a similar case, *Somerset Savings Bank v. Chicago Title Ins. Co.*.[494] In *Somerset*, the insurer did not make exception for a statutory right to consent to building on former railroad land. The Supreme Court, reversing the appellate court, found that the statutory restriction was excluded as an exercise of the police power, because it concerned use of the property rather than title. The Supreme Court rejected the insured's argument that the matter would be covered if testimony showed that local title practice was to make an exception for the statutory restriction. The court stated:

> [E]ven if such a practice was accepted, the failure to include such a statute as an exclusion does not mean that coverage is available, where the express policy terms do not provide for coverage.[495]

Thus, the court properly refused to interpret the policy coverage as being dictated by an alleged local searching practice. *Somerset*, in turn, was relied on in *Kokinis v. First American Title Ins. Co.*,[496] which held that the mere fact that a municipal lien certificate produced at closing showed a sewer charge did not mean that the title insurance policy covers the cost of complying with a municipal code requirement to hook up to municipal sewer after the home's septic system failed. The court ruled that there was no defect in the title to the land.

A record does not impart constructive notice merely because it is housed in the recorder's office. Rather, an instrument or index imparts constructive notice to a purchaser of real estate only if a statute or court decision makes that declaration. For example, in *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*,[497] town ordinances were kept in minute books located in the register of deeds office. However, the buyer had no constructive notice of the ordinances, because North Carolina statutes do not provide that such minute books are records that impart notice.

In most states, certain records or indices contained in offices other than the recorder also impart constructive notice to purchasers of real estate. For example, in Washington, records concerning the existence of roads are kept in the county engineer's office. These records have been

[494] 420 Mass. 422, 649 N.E.2d 1123 (1995).

[495] 649 N.E.2d at 1128, n. 3.

[496] 68 Mass.App.Ct. 1106, 860 N.E.2d 978 (Table), 2007 WL 328795 (Mass.App.) (unpublished).

[497] 152 F.3d 275 (4th Cir. (N.C.) 1998).

found to impart constructive notice.[498] In Indiana, a 1905 act has been held to mean that orders establishing highways were to be made "of record" in the office of the county auditor, and were not required to be delivered to the county recorder in order to impart notice.[499] In Arizona, when a mechanic's lien was properly recorded, but no lis pendens was recorded within the time period for filing a foreclosure action, a purchaser was on notice of the lien claim and had a duty to search the plaintiff and defendant indices kept by the court clerk to determine if foreclosure had been commenced.[500] This is an exception to the general rule that indices of pending suits are not constructive notice to purchasers of real estate.

By contrast, the general rule is that a court record does not impart constructive notice to a buyer, unless a notice of the lawsuit, most commonly termed a lis pendens, has been recorded. A conveyance or encumbrance by order of a court does not impart notice unless a certified copy of the judgment or order is recorded in the real estate records. Thus, for example, an easement created by an Alabama circuit court judgment did not to impart constructive notice, because it was never placed in the real estate records.[501]

A few decisions have stretched the definition of matters affecting title to include non-title instruments found in the real estate records. One court found that a timber deed invoked a Covered Risk, saying:

> A title insurance company has an obligation to answer for any loss due to a defect in a title if it has not excepted that defect from its coverage. It cannot escape liability when it does not except a defect that is a matter of public record. It is generally assumed that a title defect that appears in the public records but that is not noted is covered by a title policy. … It has been said that the most common error in the title insurance industry is the negligent failure to note a title defect appearing in the public records.[502]

The court rejected the insurer's argument that the timber deed did not affect title, since it only conveyed the timber and not the land on which the trees grew. Similarly, an instrument recorded in the chain of title that appears to be strictly a zoning matter may be considered a "restriction" which affects title and must be shown. When a conditional use permit affected only the insured property was recorded in the real estate records, it was found to be a restriction rather than a zoning ordinance. The conditional use permit required that at least one occupant of each dwelling unit in the 11-unit apartment building be 62 years old or physically handicapped. The court ruled that the restriction was not made a zoning matter by the fact that the municipality created it pursuant to its

[498] *Ellingsen v. Franklin County*, 55 Wash.App. 532, 778 P.2d 1072 (1989).

[499] *Worldcom Network Services, Inc. v. Thompson*, 698 N.E.2d 1233 (Ind.App. 1998).

[500] *Collins v. Stockwell*, 137 Ariz. 416, 671 P.2d 394 (1983).

[501] *Upton v. Mississippi Valley Title Ins. Co.*, 469 So.2d 548 (Ala. 1985).

[502] *Parker v. Ward*, 614 So.2d 975, 977 (Ala. 1992).

municipal code:

> …[T]he CUP is not a law, ordinance or governmental regulation. The mere fact the San Diego Municipal Code authorizes the issuance of CUPs does not transform the instant CUP into a zoning ordinance. Accordingly, the exclusion is unavailing to Lawyers Title.[503]

The court was further influenced by the fact that the legislative history for the statute under scrutiny had been favored by the California Land Title Association because it would "enable persons dealing with real property to be apprised of the fact of any restrictions on the owner's ability to convey the real property which have been imposed by a municipality. This will be accomplished by requiring such restrictions to be recorded in a manner which will impart construction notice."[504] The court contrasted this with the fact that zoning ordinances of general application are not recorded in the chain of title, and do not affect specific named parcels of land.

In most cases, building code violation orders fall under Exclusion 1, except to the extent of a recorded notice of violation under Covered Risk 5.[505] However, a building code violation suit pending at the date of policy was held to render title unmarketable. The building code exclusion was found to be inconsistent with the affirmative coverage regarding marketability. This ambiguity was found to render the exclusion ambiguous and unenforceable.[506] See §9.8 regarding the coverage for marketability of title.

9.13 Forfeiture Of Property For Illegal Drug Activity

The general subject of forfeiture and its effect on the property owner has been thoroughly discussed elsewhere and is beyond the scope of this text.[507] However, a short review of the law may be helpful to the reader.

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[503] *1119 Delaware v. Continental Land Title Co.*, 16 Cal.App. 4th 992, 20 Cal.Rptr.2d 438, 445 (Cal.App. 2 Dist. 1993).

[504] 20 Cal.Rptr.2d at 445.

[505] *Chu v. Chicago Title Ins. Co.*, 89 App.Div.2d 574, 452 N.Y.S.2d 229 (1982) (certificate of occupancy); *Arapahoe Land Title, Inc. v. Contract Financing, Ltd.*, 28 Colo.App. 393, 472 P.2d 754 (1970) (code violation); *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951) (building permit refusal); 40 A.L.R.2d 1238.

[506] *Radovanov v. Land Title Co. of America,* 545 N.E. 2d 351 (Ill.App. 1989).

[507] See Brown, *Innocent Owners' Rights to Federally Forfeited Real Property*, in *Current Developments in Title Insurance 1992*, Practicing Law Institute N-384 1992, p. 207 (an excellent compilation of cases on the innocent owner defense); Sterling, *Responding to the Risks of Forfeiture (With Form)*, id. at p. 445 (thorough overview of the various laws, procedural questions, and defenses); Beasley, *Federal Forfeiture Under the Controlled Substance Act*, id. at p. 571; Sherris, *Drug Related Forfeitures: Land Title Issues*, 4 A.B.A. Prob. & Prop. 33 (1990); Borden, *Federal Drug Forfeitures and Third Parties*, 62 Okla. Bar J. 1573 (1991); Joyce D. Palomar, *Criminal and Civil Forfeitures of Real Property: Marketability of the Government's Title*, 62 Okla. Bar J. 1583 (1991); Note, *Civil Forfeiture--Protecting Innocent Donees under 21 U.S.C. §881(a) (6)*, 65 Temp. L.Rev. 245 (1992); Note, *Fear and Loathing and the Forfeiture Laws*, 75 Cornell L.Rev. 1151 (1990); Annotation, *Effect of Forfeiture Proceedings Under Uniform Controlled Substances Act or Similar Statute on Lien Against Property Subject to Forfeiture*, 1 A.L.R.5th 317; Annotation, *Real*

Under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the Act),[508] title to real estate vests in the federal government if the property was used for or facilitated the sale of illegal drugs, or was bought with money obtained by sale of illegal drugs.[509] There are other federal laws providing for forfeiture of property, but this Act is the one that has generated the most seizure activity. Prior to the 1978 amendment to the Act, only the drugs themselves were subject to forfeiture. Thus, the amendment shifted the focus of the forfeiture law from confiscation of the illegal material to seizure of the fruits of the illegal act. Many states have enacted similar laws for crimes punishable by state authorities.[510]

In *United States v. Colonial National Bank, N.A.*,[511] the Fourth Circuit Court of Appeals held that the United States is not required to record a lis pendens as part of a forfeiture. The effect of this ruling on the innocent owner defense is discussed below.

Forfeiture is an in rem action. Under the Act, the government files a civil suit in District Court. Since the real estate is the defendant in a forfeiture proceeding, the caption describes the land but does not name the record titleholder. Then a warrant is issued for the seizure, which is posted on the property and served on the occupant. Notice of the seizure is given to the owner or owners of the property. An interested party has ten days after service of the warrant to file a claim and establish standing to defend against the forfeiture, and must file an answer within 20 days after the filing of

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Property as Subject of Forfeiture Under Uniform Controlled Substances Act or Similar Statutes, 86 A.L.R.4th 995; Annotation, *Forfeiture of Homestead Based on Criminal Activity Conducted on Premises--State Cases*, 16 A.L.R.5th 855; Annotation, *Forfeitability of Property Held in Marital Estate under Uniform Controlled Substances Act or Similar Statute*, 84 A.L.R.4th 620; Palomar, *Title Insurance Law*, §6.02[4], pp. 6-18 -24; and Burke, *Law of Title Insurance*, §4.5.1, p. 4:47.

[508] This Act, found at 21 U. S. C. §881(a), is the primary federal law permitting forfeitures. It states in part as follows:

"1. The following shall be subject to forfeiture to the United States and no property right shall vest in them: … (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U. S. C. §§801-904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Other federal laws permitting forfeiture of property are the Money Laundering Act, 18 U.S.C. §981 et seq.; and the Racketeering and Corrupt Organizations Act, 18 U.S.C. §1963 et seq.

[509] Under certain state forfeiture laws, real estate has been found forfeitable if it can be considered a "container" of drugs. See *Smith v. Mount*, 45 Wash.App. 623, 726 P.2d 373 (1986); *Re Forfeiture of $5,264*, 432 Mich. 242, 439 N.W.2d 246 (1989); and other cases collected at 86 A.L.R.4th 995.

[510] See cases collected at 86 A.L.R.4th 995.

[511] 74 F.3d 486 (4th Cir. 1996).

the claim.[512] The time period may be extended.[513] If no claim and answer are filed, an order is entered stating that the property is forfeit. The government then typically sells the property. If a claim and answer are filed, the case proceeds to trial.

The Act does not require that the government put any notice of the forfeiture in the real estate records. Typically, however, the federal government records or files a lis pendens containing the legal description of the property. The lis pendens serves as the sole notice in the real estate records of the intended forfeiture. The problems caused by this method are discussed later in this section.

Forfeiture causes the rarest and most cataclysmic title defect: total failure of title. Worse, the forfeiture to the government relates back to the date on which the crime was committed.[514] There is no evidence in the public records before the filing of the lis pendens to suggest that property is subject to forfeiture. It is not realistic to expect the drug trafficker to answer truthfully on an affidavit. Further, the drug seller often is not the direct owner of the property. The insured may later claim not to have any knowledge of the illegal activity, which may trigger the insurer's duty to defend. Therefore, it is almost impossible for the title insurer to eliminate the risk of forfeiture.

The insurer's response to the forfeiture claim will differ markedly, depending on the insured's relationship to the alleged criminal activity. If the insured is the person charged with the criminal activity, several exclusions may apply. These include Exclusions 3(a) (created, suffered, assumed or agreed to), 3(b) (matters known to the insured and not in the public records), and 1(b) (governmental police power).

If the insured is related to or affiliated with the alleged drug trafficker, the insurer's inquiry will concern the insured's knowledge of and participation in the crime for which the property was seized. One or more of the three exclusions listed above may also apply to this class of insured.

The insured must disclose to the insurer any knowledge that the titleholder is a straw man for another. Notorious drug traffickers often have others take title to property for their benefit. In *Schultz Management v. The Title Guarantee Co./Ticor Title Ins. Co.*,[515] the insured granted a mortgage loan to Victor Ballestas two days before a state government notice of forfeiture was recorded. The forfeiture order was premised on a finding that Eduardo Orozco had a "substantial equitable interest" in the property. Orozco was present at the loan closing (apparently not attended by the title insurer),

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[512] Supplemental Rules for Admiralty Claims, Rule C(6).

[513] A wife was allowed to file a late claim, based on excusable neglect, when she was never served personally or by mail, she was estranged from the accused husband, and the government showed no prejudice as a result of the delay. *United States v. Borromeo*, 945 F.2d 750 (4th Cir. 1991). In *United States v. $175,918.00 in United States Currency*, 755 F.Supp. 630 (S.D.N.Y. 1991), an owner in prison was allowed to file a claim within 60 days, under Rule C(6), on a showing that he had been attempting to obtain counsel, and there was no prejudice to the government in the delay. In *United States v. One Urban Lot*, 978 F.2d 776 (1st Cir. 1992), however, a claim filed 37 days after personal service on the owner was found barred, because the owner had been served in the presence of her attorney, and she had had prior experience with property forfeitures.

[514] 21 U.S.C. §881(h) was added in 1984. That section states: "All right, title and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section."

[515] 551 N.Y.S.2d 527 (A.D. 1990).

where he answered questions, apparently posed by the lender, about the property. Orozco also was in possession, and there were mechanics' liens filed against the property in his name. The court found the forfeiture excluded from coverage, stating:

> The District Court found that appellant [the mortgagee] had at least constructive notice of the fraudulent transfer, was not a bona fide purchaser for value and set aside the mortgage pursuant to New York Debtor and Creditor Law Section 278. The Court of Appeals for the Second Circuit affirmed. (March 25, 1988, Docket Nos. 87-1473, 1474).
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> The property was sold at auction, and this action followed. The title insurance policy expressly excepts from coverage "rights of creditors under the Debtor and Creditor Law." Moreover the policy provides that the suppression of a material fact (here notice of the fraudulent transfer) voids the contract. Vaughan v. United States Title Guaranty & Indemnity Co., 137 A.D. 623 (1st Dept. 1910).[516]

The *Schultz Management* decision thus correctly places the burden on the insured to inform the insurer of facts that indicate a transfer in fraud of creditors, including the government.

When no exclusion applies, the insurer ordinarily accepts the insured's defense and considers what defenses may be asserted as to the forfeiture. There are several such defenses. First, the insured may have grounds to attack the forfeiture directly. The government must show that the property had a substantial connection to the drug crimes, or was purchased with income from drug sales. The use of a telephone on the property to strike a drug deal was found to create a sufficient connection to warrant forfeiture.[517] Similarly, one sale on the premises was found sufficient in *United States v. One Parcel of Property Located at 200 Pennsylvania Ave.*[518] If the drug money can be traced to the purchase of the property, the land may be forfeit even if it is several transactions removed from the criminal transaction.[519]

However, where no particular connection exists between the crime and the property, it is not forfeit.[520] Forfeiture was not allowed when the only connection of the property to the crime was that it was the land over which drugs were smuggled, and the smuggler had only a "quasi-easement" in the property.[521] Nor was the land forfeited when its only connection to the crime was that a single

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[516] Id. at 530.

[517] *United States v. One Parcel of Real Estate*, 903 F.2d 490 (7th Cir. 1990), reh.den. 1990 U.S.App. LEXIS 11947.

[518] 786 F.Supp. 400 (D.C.Del. 1992).

[519] For example, real estate was forfeit when it was bought with the proceeds of sale of another parcel which was bought with drug money. *United States v. One Parcel of Real Estate Located at 116 Villa Rella Drive*, 675 F.Supp. 645 (S.D.Fla. 1987).

[520] See, for example, *Rogers v. United States*, 511 F.Supp. 82 (D.C.Minn. 1980).

[521] *United States v. Two Tracts of Real Property with Buildings*, 998 F.2d 204 (4th Cir. 1993).

sale of drugs occurred on the premises.[522]

Another question concerns the size of the piece of land which may be seized. When the parcel was more than 100 acres, the government was allowed to take the entire parcel, even though much of it was not connected to any drug transaction, because it was a single tract of land.[523] A second case also found that the entire parcel could be seized even though only a portion was involved in the drug activity, on the basis that the government does not have to prove a "substantial connection" in civil forfeitures.[524] Also, when the drug trafficker owned two residences next to each other, both were forfeit even though only one was used for drug trade.[525]

Some cases involving state forfeiture laws have held that state homestead exemptions apply to forfeitures. Other states take the opposite view. These cases are collected at 16 A.L.R.5th 855.

The most litigated and commonly-claimed shield against a forfeiture, however, is the so-called "innocent owner" defense. If the insured is a bona fide purchaser for value from the drug trafficker, without actual knowledge of the drug activity, the "innocent owner" defense created by the § 881(a) (7) of the Act should apply. The text of the innocent owner exception is quoted earlier in the footnotes of this section. The innocent owner exception is not limited to bona fide purchasers for value. For example, it was held to apply to the woman companion of a drug dealer who purchased the property with money given to her by the drug dealer.[526] It is generally held to be a question of fact for the trial court as to whether or not a spouse had knowledge of the drug trade which would negate the innocent owner defense.[527] However, when a drug dealer was himself in

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[522] *United States v. All Those Certain Lots*, 657 F.Supp. 1062 (E.D.Va. 1987).

[523] *United States v. One 107.9 Acre Parcel of Land Located in Warren Township*, 898 F.2d 396 (3rd Cir. 1990).

[524] *United States v. Certain Real Property*, 943 F.2d 721 (7th Cir. 1991).

[525] *United States v. Certain Real Property Located at 116 and 188 Sandy Beach Road*, 711 F.Supp. 660 (D.C. Maine 1989).

[526] In *United States v. 92 Buena Vista Ave.*, 113 S.Ct. 1126 (1993), the U.S. Supreme Court stated: "The Court of Appeals correctly concluded that the protection afforded to innocent owners is not limited to bona fide purchasers. The text of the statute is the strongest support for this conclusion. The statute authorizes the forfeiture of moneys exchanged for a controlled substance, and 'all proceeds traceable to such an exchange,' with one unequivocal exception:

"[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.' 21 U. S. C. §881(a) (6).

"The term 'owner' is used three times and each time it is unqualified. Such language is sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers. Presumably that explains why the Government does not now challenge this aspect of the Court of Appeals' ruling.

"That the funds respondent used to purchase her home were a gift does not, therefore, disqualify respondent from claiming that she is an owner who had no knowledge of the alleged fact that those funds were "proceeds traceable" to illegal sales of controlled substances. Under the terms of the statute, her status would be precisely the same if, instead of having received a gift of $240,000 from Brenna, she had sold him a house for that price and used the proceeds to buy the property at issue."

[527] See *United States v. Lots 12, 13, 14 & 15, Keeton Heights Subdivision, Morgan County, Ky.*, 869 F.2d 942 (6th Cir. 1989).

title, and purchased the land with money traceable to drug transactions, his conveyance of the property to his wife for $1 was found to be in fraud of creditors and the land forfeit.[528]

The innocent owner defense may be applied in favor of a joint owner of the property. A tenant by the entireties may preserve the entire property from forfeiture if he or she is an innocent owner.[529] The United States Supreme Court has ruled that the innocent owner defense is not limited by the relation-back provision of the forfeiture law.[530] Thus, to be an innocent owner, one is not required to prove that he or she purchased the property before the commission of the crime. In *United States v. 92 Buena Vista Ave.*,[531] a woman was given $240,000 with which she purchased her home. She then lived there for more than a decade before the seizure warrant was issued. The warrant declared that there was probable cause to believe that the funds given to the woman were proceeds of illegal drug trafficking. The owner swore that she had no knowledge of the money's origins. The government argued that the relation-back provision of the law applied to the money given to the woman, and thus the property was effectively forfeit the instant she bought it with the forfeit money.[532] The Court disagreed:

> Because proceeds traceable to illegal drug transactions are a species of "property described in subsection (a)," the Government argues that this provision has the effect of preventing such proceeds from becoming the property of anyone other than the United States. The argument fails.
>
> Although proceeds subject to §881(h) are "described" in the first part of subsection (a)(6), the last clause of that subsection exempts certain proceeds -- proceeds owned by one unaware of their criminal source -- from forfeiture. As the Senate Report on the 1984 amendment correctly observed, the amendment applies only to "property which is subject to civil forfeiture under section 881(a)."[footnote omitted]
>
> Under §881(a)(6), the property of one who can satisfy the innocent owner defense is not subject to civil forfeiture. Because the success of any defense available under §881(a) will necessarily determine whether §881(h) applies, §881(a)(6) must allow an assertion of the defense *before* §881(h) applies. [footnote omitted]
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> *   *   *   *
>
> Our decision denies the Government no benefits of the relation back doctrine. The

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[528] *United States v. One Parcel of Real Property*, 648 F.Supp. 436 (D.C.Mass. 1986).

[529] See cases collected in Burke, *Law of Title Insurance*, at §4.5.1.

[530] The relation-back doctrine was added to the Act in 1984, by the addition of 21 U.S.C. §881(h), which states: "All right, title and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section."

[531] 113 S.Ct. 1126 (1993).

[532] In the *Buena Vista* case, the government argued that the provision or an equivalent principle of common law should apply, although the property was purchased before the amendment took effect.

> Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. And it cannot profit from the statutory version of that doctrine in §881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense under §881(a)(6).[533]

Thus, a party asserting the innocent owner defense is not required to establish the priority in time of his or her interest as compared to the date of the commission of the crime.

The innocent owner defense grants protection to a purchaser without actual knowledge of the forfeiture. Constructive notice is not sufficient to negate the defense.

> The government's contention that the innocent owner defense is not available to a claimant having constructive notice of alleged illegal activity and possible forfeiture claims is erroneous. ... "We agree with ... [the claimant] that the application of the statutory 'innocent owner' defense turns on the claimant's actual knowledge, not constructive knowledge."[534]

The recording of the lis pendens by the government does not provide actual knowledge, therefore, except in the exceedingly rare case in which a purchaser would actually go to the public records and find that notice.

In any event, there is a real question as to the notice given by the lis pendens. Where the official real estate index is the grantor-grantee index, the lis pendens may not be sufficient notice of the government's claim of ownership. The lis pendens will be posted with the United States as "grantor" and the land as "grantee." Neither name is in the chain of title. A search forward from the last grantee will skip over the posting for the lis pendens, because the grantee of record appears nowhere on the lis pendens. As one commentator has opined,

> Unless the legislative history of §881(a)(7) shows that Congress intended to upset the customary methods of title search used in this country, there is no evidence that the innocent owner exception should be denied an owner without actual knowledge of the pending forfeiture.[footnote omitted] Constructive knowledge through records indexed only through the United States and not found in a tract index should be insufficient to deny an innocent owner defense.[535]

This issue was resolved as the commentator suggested in *United States v. One Parcel of Real Estate*

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[533] 113 S.Ct. 1126 (1993).

[534] *United States v. One Parcel of Real Estate Located on Fellows Tracts C, D, E, and F of Pine Island Estates*, 715 F.Supp. 360 (S.D.Fla. 1989) [quoting from *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars*, 762 F.2d 895, 906 and n. 24 (11th Cir. 1985)].

[535] Burke, *Law of Title Insurance*, §4.5.1, p. 4:56.

Located on Fellows Tract C, D, E, and F of Pine Island Estates,[536] in which the court found:

> Because Marion County utilizes a grantor-grantee system of indexing title to realty, the Clerk recorded the notice of lis pendens only under the letter "U" of the index for "United States" since no other party was listed. Since a tract index system is not used, an examination of the available grantor-grantee index would not disclose the prior recording of the government's notice of lis pendens.
>
> *　　*　　*　　*
>
> The claimants contend that the government's notice of lis pendens was a "wild deed" outside of the scope of a reasonable grantor-grantee search. Given the inherent deficiencies in such a recordation system, the claimants assert that a reasonable title searcher should be able to rely on researching the name indexes under grantor and grantee and no more. The court doubts that the claimants are correct in maintaining that a diligent title search would not have uncovered the government's notice of lis pendens. A reasonably prudent title searcher should certainly check for any adverse interest caused by liens filed by the local, state, or federal government. Nonetheless, because actual notice is the standard, the court does not reach this issue of constructive notice in this case.
>
> Even if constructive notice is the standard, the Cavanaughs still prevail as innocent owners. [The court detailed the government's failure to publish or post notices before the transfer.] The Cavanaughs actually and reasonably relied upon their absence of actual notice of any forfeiture claim, and upon the Flanagan title search in purchasing their property and building the home. In doing so they acted as would any innocent owner. The need for certainty of land title is critical to the orderly transfer of property. Surely Congress did not intend to disrupt state regulation of land transfers by enacting the forfeiture provisions in section 881 so as to place all land titles in doubt because of the "relation back" effect of that statute.[537]

See §9.12 for a discussion of public records and the chain of title.

A lender is not an "innocent owner" of the property. Thus, it may not directly assert the innocent owner defense unless the lender has become the titleholder through foreclosure.[538] However, the "innocent lender" has been held to have lien rights on the property. Some cases have found innocent lien holders entitled to their principal and interest accrued up to the date of seizure.[539]

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[536] 715 F.Supp. 360 (S.D.Fla. 1989).

[537] Id. at 361, 362-3.

[538] An excellent survey of cases involving lienholders' rights after forfeiture is found in Brown, *Innocent Owners' Rights to Federally Forfeited Real Property*, in *Current Developments in Title Insurance 1992*, Practicing Law Institute N-384 1992, p. 207. Mr. Brown is a Trial Attorney, Asset Forfeiture Office, U.S. Department of Justice.

[539] *United States v. One Piece of Real Property Described in Part as: 1314 Whiterock*, 571 F.Supp. 723 (W.D.Tex. 1983); *United States v. One Condominium Apartment*, 636 F.Supp. 457 (S.D.Fla. 1986) (holding disapproved of in *In re Metmor Financial, Inc.*, 819 F.2d 446 (4th Cir. 1987).

In other cases, however, the innocent lender has been found entitled to interest through the date of sale, plus reasonable attorney's fees.[540] A wide range of cases involving lenders is collected at 1 A.L.R.5th 317.

In *United States v. Colonial National Bank, N.A.*,[541] a forfeiture was completed without the recording of a lis pendens. Colonial National Bank recorded its deed of trust three months after the judgment of forfeiture was entered. The bank argued that the United States was obligated by 28 U.S.C. §1964 to record a lis pendens and, because it did not, the bank was an innocent owner.[542] The court avoided the issue of §1964 because, under the *92 Buena Vista Avenue* case,[543] title had vested in the United States before the mortgage was recorded. The judgment of forfeiture was "as valid and effectual, as against all the world, as a recorded deed."[544] Therefore,

> the judgment of forfeiture being prior in time must prevail over the bank, whose deed was not recorded until some three months later on April 29th. So the failure of the government to file a lis pendens has no effect on this case; the government was the winner in all events.[545]

The court conceded in a footnote that the decision was "bound to have a potential adverse effect on land titles," but insisted that it was up to Congress to "change this rule."[546]

The *Colonial* decision does not directly address the question of whether or not 28 U.S.C. §1964 requires the recording of a lis pendens. Nor does it answer whether or not the failure to record a lis pendens allows a buyer to assert the innocent owner defense if the purchase takes place before forfeiture. However, the Fourth Circuit certainly did nothing to encourage the government to give notice of an intended forfeiture. Perhaps that is why the court's characterization of the government as "winner" is distasteful--the decision creates an uneven playing field between the contestants.

Title insurers are sometimes asked to treat a forfeiture judgment as erasing real estate tax liens, most often current year taxes which are liens by statute but not yet on the tax roll or delinquent tax roll. In *Town of Sanford v. United States*,[547] the United States conducted its forfeiture action

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[540] *United States v. Real Property Constituting Approximately Fifty (50) Acres*, 703 F.Supp. 1306 (E.D.Tenn. 1988), later proceeding 1989 U.S.Dist. LEXIS 850; *United States v. Real Property Known as 708-810 West 9th St., Erie, Pa*., 715 F.Supp. 1323 (W.D.Pa. 1989).

[541] 74 F.3d 486 (4th Cir. 1996).

[542] That section provides that, where state law requires notice of an action affecting real estate to be recorded in a particular manner, notice of an action pending in a U.S. district court is to be recorded so as to give constructive notice.

[543] *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 126 S.Ct. 1126, 122 L.Ed.2d 469 (1993).

[544] 74 F.3d at 488. quoting *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 627, 109 S.Ct. 2646, 2653, 105 L.Ed.2d 528 (1989).

[545] 74 F.3d at 488.

[546] Id.

[547] 140 F.3d 20 (1st Cir. (Me.) 1998), aff'g 961 F.Supp. 16 (D.Me. 1997).

without giving notice to the Town because it was unaware of the tax lien which had already attached. The Town was found to qualify under the innocent owner defense, and thus entitled to notice of the proceeding. Because of the case, the Department of Justice "resolved to send written notice of all future real estate forfeiture actions to the tax collector in each Maine municipality in which the property lies." In the *Town of Sanford* case, the Town was not entitled to payment of the taxes because it had already discharged the lien at the time the property was sold by the United States. However, the case establishes that any similar municipality is entitled to the innocent owner defense.

Thus, given its drastic effect on title to the insured property, the secret nature of the problem, the strict time deadlines imposed, and the burgeoning volume of cases, forfeiture of property is a very serious hazard to the title insurer and its insureds.

9.14 Covered Risks Of Specialty Policies

In recent years, ALTA has adopted several title insurance policies in addition to its all-purpose owner's and loan policies. One purpose served by the owner's policies is to provide a plain-language policy that satisfies insurance regulations limiting the number of words in a sentence or syllables per word, sometimes known as the Flesch or Flesch-Kincaid readability test. ALTA has adopted two such policies, the Residential policy (§9.14.1) and the Homeowner's policy (§9.14.2). The second purpose of these policies has been to offer increased coverage, typically at a higher premium, as an alternative to the basic or standard-coverage policy.

The industry and its customers also wanted a short form loan policy that could be issued at closing or shortly thereafter, addressing the perennial complaint of lenders that the last document needed to complete their loan files is the title insurance policy issued some time after closing. The ALTA adopted the Short Form Residential Loan Policy in response to that demand, as discussed at §9.14.3. ALTA also adopted a special policy to be used only for subordinate liens, the ALTA Residential Limited Coverage Junior Loan Policy, discussed at §9.14.4.

Finally, for many years, the ALTA has provided a special policy form for use only when the United States is the insured. The ALTA United States of America Policy is discussed at §9.14.5. ALTA has adopted a Limited Pre-Foreclosure Policy, which protects a lender seeking to foreclose against certain liens and other matters not described in the policy, as discussed at §9.14.6. Finally, the ALTA Expanded Coverage Residential Loan Policy is discussed at §9.14.7.

This section discusses the special Covered Risks found in each of the above policies.

9.14.1 ALTA Residential Policy

The ALTA Residential policy was drafted for use in insuring owners on residential property having no more than four dwelling units.[548] It is not intended for use on vacant land or improved non-residential or multi-unit property. The coverages provided by the Residential policy are similar to those found in the California Land Title Association endorsement form 126.1.

The Residential policy states the various classes of covered defects and liens with much more detail than does the 1992 ALTA Owner's policy. The Residential policy also gives certain coverages

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[548] The Owner's Information Sheet on the cover of the policy states: "Your Title Insurance Policy is a legal contract between you and Blank Title Insurance Company. It applies only to a one-to-four family residential lot or condominium unit. If your land is not either of these, contact us immediately."

not found in the 1992 or 2006 policies, at Covered Title Risks 12 and 13, which provide the following:

> This Policy covers the following title risks, if they affect your title on the Policy Date.
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> *　　*　　*
>
> 12. You are forced to remove your existing structure -- other than a boundary wall or fence -- because:
>   . it extends on to adjoining land or on to any easement
>   . it violates a restriction shown in Schedule B
>   . it violates an existing zoning law
> 13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.

The two central coverages in these provisions are (1) protection against removal of a structure resulting from one of the three stated causes, and (2) loss of the right to use the land as a single-family residence for either of the two stated reasons.

Title Risk 12 covers loss caused by forced removal of "structures." See § 3.2.3.1.7 for a complete discussion of claim issues about forced removal coverages. Title Risk 13 protects against a restriction or zoning ordinance prohibiting the use of the property for a single-family residence. The entire subject of zoning has traditionally been completely excluded because it affects use, not title. See §11.1.2 regarding the zoning exclusion. The ALTA Homeowner's policy contains the same zoning coverage (Covered Risk 20), which is discussed at §9.14.2. The Residential policy is to be used only when the property is improved with a dwelling having not more than four units. It is not to be issued on vacant land.[549] For the coverage to be triggered, then, the zoning code would have to prohibit the use of the existing structure for a single-family residence.

The Residential policy says that it may be used on property having up to four dwelling units. Title Risk 13 does not assure that the property may be used for more than a single-family residence, however. Thus, the policy does not insure against a violation of a zoning ordinance or restriction caused by use of the property for more than one unit.

Covered Title Risk 14 protects against "Other defects, liens, or encumbrances" which "affect your title," subject to the conditions, exclusions and exceptions in the policy. The Residential policy, unlike other policy forms adopted before or since, lists separate Covered Title Risks for each type of covered defect, lien or encumbrance. This coverage is thus a catch-all provision, intended to encompass covered defects not listed in the thirteen prior Covered Title Risks. Title Risk 14 is thus no broader than Insuring Provision 2 of the 1992 policy, which protects against "[a]ny defect in or lien or encumbrance on the title... ." The 2006 policies also recite risks by type, but do so only as an

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[549] "Your Title Insurance Policy is a legal contract between you and Blank Title Insurance Company. It applies only to a one-to-four family residential lot or condominium unit. If your land is not either of these, contact us immediately." The insurer should be permitted to reform the policy if it issues the residential policy on land other than that specified. This would be particularly true when the proposed insured or its agent told the insurer that the property qualified for a Residential policy. See §11.3.1 regarding misrepresentation of material facts in the application for insurance.

itemization of some risks that fall under Covered Risk 2, for "[a]ny defect in or lien or encumbrance on Title."

The use of the word "other" in Covered Title Risk 14 was found by a New Jersey court to provide protection against the forced removal of a dock in a riparian zone between a bulkhead line and a pierhead line.[550] The court strained to find coverage, invoking the reasonable expectations doctrine to do so:

> This provision can have substantive and relevant meaning only if it is construed to refer to claims, other than those expressly articulated in the list of covered risks, that assert an interest by others in, or a limitation of an owner's rights to, the subject property. … The forced removal of the floating dock (which had been constructed before the policy was issued and was shown on the survey that Defendant insured) would have resulted from a finding in the Chancery Division that the dock was located on "adjoining land" to which Plaintiff would have had no right… Accordingly, ... I think that the "other defects" section of the covered risk provisions of the policy could be interpreted as insuring Plaintiff against the forced removal of the floating dock so long as Plaintiff had a proper legal claim to use of the "adjoining land." Bayside's claim directly attacked Plaintiffs' legal right to seek access from the State to the portion of the Inlet that abutted the Property, a claim that most certainly "affected" Plaintiffs' title to the Property because Plaintiffs' right derived directly and exclusively from, and was completely dependent upon, the validity and prerequisites associated with that title. I believe that this risk is well within the "reasonable expectations of the average insured" and is generically of the same nature as those delineated in the enumerated "covered risks" of the policy.

9.14.2 Homeowner's Policy

ALTA adopted the Homeowner's Policy of Title Insurance in 1998. The policy was revised in 2003, 2008, 2010 and 2013.[551] The policy is found at Appendix B. In some respects, the Homeowner's Policy has its roots in the Residential policy. However, it is more directly derived from the First American Eagle(TM) Protection Owner's Policy, introduced in 1996. The Eagle(TM) policy incorporated a number of coverages previously provided only by endorsement, and added a few that had never previously been offered. Other insurers adopted owner's policies providing coverages similar to, but not identical with, the Eagle(TM) policy. The result was that, for the first time in some years, most insurers offered policies with different coverages, on forms not promulgated by ALTA.[552]

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[550] *Florio v. Lawyers Title Ins. Corp.*, 2006 WL 1520175 (N.J.Super.A.D.) (unpublished).

[551] The Homeowner's Policy differs from the 1992 ALTA owner's policy in so many respects that all of its terms are discussed in this section, rather than throughout this treatise. The reader is directed to this section from the main topics on which the two policies vary.

[552] See the discussion of these "homegrown" policies, and the subsequent ALTA actions, in LaBelle, *Enhanced Protections for Residential Homeowners: Introduction to the New ALTA Homeowner's Policy of Title Insurance for a*

This interesting experiment in originality netted mixed results for insureds and the industry. In June, 1998, the California Land Title Association adopted its Homeowner's Policy of Title Insurance. The CLTA policy contained 29 coverages. A few months later, the ALTA adopted the CLTA policy, except that it made Covered Risk 29 optional.[553] One commentator suggested that companies might print the policy without Covered Risk 29, which mimics the CLTA 116 endorsement (commonly known as the location endorsement).[554] Since then, however, the Homeowner's Policy has ballooned to 32 covered risks. The Residential policy was not withdrawn when ALTA promulgated the Homeowner's policy.[555]

As with the Residential policy, ALTA intends that the Homeowner's Policy be used only for one-to-four family residences. The Homeowner's Policy Owner's Information Sheet says the policy

> applies only to a one-to-four family residence and only if each insured named in Schedule A is a Natural Person. If the Land described in Schedule A of the Policy is not an improved residential lot on which there is located a one-to-four family residence, or if each insured named in Schedule A is not a Natural Person, contact Us immediately.

Implicit in this statement is the conclusion that the insurer will replace the Homeowner's Policy with another form, such as the 2006 policy, if contacted by the insured per this paragraph.

The 2010 version of the ALTA Homeowner's policy contains 32 Covered Risks. Like the Residential policy, the Homeowner's policy identifies specific types of covered title risks, rather than listing classes of risks such as defects, liens and encumbrances. This section discusses the Covered Risks in numerical sequence. Paragraph 9 of the Conditions says that the Policy Amount automatically increases by 10% each year for the first five years, on the policy anniversary date. See §3.2.3.1 for a discussion of the resolution of a claim invoking the special coverages of these policies, including forced removal, zoning and existing violations of use regulations such as the building code.

The first eleven Covered Risks, other than 5 and 7, are an itemization of traditional title insurance risks. Covered Risk 1 indemnifies if "Someone else owns an interest in Your Title," which is essentially identical to Covered Risk 1 of the 2006 and earlier policies. Covered Risk 2 protects

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One-to-Four Family Residence (10-17-98), in Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders, Practicing Law Institute N-448 1999, p. 151.

[553] The policy was adopted on October 17th, 1998.

[554] James L. Gosdin, *The New Homeowners Policy of Title Insurance*, Virginia Land Title Association Examiner, Spring, 1999, p. 15. This article contains an excellent analysis of the new policy. Mr. Gosdin serves on the ALTA Forms Committee, and his article reflects his first-hand experience. See also LaBelle, *Enhanced Protections for Residential Homeowners: Introduction to the New ALTA Homeowner's Policy of Title Insurance for a One-to-Four Family Residence (10-17-98)*, in Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders, Practicing Law Institute N-448 1999, p. 151.

[555] ALTA withdrew the 1970 and 1992 policies when it adopted later versions, but took no similar action as to the Residential policy when the Homeowner's Policy was approved.

against "rights affecting Your Title arising out of leases, contracts, or options," which is one of the risks that falls under Covered Risk 2 of the 2006 and earlier policies. Covered Risk 3, similarly, specifically covers claims by others to have rights in the property due to "forgery or impersonation." See §9.2 for a complete discussion of this covered risk. Covered Risk 4 protects against easements.[556] See §9.6. Covered Risk 6 protects the insured if "Your Title is defective." The 2010 version of Covered Risk 6 gives six illustrations of title defects, which correspond with the illustrations provided in the 2006 policy forms. One example given is that the policy indemnifies the insured if "[a] document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded." One decision found that the 1992 policy does not assure that the insured's deed is recorded, as long as no one is challenging the insured's ownership of the land.[557] The result is the same under the Homeowner's Policy, since the coverage is invoked only if the insured's title "is invalid" due to lack of recording, delivery, etc. Covered Risks 8, 9 and 10 protect against liens, encumbrances and "rights affecting Your Title because of fraud, duress, incompetency or incapacity," all of which also fall under Covered Risk 2 of the 2006 and earlier policy forms.

Covered Risk 5 indemnifies the insured if "Someone else has a right to limit Your use of the Land."[558] This covered risk appears to be intended to protect against an adverse claim of title that would dispossess the insured from the quiet enjoyment of the land, similar to the covenant of warranty that is commonly made by a seller. However, the phrase "use of the Land" does not tie explicitly to matters affecting title. Thus, the term "use" is limited by the exclusions that remove coverage for most governmental regulation of the property's use.

Covered Risk 7 indemnifies the insured as to "[a]ny of Covered Risks 1 through 6 occurring after the Policy Date." James L. Gosdin, the long-time chair of the ALTA Forms Committee, summarized this post-policy coverage as follows:

> Covered Risk 7 insures against loss because of "Any of Covered Risks 1 through 6 occurring after the Policy Date." Those matters include adverse ownership, leases, contracts, options, rights affecting title arising out of forgery or impersonation, easements, defects in title, and rights to limit use of the land. For example, this covered Risk 7 could cover post-policy forgery, adverse possession, and prescription claims. It would not insure against post-policy eminent domain (because of the condemnation exclusion) or post-policy conveyances or contracts by the insured

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[556] In *Rouse v. North American Title Ins. Co.*, Northern District of Georgia federal court, Atlanta Division, Civil Action No. 1:17-CV-04709-LMM, June 29, 2018 (no Westlaw citation available), the court held that Covered Risk 4 of the Homeowner's policy could be and was negated by an exception for "[c]ovenants, conditions, restriction, easements and/or servitudes."

[557] See *Alford v. Chicago Title Ins. Co.*, 3 S.W.3d 164 (Tex.App.-Eastland), discussed in §9.5.

[558] In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court found that only Covered Risk 18 was invoked, and not Covered Risk 5, when the neighbor sued the insureds to force the removal of the insureds' encroaching garage. The court said that the insureds had full use of the land they purchased. "What they no longer have is full use of the southern encroachment, which, again, is not their property."

> (because of the "acts of the insured" exclusion). It would not insure against post-policy liens, because Covered Risk 8, which insures against liens on the title, is not a subject of post-policy coverage.[559]

When someone forges a deed of the insured's property after the policy date, there is no protection afforded the insured under the 2006 and other policy forms. Widespread deed forgery had been publicized as a significant problem in certain large cities, including Los Angeles. The attention given to the victims of those schemes may have contributed to the development of this coverage. Mr. Gosdin notes a common issue concerning this covered risk—the assertion by the insured that it provides protection against adverse possession or a prescriptive easement that ripens after the policy date. If, for example, a person had used a driveway on the insured land for several years before the policy date, which use ripens into a prescriptive easement by continued use after the policy date, the combined pre- and post-policy use would apparently invoke Covered Risk 4 ("Someone else has an easement on the Land") as augmented by Covered Risk 7. Exclusion 4.d, for post-policy matters, would not apply. However, Exclusion 4.a, for matters "created, allowed or agreed to" by the insured may still apply. Further, the covered risk may be negated by a possession, survey or other exception.

Covered Risk 11 provides an access protection that is broader than that found in the 2006 or earlier policies. The covered risk protects the insured in the event he or she does "not have both actual vehicular and pedestrian access to and from the land, based upon a legal right." As Mr. Gosdin explains,

> This insures that 1) the insured has actual (not just legal) right of access to the land, 2) the access is both vehicular and pedestrian, and 3) the actual access is based on a legal right (*e.g.*, located on an easement). It does not insure that the access is over a public right of way. For example, the access can be by a private easement. This provision insures "actual" access, but does not insure that the access is paved or publicly maintained.[560]

Covered Risk 12 indemnifies an insured who is "forced to correct or remove an existing violation of any covenant, condition, or restriction affecting the land," including (but apparently not limited to) those excepted on Schedule B. The covered risk applies to enforcement of a covenant, condition or restriction on the land, which includes building and use restrictions, and the term "condition" is not meant to refer to physical conditions on the land.[561] The covered risk explicitly

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[559] James L. Gosdin, *The New Homeowners Policy of Title Insurance,* Virginia Land Title Association Examiner, Spring, 1999, p. 15.

[560] Id.

[561] *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished) held that a municipality's claimed interference with the insured's attempt to lay utility lines was not a condition or an existing violation, and did not invoke this covered risk. In *First American Title Ins. Co. v. Silbiger*, 2016 WL 5394112 (N.D.Ga.) (unpublished), the court held that this coverage paid for the cost to repair an underground storm water retention vault that caved in due to heavy rain. The court held that an indemnity agreement about maintaining the vault was a "covenant" and the municipality's letter informing the insured that it had to repair the vault was a "requirement" that he "correct" the

states that there is no coverage for a violation that relates to "any obligation to perform maintenance or repair on the Land, or environmental protection of any kind, including hazardous or toxic conditions or substances, unless there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists." The handling of claims under this Covered Risk is discussed at §3.2.3.1.10.

Covered Risk 13 indemnifies the insured if "title is lost or taken because of a violation of any covenant, condition, or restriction, which occurred before you acquired your title." This covered risk also applies even if the covenant is excepted on Schedule B. This is a protection against a reverter or right of reentry due to the violation of a restriction. The event that triggers the reverter or right of reentry must have occurred before the insured took title, rather than by the transfer to the insured. The insurer will most commonly address a claim under this covered risk by defending against the asserted reverter. A reverter of title is rare and not favored in the law. A subsequent owner has the additional protection of being a bona fide purchaser for value without notice. Also, most states have laws limiting the enforcement of reversionary clauses, and statutes of limitation that prevent their enforcement, or cause them to be extinguished altogether, after a designated period of time.

Covered Risk 14 indemnifies for loss caused by the violation or enforcement of a building code, zoning, land use and similar regulation of the use of the land, if there is a notice in the public records as of the date of policy "claiming a violation exists or declaring the intention to enforce the law or regulation." This covered risk is effectively the same as Covered Risk 5 of the 2006 owner's policy, which is discussed at §9.9.2. The handling of claims under this Covered Risk is discussed at §3.2.3.1.10.

Similarly, Covered Risk 15 protects against an enforcement action based on the exercise of governmental police power if there is a notice in the public records "of the enforcement action or intention to bring an enforcement action." This coverage is the same as Covered Risk 6 of the 2006 owner's policy, discussed at §9.9.2. The handling of claims under this Covered Risk is discussed at §3.2.3.1.10.

Covered Risk 16 protects the insured if an "existing violation" of a subdivision law or regulation (a) prevents the insured from obtaining a building permit, (b) causes a buyer, lender or tenant to reject a contract, loan or lease, or (c) the insured is "required to correct or remove the violation" of the subdivision law. This covered risk is subject to a deductible and a Maximum Dollar Amount of Liability. This covered risk is not invoked if a building permit is denied the insured for any reason other than an existing violation of a subdivision law.[562] This coverage would only be invoked by an illegal land division prior to the conveyance to the insured. The covered risk is not invoked if the conveyance to the insured created the subdivision law violation, because that would not be an existing violation on date of policy. The covered risk also is invoked only if one of the three listed events occurs. The insurer will typically remedy the subdivision law violation if possible,

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"existing violation" of the "covenant." *Silbiger* is discussed further at §3.2.3.1.10.

[562] In *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), the insured was denied a building permit, but alleged that it was due to collusion between the town board members and others. The court held that this covered risk was not invoked, because the insured "has not demonstrated that his inability to obtain the building permit at issue was due to 'an existing violation a subdivision law or regulation affecting the land.'"

such as by filing a subdivision map with appropriate approvals. If a cure is not feasible or possible, the insurer will typically require the insured to establish a proof of loss, and then pay up to the maximum liability. See the discussion at §3.2.3.1.7 of how to calculate the loss using the deductible and Maximum Dollar Amount of Liability amounts.

Covered Risk 17 protects against loss of title due to condemnation, if there was a notice of the exercise in the public records on date of policy. This coverage is the same as Covered Risk 7 of the 2006 owner's policy, discussed at §9.9.2. The handling of claims under this Covered Risk is discussed at §3.2.3.1.10.

Covered Risks 18, 19 and 21 concern the forced removal or remedy of existing structures and are limited by deductibles and Maximum Dollar Amounts of Liability. Covered Risk 18 protects against the forced removal of "existing structures, or any part of them—other than boundary walls or fences—because any portion was built without obtaining a building permit" from the correct government office.[563] Covered Risk 19 protects the insured if he or she is forced to "remove or remedy" existing structures because they violate an existing zoning law or regulation. This coverage is similar to Residential policy Covered Title Risk 12. The phrase "or remedy" may broaden coverage somewhat. Covered Risk 21 protects against enforced removal of existing structures because they encroach onto a neighbor's land.[564] Covered Risk 21 says that the Deductible Amount and Maximum Dollar Limit of Liability apply to encroaching boundary walls or fences. The manner in which a claim is resolved concerning these forced removal coverages is discussed at §3.2.3.1.7.

Covered Risk 20 protects the insured if "[y]ou cannot use the land because use as a single-family residence violates an existing zoning law or zoning regulation." This coverage is essentially the same as the zoning portion of the Residential policy Covered Title Risk 13. This covered risk will rarely be invoked in areas that have adopted Euclidean zoning, in which nearly all classes of property permit use as a single-family residence.[565] Also, most zoning ordinances permit the grandfathering of an existing building even if it violates the zoning classification, and the Homeowner's Policy is intended to be issued on property that already has a residence located on it. However, a case construing the very similar coverage of the Residential policy found the covered risk invoked by an ordinance limiting the owner to the installation of a mobile home, because that was the type of residence that existed on the property when she bought. The court ruled that "the term 'single-family residence' is patently ambiguous and must be construed against the drafter so as not to include a mobile home," thus invoking coverage.[566] See §3.2.3.1.8 for a discussion of the

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[563] See *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), involving an encroaching garage, in which the insurer paid the insured the Maximum Dollar Amounts of Liability of $5,000 and waived the deductible amount of $2,500, which the court said was the company's full indemnity duty. The court found, however, that Covered Risk 18 was not actually invoked, because the trial court in the neighbor lawsuit had not ordered that the garage be removed.

[564] In In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court found that only Covered Risk 18 was invoked, and not Covered Risk 21, when the neighbor sued the insureds to force the removal of the insureds' encroaching garage.

[565] See Patricia E. Salkin, *American Law of Zoning (5th Ed.)*, Chapter 1, *Introduction: Public Control of Private Land* (West).

manner in which a claim is resolved concerning this coverage.

Covered Risk 22 provides the only coverage against encroachments of a neighbor's existing structures onto the insured land. That coverage is limited to a marketability claim: "[s]omeone else has a legal right to, and does, refuse to perform a contract to purchase the land, lease it, or make a mortgage loan on it because Your neighbor's existing structures encroach onto the land." This marketability coverage is limited. The insured must establish that a buyer, lender or tenant has rejected title because of the encroachment. The insurer's willingness to insure a buyer, lender or tenant against the encroaching structure may cause title to be acceptable to the buyer, lender or tenant, negating any loss. See §3.2.3.1.6 regarding measurement of loss on marketability claims. In any event, Covered Risk 22 does not obligate the insurer to *remove* the neighbor's existing structure. Thus, there is no coverage as to a neighbor's encroaching structures to mirror the covered risks concerning the insured's structures that encroach onto neighboring land. This is not an oversight, but an acknowledgment that the cost of ejecting a neighbor's structures from the insured's land or paying diminution in value due to adverse possession of the insured land is a far different and greater risk than the cost of cutting off and removing a structure belonging to the insured that is trespassing on neighboring land. The policy does not insure the title to structures that encroach on a neighbor's land.

Covered Risk 23 protects against the forced removal of "existing structures which encroach onto an Easement or over a building set-back line, even if the easement or building set-back line is excepted in Schedule B." There is no Maximum Dollar Amount of Liability for this covered risk. Otherwise, however, the method for calculating the loss payable under this covered risk is the same as for the other forced-removal risks. This covered risk may be negated by a possession, survey or other exception.

Covered Risk 24 indemnifies the insured in the event that the insured's structures are "damaged because of the exercise of a right to maintain or use any Easement affecting the land, even if the Easement is excepted in Schedule B." Again, there is no Maximum Dollar Amount of Liability for this covered risk. However, the nature of this risk is different from the encroaching structure covered risks. The loss is measured as the value of repairing the structures that are damaged by the easement holder's exercise of its rights.[567] An easement holder does not typically have the right to tear down the servient owner's structures in the use of the easement. Also, most easements provide for restoration and repair of damage caused by the easement holder. If such a repair provision is not explicit in the easement grant, it is often implied by law. Thus, the insurer will typically demand that the easement holder perform the repair of the structure. Only if the easement holder fails to perform that duty does the insurer have to step in and make the repairs.

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[566] *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C.) (unpublished). The *Whitlock* analysis was adopted wholesale in *Lyons v. Fidelity Nat'l Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (S.C.App. 2015).

[567] In *Rouse v. North American Title Ins. Co.*, Northern District of Georgia federal court, Atlanta Division, Civil Action No. 1:17-CV-04709-LMM, June 29, 2018 (no Westlaw citation available), the court held that the mere existence of a sewer pipe on the insured parcel did not invoke Covered Risk 24 of the ALTA Homeowner's policy. The insured argued that the sewer pipe reduced the value of his property but did not allege any loss caused by the exercise of the easement right. The court said that, even if his assertion about decreased value was true, that type of loss was not payable under this covered risk. Further, the policy contained an exception for "[c]ovenants, conditions, restriction, easements and/or servitudes," which the court said was not negated by Covered Risk 24.

Covered Risk 25 is similar to Covered Risk 24. It indemnifies the insured for damage to surface improvements caused by mineral extraction. It protects in the event that "[y]our existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery, or trees, are damaged because of the future exercise of a right to use the surface of the land for the extraction or development of minerals, water, or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B." This is the only covered risk that refers to improvements rather than structures, and to improvements replaced or modified after the policy date. This covered risk should rarely be invoked on the one-to-four family residential property for which the Homeowner's Policy is to be issued, because such parcels are typically too small to permit surface extraction of minerals and not zoned for such use. If it is invoked, however, the party extracting the minerals will typically be required to restore the surface as described in the covered risk. Thus, the insurer will typically demand that the party that extracted the minerals perform the restoration work. Only if that party fails to perform that work does the insurer have to step in.

Covered Risk 26 is against the attempted enforcement of a discriminatory restriction based on race, color, religion, sex, handicap, familial status or national origin. This covered risk would obligate the insurer to assert the protection of federal law banning such restrictions on behalf of the insured. The Civil Rights Act of 1964 and later laws banned the enforcement of such restrictions. A later federal law made it illegal to record such a restriction.[568] Thus, any such attempted enforcement is itself a violation of the law.

Covered Risk 27 expands tax coverage by indemnifying the insured against the post-policy levy of "supplemental" taxes for certain limited pre-policy events. It indemnifies if "[a] taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date." There are various types of charges and assessments in the various jurisdictions which are made as the result of either development or a change in ownership. By using the phrase "supplemental real estate taxes," this coverage refers only to an increase in general ad valorem taxes because of a bump in assessed value. The value increase must be caused either by a recent (but pre-policy) improvement built on the land or change of use or sale of the land. A common example is a law that mandates that agricultural land be taxed at its value for farming while so used, but which allows a change in value and sometimes a recapture of tax if the land is no longer used for farming. This coverage does not include special assessments or charges due as a result of the property's development. Such assessments represent the cost of permanent improvements that add value to the insured property. The coverage also does not apply to an increase in the general tax caused by reassessment of the property based on the sale price to the insured, or any pre-policy event other than those that are listed.

Covered Risk 28 gives future coverage if "Your neighbor builds any structures after the policy date--other than boundary walls or fences--which encroach onto the Land."[569] Risk 28 will be

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[568] Under 42 U.S.C. 3604(c), recorders were prohibited from recording race and ethnicity restrictions as of April 11, 1968. See *Mayers v. Ridley*, 465 F.2d 630 (D.C.Cir. 1968).

[569] In *Wei v. Stewart Title Guar. Co.*, 2018 WL 1870400 (Cal.App. 2 Dist.) (unpublished), the court found that only Covered Risk 18 was invoked, and not Covered Risk 28, when the neighbor sued the insureds to force the removal of the

limited by Exclusion 4.a, for matters "created, allowed, or agreed to by You." If that exclusion does not apply, the insurer will typically resolve a claim under this covered risk by taking some action to cause the neighbor to remove the encroaching structure, which is a trespass. That action typically begins with a letter to the neighbor informing him or her that the structure must be removed if the neighbor wishes to avoid an action for trespass. Note that this covered risk does not apply to boundary walls or fences. If the insured provides tardy notice to the insurer of a post-policy encroaching structure, or grants permission to the neighbor to erect the structure, this prejudices the insurer's ability to have it removed, and likely negates coverage as to that structure.

Covered Risk 29 is the marketability of title assurance. It protects if "Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it." This covered risk is fully discussed at §9.8.

Covered Risk 30 provides a limited creditors' rights coverage which is essentially the same as is found in the 2006 owner's policy. See §9.9.3 regarding that covered risk.

Covered Risk 31 insures against loss suffered if "[t]he residence with the address shown in Schedule A is not located on the land at the policy date." Schedule A has a place at which the insurer can insert the property's street address. This coverage is essentially the same as the CLTA 116 (location) endorsement. See §9.11.1 for a discussion of the location endorsement.

Covered Risk 32 assures against loss sustained by the insured if "[t]he map, if any, attached to this policy does not show the correct location of the land according to the public records." The elements of damage that may flow from this covered risk will vary, and are dependent on the facts.[570]

9.14.3 ALTA Short Form Residential Loan Policy

The ALTA promulgated its Short Form Residential Loan Policy to meet lender customers' demands that policies be issued more quickly. The policy is typically one page long. It incorporates by reference the Covered Risks, Exclusions and Conditions of the designated policy, certain endorsements, and even the legal description for the property.[571] This format allows the closer to

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insureds' encroaching garage.

[570] In *De Paz v. First American Title Ins. Co.*, 2010 WL 2856089 (Cal.App. 2 Dist.) (unpublished), the insureds bought a house on a lot created by the combination of two tax parcels. However, the deed included only one of the parcels, and the house straddled the lot line between the parcels. The tax map attached to the policy and incorporated into Covered Risk 29 (which is Covered Risk 32 under the 2010 version of the policy) showed the combined parcel. The other parcel was eventually sold for taxes. The insureds lost a sale of the property due to the issue, although the insurer offered to insure both parcels. The insurer later obtained a curative deed. The court overturned an arbitrator's finding that the insureds had suffered no loss because the insurer cleared title promptly and diligently, and denied the insurer's motion for summary judgment. It suggested that the measure of loss for this covered risk might be the amount of value that the property lost during the time title was being cleared.

[571] In *United Security Bank v. First American Title Ins. Co*., 2009 WL 3561618 (M.D.Ga.) (unpublished), the insured lender argued that the insurer was precluded from clearing title as permitted under the terms of the 1992 ALTA Loan Policy it had issued, because, the bank said, "it never received these additional terms, and that 'there is a question of fact as to which documents actually constitute the insuring agreement between the parties.'" The court said the bank's "argument does give this Court pause--but just barely." It quoted the incorporation by reference language in the short form policies, and concluded that it means what it says: "It is obvious from the Short Form policies that these do not

issue the policy at the closing table, or send it with the loan closing package immediately after closing. This policy pioneered the check-the-box method for adding ALTA endorsement coverages.

The policy also includes certain affirmative assurances that are not found in the 2006 loan policy but which are grafted from popular loan policy endorsements. The Short Form Residential Policy also includes the same survey coverage as found in the 2006 policies, which appears as Paragraph 5 of the Exceptions from Coverage and Affirmative Insurance page of the Short Form policy.

9.14.4 ALTA Residential Limited Coverage Junior Loan Policy

The ALTA promulgated the Residential Limited Coverage Junior Loan Policy in 1996. It was revised most recently in 2013. The policy is to be issued to the holders of mortgages on residential property that are not first liens. The Junior Loan Policy indemnifies the insured lender if the party names as Grantee in the policy is not the grantee on the last recorded deed or other instrument vesting title to the parcel. The policy does not insure that the borrower is vested in title, however. It also indemnifies the insured in the event the land described in the policy is not the same as that contained in the last recorded instrument, against a "Monetary Lien" has been recorded in the public records and not excepted in Schedule B, and against real estate taxes or assessments that are "a lien on the Title and that on Date of Policy appear in the official ad valorem tax records where the Land is located." The policy defines a Monetary Lien as a mortgage, deed of trust, judgment lien or other lien affecting the title.

The Junior Loan Policy does not contain the assurances found in other ALTA loan policies concerning the validity, enforceability and priority of the insured mortgage. In fact, Exclusion 1 emphasizes the lack of coverage by stating that the policy does *not* protect against "[a]ny invalidity, unenforceability or ineffectiveness of the Insured's Mortgage." One court noted that a Junior loan policy "only protects against *loss* caused by unknown senior liens, and does not guarantee the validity or enforceability of the loan itself."[572]

Thus, the Junior Loan Policy does not insure the insured's lien or that the borrower is vested in title. Principally, it indemnifies the insured against other liens on the same parcel. The Junior Loan Policy's Conditions are nearly identical to those of the 2006 ALTA loan policy.

9.14.5 ALTA United States of America Policy

The United States of America policy was promulgated by the ALTA for issuance to agencies of the federal government for land owned by the government. The most current version of this policy was adopted on December 3, 2012, replacing a form adopted in 1991. In most respects, the 2012 USA Policy is the same as earlier versions.

The USA Policy contains a Covered Risk 5 that is not found in other ALTA policies, which indemnifies the government, when it took title by condemnation, against loss or damage caused by

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represent the entire agreements; for one thing, almost all of the terms are missing, for another, the policies explicitly incorporate by reference the ALTA Loan Policy. Thus, the essential terms regarding the Defendant's duty to its insured when the insured makes a claim are missing."

[572] *First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp.*, 282 F.R.D. 423 (N.D.Ill. 2012).

the commitment's failure to recite all parties having an interest in the property:

> In instances where the insured acquires title to the land by condemnation, failure of the commitment for title insurance, as updated to the date of the filing of the *lis pendens* notice or the Declaration of Taking, to disclose the parties having an interest in the land as disclosed by the public records.

However, Exclusion 4 says the insurer will not protect the United States against "the invalidity or insufficiency of any condemnation proceeding instituted by the United States of America," except to the extent of the coverage provided by Covered Risk 5.

Covered Risk 6 indemnifies against loss caused by the avoidance in bankruptcy court of a prior conveyance or of the deed to the United States, if based on the failure to timely record the deed or because the deed fails "to impart notice of its existence to a purchaser for value or to a judgment or lien creditor."

Conditions 5(e) of the USA Policy says that the insurer has a duty to defend the United States, but that either the Attorney General will appear on behalf of the government, or must give permission to the insurer to retain someone else to represent the government. If the Attorney General "shall fail to authorize and permit the Company to defend, all liability of the Company with respect to that claim shall terminate… ." The Attorney General is to give the insurer "an opportunity to suggest defenses and actions as it shall recommend should be taken, and the Attorney General shall present the defenses and take the actions of which the Company shall advise the Attorney General in writing… ."

Similarly, Conditions 6 states that the Attorney General has the right to consent to any settlement with a third party, and his or her refusal to consent to a settlement limits the government's claim under the policy only to the extent that the insurer is harmed by the refusal to settle.

Conditions 8 of the USA Policy contains an apportionment provision as found in the 1992 ALTA Owner's policy. Conditions 13(c) states that the insurer is not subrogated to the rights held by the United States. However, if the United States pursues its rights against third parties concerning the subject matter of the claim and "the Company agrees in writing to reimburse the United States for all costs, attorneys' fees and expenses," the insurer is paid first from any recovery. Finally, Conditions 14 states that "arbitrable matters shall be arbitrated only when agreed to by both the Company and the Insured." In other words, there is no mandatory arbitration provision, as is found in most other policies.

9.14.6 ALTA Limited Pre-Foreclosure Policy

ALTA adopted a new policy form on December 3, 2012, intended for lenders seeking to foreclose on mortgages or deeds of trust, known as the ALTA Limited Pre-Foreclosure Policy. Texas has also adopted a Pre-Foreclosure Policy, as policy form T-98.

The Covered Risks of the policy are very limited, and are different from those found in other policy forms, reflecting the limited purpose of the policy. The policy indemnifies the insured against loss suffered as a result of various matters that first affect the property after the date of the recording of the mortgage, except to the extent that Schedule B negates coverage for those matters. The policy indemnifies against a post-mortgage-recording instrument "purporting to change or evidencing a change in the ownership of the Title," creating "a right or interest affecting the Title," various kinds of liens, notices of judicial proceedings, bankruptcy notices under 11 U.S.C. § 549(c), or notices of condemnation. The policy also protects against a judgment or federal tax lien that affects the title and was recorded against the mortgagor prior to the recording of the mortgage, unless excepted in Schedule B. It also protects against ad valorem taxes and assessments that have been imposed and which are due and payable as of the Date of Policy.

These limited Covered Risks pick up matters that are not covered by the loan policy issued to the lender at the time its mortgage was recorded. The coverages of the two policies should thus dovetail, so that any loss payable due to a defect, lien or encumbrance will be covered under one or the other of the two policies, but not both.

The Pre-Foreclosure Policy is designed to be issued when the loan is in default and the lender is contemplating foreclosure or the acceptance of a deed in lieu of foreclosure. No commitment is issued in advance of the issuance of the policy. It may be amended to cover the date on which the lender acquires title by an endorsement.

The Limited Pre-Foreclosure Policy indemnifies only against liens and defects discoverable in a search and examination of title. Losses payable under the policy are thus limited to matters that were discoverable but not excepted. See Chapter 3 for a discussion of the resolution of covered claims.

9.14.7 ALTA Expanded Coverage Residential Loan Policy

ALTA adopted the Expanded Coverage Residential Loan Policy on October 13, 2001, and has modified the policy several times, most recently on April 2, 2015. ALTA decertified this policy form on June 9, 2016, effective ALTA has also adopted a Short Form Expanded Coverage Residential Loan Policy, revised most recently on April 2, 2015. As the name implies, the Short Form policy has the same terms, but incorporates by reference in the same manner as is done in the ALTA Short Form Residential Loan Policy, discussed at §9.14.3.

The Expanded Coverage Residential Loan Policy contains 28 Covered Risks. It splices together the Covered Risks found in the 2006 ALTA Loan Policy with some of the coverages in the Homeowner's Policy. See the discussion of the Loan Policy Covered Risks in §9.10 and the Homeowner's Policy Covered Risks, in §9.14.2. The policy contains two interesting exclusions that seem to have been inspired by the new technique of extracting oil by fracturing. Exclusion 10 negates coverage for "[c]ontamination, explosion, fire, flooding, vibration, fracturing, earthquake, or subsidence." Exclusion 11 negates coverage for "[n]egligence by a person or an Entity exercising a right to extract or develop minerals, water, or any other substances." The Conditions are the same as those found in the 2006 ALTA Loan Policy.

10 Construction Liens

In most states, a party that provides labor, services or material that becomes part of an improvement to real estate is entitled to record or file a lien against the property if not paid for the work, in recognition that the property has been increased in value as a result. Many states' laws grant such liens, commonly called either construction liens[1] or mechanic's liens, retrospective priority to some date related to project commencement. These liens have historically been one of the greatest sources of loss to the land title industry.[2] This can be attributed to the combined facts that construction liens often involve very large sums of money, and the secret nature of the liens in many states. In secret-lien states, construction liens often defy the title insurer's best efforts at risk elimination.[3]

This chapter addresses two main topics. Section 10.1 deals with the policy provisions

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[1] In this treatise, the term construction lien is used rather than mechanic's lien, for consistency and because it is more specific and descriptive of the nature of the lien right.

[2] See O'Connor, *Mechanic's Lien Coverage: Have the Policy Changes Changed the Coverage?*, in *Title Insurance: The New Policy Changes*, Practicing Law Institute, Real Estate Course Handbook N4-4480 (1987), at p. 14. The significant mechanic lien losses suffered in the early 1970s are recounted in John E. Jensen, Accounting Procedure Slaying the IBNR Monster, *Title News*, Volume 60, Number 4 (April 1981), p. 6. See also, Ray E. Sweat, *Mechanics' and Materialmen's Lien Coverage*, in *Title News*, Volume 53, Number 1 (January 1974), p. 24, which includes a very good summary of the mechanic's lien laws in all 50 states, a summary of case law up to that point, and a thorough description of mechanic lien coverage as found in the New York Board of Title Underwriters Form policy, and the 1946, 1960, 1962, 1969 and 1970 ALTA loan policy forms. Mr. Sweat was the longtime chief underwriting counsel for Pioneer National Title Insurance Company. That article is followed by the comments of Irving Morgenroth, then chief counsel for Commonwealth Land Title, on the same subject of construction loans and mechanic lien policy coverage. These articles can be retrieved by ALTA members from the *Title News* archives at alta.org.

[3] The enormous risks imposed by construction liens are neither fated nor immutable, however. Insurers interested in curtailing losses should consider a serious effort at changing existing law. Construction liens are creatures of statutes, not of the common law. The laws vary in the extreme, and so does loss experience. Missouri gives almost no protection to lenders (or owners), while Wisconsin gives automatic, blanket priority to almost all classes of lenders. Michigan thoroughly overhauled its law in the 1980's, with a very balanced and rational result.

concerning construction liens and construction loan disbursement. Section 10.2 addresses construction loan escrows and disbursing, as performed by title companies.

10.1 Construction Lien Policy Coverage

The loan policy contains a series of provisions which fit together to establish the scope of this coverage. The construction lien provisions of the policy have been much discussed by scholars.[4] The provisions concerning construction liens that are found in the ALTA Loan policies are the following:

1. Covered Risk 2, which indemnifies the insured against loss caused by "[a]ny defect in or lien or encumbrance on the Title."

2. A Covered Risk indemnifies the insured lender against a construction lien that obtains priority over the insured mortgage, whether recorded before of after the date of policy, if the lien is for work contracted for or commenced before the policy date, or after policy date if the work is financed at least in part by loan funds secured by the insured mortgage.[5]

3. These Covered Risks may be negated by a Schedule B exception for construction

[4] Construction lien liability is also analyzed in Jones & Maessell, *Mechanic's Lien Title Insurance Coverage for Construction Projects*, 16 Real Estate L.J. 291 (1988); Urban, *Future Advances and Title Insurance Coverage*, 15 Wake Forest L. Rev. 329 (1979); Jordan, *Mechanics' Lien Coverage*, Practicing Law Institute, Real Estate Course Handbook (1988); Bohan, *Mechanics' Lien Coverage in Title Insurance Policies*, in *Attorneys' Role in Title Insurance*, A.B.A. Real Property & Trust Section, (1990); Sweat, *Obligatory Advances: Mechanics' Liens and the 1987 Loan Policy*, Practicing Law Institute, Real Estate Course Handbook (1988); O'Connor, *Mechanic's Lien Coverage: Have the Policy Changes Changed the Coverage?*, in *Title Insurance: The New Policy Changes*, Practicing Law Institute, Real Estate Course Handbook N4-4480 (1987); J. Patterson, *Title Insurance and Mechanic's Liens*, 5 A.B.A. Real Property Financing Newsletter 20 (1985); Palomar, *Title Insurance Law*, § 6.12, pp. 6-78 to -83.

[5] Covered Risk 11 of the 2006 ALTA Loan policy indemnifies the insured against loss due to "[t]he lack of priority of the lien of the Insured Mortgage upon the Title (a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either (i) contracted for or commenced on or before Date of Policy; or (ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance… ." A very similar provision is found in Covered Risk 7 of the 1992 ALTA Loan policy. Although the phrase "statutory lien for services, labor, or material arising from construction of an improvement" could be reasonably understood to refer only to construction or mechanic's liens, several insureds have asserted that the phrase is broader. In *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co*., 2015 WL 4647894 (D. Utah 2015) (unpublished), the court rejected the insured's argument that the phrase "statutory lien" could include taxes imposed under the auspices of a special taxing district. In *380 Kings Highway, LLC v. Fidelity Nat'l Title Ins. Co*., 2011 WL 6182117 (N.Y.Sup.), 2011 N.Y. Slip Op. 52223(U) (unpublished), a New York form of endorsement that uses the same phrasing as Covered Risk 11 concerning "statutory liens" was found to affirmatively protect against a municipal emergency repair lien for repairs done to a building. The *380 Kings Highway* decision ignored substantial evidence that the endorsement was not intended to encompass municipal repair liens, including *Cole v. Home Title Guar. Co*., 29 A.D.2d 552, 285 N.Y.S.2d 914 (N.Y.App.Div. 1967), which said that a tax assessment is not a construction lien and does not fall under the "statutory lien" coverage of the policy.

liens and inchoate construction lien rights.[6]

4. Liens attaching after the date of policy may be excluded from coverage under the post-policy exclusion.[7]

5. Certain actions by the insured lender may be deemed to have been created, suffered, assumed or agreed to by it, thus negating construction lien coverage.[8]

6. Construction liens arising from projects contracted for or commenced after the date of policy and not financed in whole or in part by the insured mortgage loan are excluded.[9]

7. Some versions of the ALTA Loan policy do not insure the priority of construction advances made after the date of policy for which the lender was not obligated on date of policy.[10]

8. The policy may contain one or more endorsements modifying the policy's terms as

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[6] The ALTA-promulgated construction lien exception removes coverage as to "[a]ny lien or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records."

[7] Exclusion 3(d) of the 2006 ALTA Loan policy removes from coverage "[d]efects, liens, encumbrances, adverse claims or other matters: … (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14)… .

[8] Exclusion 3(a) of the 2006 ALTA Loan policy removes from coverage "[d]efects, liens, encumbrances, adverse claims or other matters: … (a) created, suffered, assumed or agreed to by the Insured Claimant… ." See §10.1.4 for a discussion of the application of this exclusion.

[9] The 1992 ALTA Loan policy contained Exclusion 6, for "[a]ny statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance." The 2006 ALTA Loan policy does not contain a corresponding exclusion.

[10] Conditions & Stipulations ¶ 8(d), which appeared in the 1987, 1990 and 1992 versions of the ALTA Loan policy, provided: "The Company shall not be liable for: ... (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy." This provision is discussed at §10.1.4. The 2006 ALTA Loan policy does not contain a corresponding provision, but rather in the definition of "Indebtedness" it includes "(iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance… ."

stated above.[11]

The provisions in the loan policy concerning construction lien coverage were rewritten beginning with the 1987 version of the policy to make them more cohesive.[12]

The ALTA owner's policies contain several provisions which have a bearing on coverage: Covered Risk 2, which indemnifies against "defects, liens or encumbrances" on title; Covered Title Risk 8 of the Residential policy, which specifically applies to construction liens;[13] Exclusion 3(a), for matters "created, suffered, assumed or agreed to;" Exclusion 3(d), for matters attaching after the date of policy; and the standard mechanic lien exception.

Because these policy provisions work in concert, the discussion of construction lien coverage below is by fact situation rather than by policy provision.

10.1.1 Liens Filed After Policy Date For Work Done Before Policy Date

Most state construction lien laws adopt the relation-back principle. In such states, construction liens take their priority not from the date of filing or recording but some earlier date tied to work done on the construction project, such as the first actual physical improvement on the land or the first date of work by the lien claimant. This relation-back principle is one reason construction liens are such a large risk to the title insurer.

The covered risks of both owner's and loan ALTA policies protect against inchoate lien rights that, if perfected by filing, will take their priority from before the date of policy. Covered Risk 2 of the 2006 ALTA Owner's policy indemnifies against liens rights. Coverage under the owner's policy is further analyzed at §10.1.2. The Residential policy specifically assures against loss resulting from relation-back construction liens under Covered Title Risk 8, which protects the insured if "[t]here are liens on your title, arising now or later, for labor and material furnished before the Policy Date—unless you agreed to pay for the labor and material." This coverage is in keeping with the design of the Residential policy, which identifies numerous particular risks rather than classes of risks. However, the Residential policy coverage is no broader than that found in the standard form ALTA policy. See §9.14.1 regarding the coverages under the Residential policy form and §9.14.2 regarding the Homeowner's policy.

The ALTA Loan policies contain two construction lien coverages, which are Covered Risks 11(a)(i) and (ii) of the 2006 policy and 7(a) and 7(b) of the 1992 policy. The 2006 Covered Risks are:

11. The lack of priority of the lien of the Insured Mortgage upon the Title

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[11] See §10.1.4 for a discussion of the so-called pending disbursement endorsement.

[12] A particularly lucid analysis of this coverage as found in the 1970 and later policies is found in O'Connor, *Mechanic's Lien Coverage: Have the Policy Changes Changed the Coverage?*, in *Title Insurance: The New Policy Changes*, Practicing Law Institute, Real Estate Course Handbook N4-4480 (1987).

[13] "8. There are liens on your title, arising now or later, for labor and material furnished before the Policy Date -- unless you agreed to pay for the labor and material."

(a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either

(i) contracted for or commenced on or before Date of Policy; or

(ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance… .

The 1992 policy had a mirroring Exclusion 6, which is not found in the 2006 policy, perhaps because the post-policy exclusion was deemed sufficient.[14]

Covered Risk 11(a)(i) of the 2006 ALTA Loan policy is invoked if a lien is filed after the date of policy for work contracted for or started before the policy date, and the lien claimant asserts priority over the insured mortgage. The covered risk protects against liens filed after the date of policy. It would be superfluous if it merely referred to liens that had already been filed on the policy date, since liens generally are protected against by other covered risks. Covered Risk 11(a)(ii) states that, if the work was contracted for, or started or continued, after the date of policy, there is coverage only if the insured lender finances the work in part or in full.

The combination of these coverages has been deemed to provide a lender with full protection against any lien claimant that asserts priority over the insured mortgage, if the loan money is used to fund the construction project.[15] However, when the loan secured by the insured mortgage did not fund the improvement, the court in *Pullum Window Corp. v. Randy M. Deprez Custom Builder, Inc.*[16] found that there was no coverage for liens for work performed after the date of policy. That

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[14] Exclusion 6 of the 1992 ALTA Loan policy read: "Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance."

[15] The policy's construction lien coverage "unambiguously contemplates coverage if such [inchoate] liens attain priority over the deed of trust and a loss results." *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. 522, 531 (W.D.Tenn. 1993).

[16] 2010 WL 5175404 (Mich.App.) (unpublished). In that case, liens were filed for work done two years after the purchase money mortgage was recorded. The lender paid off the liens after the insurer refused to do so. The insured produced a building permit report showing that the liens might have related back to a commencement date for the project before the policy date. The court said this was "merely a smokescreen." It found the liens not to be covered by Covered Risk 7(a) of the 1992 policy, and its companion Exclusion 6. Even if the liens related back to a pre-policy date, the court said, "for purposes of negotiated title insurance coverage at issue in this case, we decline to overlay the relation back principle of the Construction Lien Act on the parties' insurance contract." The court also noted that, under Michigan's lien law, a lender can salvage "broken" priority by accurate disbursement, so that its loss of priority would not be automatic. *Pullum* was distinguished in *Lower Town Project, LLC v. Lawyers Title Ins. Corp.*, 2011 WL 3319710 (E.D.Mich.) (unpublished), which held that there was policy coverage for construction liens that clearly related back to a first actual physical improvement date prior to the policy date.

court said that the mere hypothesis that the lien claimants could assert that their liens related back to a date prior to the policy date did not invoke coverage, particularly when the lender settled the liens before waging a priority fight.

It can be difficult to establish whether or not the loan policy covered risk is invoked when the lender did not fund the improvement. The wording of the covered risk strongly suggests that the proper analysis is based on the start date for "the improvement," not the individual lien claimant's first work.

The essence of the relation-back doctrine in many states is that all construction lien claims relate back to the visible commencement of the improvement. However, in most states, the lien claimant is not required to state on the filed lien what date he believes to have been the date of visible commencement for the improvement. In most such states, the lien claimant's own first date of work, which usually *is* recited on the lien, is not the relation-back date. The visible commencement date usually cannot be determined until there is lien priority litigation.

Therefore, it is industry custom for the title insurer to adopt a "watchful waiting" posture in most cases when the insured submits the claim after a lien has been filed but before the priority issue has been joined in litigation. See §3.1 regarding watchful waiting. The title insurer will typically caution the lender that any resolution of the lien claim will invoke the voluntary settlement provision unless the insurer grants its prior written consent, voiding coverage. See § 2.14 regarding the voluntary settlement provision. If the lender does settle the liens without getting a priority determination, its policy rights are typically negated, as in the *Pullum Window Corp.* case discussed above.

The "standard" construction lien exception removes the coverage provided by the Covered Risks. The most commonly-used exception negates coverage for "[a]ny lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records." The "right to a lien" phrase refers to the inchoate lien right. The word "heretofore" makes it clear that the exception applies to work already done on the date of policy. The phrase "and not shown by the public records" further makes plain that the exception applies to inchoate lien rights existing on date of policy, for work already done, but for which no lien has yet been filed. The exception in the form recited above does not apply to liens already filed on the date of policy.

10.1.2 Lien Coverage On Owner's Policies

In all or most states, the risk in removing the construction lien exception from the owner's policy is much greater than on a loan policy. The insured owner incurs a loss immediately when a lien is recorded. See §3.2.4 regarding the cases discussing the owner's "immediately diminished" title versus the lender's obligation to also show that the loan is in default and that the lender's security has been impaired by the lien. The only defenses ordinarily available to an owner relate to the validity or amount of the lien. By comparison, the loan policy insures only that the lender's lien has priority over the construction lien. Thus, in addition to any defenses as to the construction lien's validity, the insurer may fully protect an insured lender by establishing that the mortgage has priority over the construction lien. In many situations, a construction lien which causes a loss to the owner insured does not result in a corresponding loss to the insured lender.

Because of the difference in risk, it is not uncommon for an insurer to give protection against construction liens to a lender but not the owner in the same transaction. The insurer has no duty to notify the purchaser of the difference in coverage between the two policies. Absent active misrepresentation, the purchaser has no cause of action against the insurer for breach of contract, fraud, or similar cause of action, for not so advising the owner.[17] Also, an owner is not a beneficiary of construction lien coverage given only to the lender,[18] as is fully discussed at §7.7.

In addition, when construction lien coverage is given to an owner while a construction project is pending, liens may arise as a result of the insured's refusal to pay a lien claimant.[19] Exclusion 3(a) is often an appropriate defense if it was within the insured's power to avoid the filing of the lien, or if the lien resulted from a dispute between the insured and the lien claimant. See §11.2.9 concerning Exclusion 3(a) and owner's policies.

10.1.3 Liens For Work Done After Policy Date

FORM 43, Appendix A
Construction lien filed after policy date

The owner's policy does not protect against any construction liens for work done after the date of policy. See §11.5 regarding Exclusion 3(d), for post-policy matters.

Exclusion 6 of the 1992 ALTA Loan policy removed coverage for liens filed for work contracted for or commenced after date of policy and not fully or partially funded by the insured mortgage loan. Thus, generally, the policies do not protect against liens for work done after the date of policy.[20]

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[17] See *Clements v. Mississippi Valley Title Ins. Co.*, 612 So.2d 1172 (Ala. 1992). The dissent in *Clements* would have required the insurer to advise the owners that their policy excepted construction liens while the loan policy did not. The dissent seemed to think that the insurer sought to benefit from the purchaser's ignorance: "At the closing here, everybody in the room, except the Clementses, knew that there were outstanding debts owed by the seller to subcontractors, and knew that the Clementses would be liable for liens filed against the property after the closing, but failed to tell them that the policy about to be issued would exclude coverage for those very liens. Mississippi Valley and its attorney agent had a duty to disclose those facts." 612 So.2d at 1177. The majority, however, found no support for this view.

[18] See, for example, *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (Cal.App. 1 Dist. 1978) and *Pippin v. Kern-Ward Bldg. Co*., 8 Ohio App.3d 196, 456 N.E.2d 1235 (8th Dist. 1982). However, in *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017), the court held that the borrower *was* a third party beneficiary of KeyBank's escrow instructions, distinguishing *Pippin* on a pretext.

[19] However, note that, in *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017), the court ignored an owner's policy construction lien exception, Exclusion 3(a) and the post-policy exclusion to hold that the policy might cover construction liens filed after the policy date after the owner insured refused to pay the contractors. There is a strong dissenting opinion.

[20] *Wheeler v. Real-Estate Title Ins. & Trust Co. of Philadelphia*, 160 Pa. 408, 28 A. 849 (1894). In a case involving very unusual facts, a mortgage was found to have priority over later-filed construction liens, but the court found the insurer liable for payment of the liens. In *Lawyers Title Ins. Corp. v. Honolulu Federal Savings & Loan Ass'n*, 900 F.2d 159 (9th Cir. 1990), the insured mortgage was a lien on a lessee's interest. The lease provided that the lessor could terminate the lease and wipe out the mortgage if construction liens were filed and foreclosed. The right to terminate the lease because of the liens was found sufficient to create a duty of the insurer to pay the liens, despite the fact that the mortgage was superior to the liens. The *Honolulu Federal* decision should be limited to its unique facts. In *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017), the court ignored an owner's policy

10.1.4 Pending Disbursement Endorsement And Disbursing Agreement Limitations

In certain jurisdictions, it is common for an insurer to provide construction lien coverage in connection with or dependent on a construction loan disbursement escrow. See §10.2 regarding construction loan disbursement escrows. It is also common in many jurisdictions for the title insurance policy to contain a pending disbursement clause, which is inserted in Schedule B, and which states that coverage is limited by the terms of an endorsement to be issued with each loan advance, which the industry terms a pending disbursement endorsement.[21] It is typical to have both a disbursing escrow agreement and pending disbursement endorsements on a project. In such cases, the insurer reviews draw requests, collects lien waivers, disburses the lender's funds, and increases the policy coverage against construction liens by a pending disbursement endorsement.[22]

In giving construction lien coverage by pending disbursement endorsements, the insurer limits its liability for construction liens to lien rights that have accrued on or before the date of the endorsement, and also limits the amount of its liability, either for construction liens or for all policy purposes, to the amount stated in the endorsement.[23] By so limiting the construction lien coverage, the insurer agrees to defend against only those liens that result from work done before the date of the last endorsement. If the pending disbursement endorsement extends the date of policy as to matters other than construction liens, the insurer may except from coverage all matters that first appear of record or come to the insurer's notice after the previous endorsement date. All such matters become excepted from the coverage of the policy, as so modified.[24]

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construction lien exception, Exclusion 3(a) and the post-policy exclusion to hold that the policy might cover construction liens filed after the policy date after the owner insured refused to pay the contractors. There is a strong dissenting opinion.

[21] A reference to a pending disbursement endorsement in a commitment gives evidence that the policy will contain the endorsement. *First American Title Ins. Co. v. Seaboard Sav. & Loan Ass'n*, 227 Va. 379, 315 S.E.2d 842 (1984). In *First Federal Sav. & Loan Assn. of Beaumont v. Stewart Title Co.*, 732 S.W.2d 98 (Tex.App. 1987), two policies were to be issued. One commitment contained a reference to a pending disbursement endorsement and the other did not. The court found that there was a question of fact as to whether or not there was a difference in coverage under the two forms of policy.

[22] There is no industry standard pending disbursement endorsement, in large part because of the wide variation in state construction lien laws.

[23] The pending disbursement endorsement typically would explicitly alter policy coverage when issued under a 1992 ALTA Loan policy or other policy forms that contained Conditions & Stipulations 8(d), which imposed a limitation on coverage for post-policy construction advances.

[24] In *Lawyers Title Ins. Corp. v. Bank of New York*, 1992 U.S. Dist. LEXIS 8355 (S.D.N.Y.), No. 95-7514, 12/13/95 (2nd Cir. N.Y.) (unpublished), a lawsuit was filed that attacked the validity of the leasehold estate to which the construction mortgage attached. The insurer made exception for the lawsuit in its pending disbursement endorsement, which the bank considered a breach of contract. The court found, however, that the bank misunderstood the limitations of the pending disbursement endorsement: "The … "pending disbursement" provision … insures all covered risks up to the amount already disbursed by the Bank; however, if a "defect in, or objection to, title" should arise, Lawyers Title may cap its coverage for that risk at the amount already paid out. The incremental nature of the insurance allows the insurer to

When the insurer attaches a pending disbursement endorsement to the policy or commitment, the lender must make any advances under the construction loan according to the terms of that endorsement to obtain extended coverage in future endorsements. Thus, when the commitment attached a pending disbursement clause and called for waivers and contractor's statements, but the requirements were not met and subsequent draws were not presented to the insurer, there was no coverage for liens filed for work done after date of policy.[25]

The pending disbursement endorsement system alters the provisions of Conditions & Stipulations 8(d)(ii) of the 1992 ALTA Loan policy, which states that the insurer is not liable for construction loan advances made after the date of policy except construction loan advances which finance improvements to the land which the lender was obligated to make on date of policy. Most pending disbursement endorsements issued in conjunction with the 1992 ALTA Loan policy specifically amended that provision. The 2006 ALTA Loan policy does not contain a corresponding provision.

Very often, the endorsement is written to extend the date of policy coverage through the date of disbursement, even though the last work paid for by the advance was done days or weeks prior to the disbursement date. This creates a gap period for which the lender receives coverage against lien rights for work for which the lender has not paid. The explicit or implicit agreement in disbursing escrows is that the lender will continue to advance money to pay for gap work.

Historically, the terms of pending disbursement endorsements varied considerably from company to company and state to state, due in large part to the variations in state law concerning the priority of construction liens versus mortgages under the relation-back doctrine. In February of 2011, American Land Title Association adopted several pending disbursement endorsements, with the intent of standardizing the language of such endorsements. The ALTA endorsements are the 32.0-06, 32.1-06, 32.2-06 and 33.0-06. The endorsements were modified in 2013. The names of the endorsements were changed in 2018.

The ALTA 32 endorsement is issued with the policy. Paragraph 1 of the endorsement deletes Covered Risk 11(a), the standard construction lien coverage. Paragraph 2 provides several definitions for terms used in the endorsement. In this discussion of the endorsements, the terms defined in paragraph 2 are capitalized for clarity's sake. Paragraph 3 states the coverage that replaces Covered Risk 11(a). Paragraph 4 recites limitations on the endorsement's coverage.

The ALTA 33 endorsement is issued with each subsequent advance under the construction loan. There is only one version of the ALTA 33 endorsement. Each time an ALTA 33 endorsement is issued, the Date of Coverage as to Mechanic's Liens is extended. However, the Date of Policy is

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limit its exposure for any sums paid out by the Bank after a defect or objection arises." The bank also argued that the pending disbursement endorsement's own terms did not allow the insurer to except the lawsuit, because the endorsement provided that the insurer could except any matter which was a "defect in, or objection to, title." The bank argued that the lawsuit was neither a defect nor an objection, under New York law on title insurance and marketability of title. The court found, however, that the cases and policy provisions cited do "not alter the District Court's plain-meaning reading of the 'pending disbursements' clause to mean that the filing of a lawsuit is an 'objection' that justifies the insurer in declining to provide coverage for any disbursements made after the objection is lodged."

[25] *First American Title Ins. Co. v. Seaboard Sav. & Loan Ass'n*, 227 Va. 379, 315 S.E.2d 842 (1984).

not altered, and no other coverage is extended forward by the ALTA 33 endorsement. The ALTA 32 endorsement supplies the defined term Date of Coverage in order to distinguish between that date and the Date of Policy.

It is necessary to understand the defined terms in order to understand the coverages of the ALTA 32 endorsement. The Date of Coverage is the later of the policy date or the date of a subsequently-issued ALTA 33 endorsement. A Construction Loan Advance is an advance made by the insured for construction purposes that becomes part of the debt secured by the insured mortgage. Mechanic's Lien is defined using the familiar phrase "any statutory lien or claim of lien, affecting the Title, that arises from services provided, labor performed, or materials or equipment furnished."

There are three versions of the ALTA 32 endorsement. All versions of the ALTA 32 endorsement provide three coverages. Paragraph 3(a) indemnifies the insured if the insured mortgage is found to be invalid or unenforceable as to a Construction Loan Advance made on or before the Date of Coverage. Paragraph 3(b) indemnifies the insured if a Construction Loan Advance made on or before the policy date lacks priority over any lien or encumbrance that existed on the policy date and that is not excepted in Schedule B.

Paragraph 3(c) provides the central construction lien priority coverage. It indemnifies the insured against the priority of certain Mechanic's Liens not filed in the Public Records on the Date of Coverage over the lien of the insured mortgage, as to specified Construction Loan Advances. The three variations in the ALTA 32 endorsement are necessary to modify the coverage in paragraph 3(c) to conform to the method that will be used to disburse the construction loan money. Each version of the ALTA 32 endorsement contains two limiting phrases. The variation in the endorsements is found in the wording of those limiting phrases.

In the ALTA 32.0-06 endorsement, the Mechanic's Lien priority coverage is limited as follows:

> … but only to the extent that the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage.

This version of the endorsement is to be used when the insured lender reviews the draw requests, disburses the money itself, and makes payment to the general contractor and not to the subcontractors and suppliers.

In the ALTA 32.1-06 endorsement, the Mechanic's Lien priority coverage is limited as follows:

> … but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed has been made by the Company or by the Insured with the Company's written approval.

This version of the endorsement is to be used when the title insurer reviews the draw requests, disburses the money on the lender's behalf, and makes payment to the subcontractors and suppliers.

It may also be used when the lender reviews the draw requests and disburses the money directly to the subcontractors and suppliers, but the insurer gives its written approval for the disbursements.

In the ALTA 32.2-06 endorsement, the Mechanic's Lien priority coverage is limited as follows:

> … but only to the extent that direct payment to the Mechanic's Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed has been made by the Insured or on the Insured's behalf on or before Date of Coverage.

This version of the endorsement is to be used when the insured lender reviews the draw requests, disburses the money itself, and makes payment directly to the subcontractors and suppliers.

Thus, some variant of the ALTA 32 endorsement may be used when the insured lender disburses the money itself, when the title insurer reviews the draws and disburses the money, when the general contractor is paid, and when payments are made directly to subcontractors and suppliers. See further discussion of direct payment to subs and suppliers in §10.2.2.

Each version of the ALTA 32 endorsement contains two other limitations, found in paragraph 4. Limitation 4(a) is the same in each version of the endorsement. It states that there is no coverage against a Mechanic's Lien that arises from services, labor, materials or equipment "furnished after Date of Coverage." This statement reiterates that the coverage provided by each ALTA 33 endorsement protects only against construction lien rights that had accrued as of the endorsement's Date of Coverage. This is a limitation common to all forms of pending disbursement endorsements.

The second limitation found in paragraph 4(b) is different in each of the three versions of the ALTA 32 endorsement. Again, each version is tailored to the disbursing method that will be used.

Paragraph 4(b) of the ALTA 32.0 endorsement says that the insurer will not indemnify against a Mechanic's Lien that arises from work that was performed but that was "not designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before Date of Coverage." Paragraph 4(b) of the ALTA 32.1 endorsement says that the insurer will not indemnify against a Mechanic's Lien that arises from work performed "to the extent that the Mechanic's Lien claimant was not directly paid by the Company or by the Insured with the Company's written approval." Paragraph 4(b) of the ALTA 32.2 endorsement says that the insurer will not indemnify against a Mechanic's Lien that arises from work performed "to the extent that the Mechanic's Lien claimant was not directly paid by the Insured or on the Insured's behalf."

The ALTA 32.0 endorsement provides coverage to the insured against a Mechanic's Lien that is later filed for work that was performed before the Date of Coverage in an ALTA 33 endorsement, and which work was "designated for payment in the documents supporting a Construction Loan Advance" and for which the insured lender advanced payment. There is no coverage against a Mechanic's Lien, even if the work was performed before the endorsement's Date of Coverage, if the work for which the lien was filed was *not* "designated for payment in the documents supporting a Construction Loan Advance… ." There also is no coverage even if the work was performed before the Date of Coverage, and the work *was* designated for payment in the draw request, if the insured lender did not make a disbursement for that work. The ALTA 32.0 endorsement thus provides limited construction lien coverage. However, the ALTA 32.0 endorsement does protect the lender against one of the biggest risks in construction lending, that the general contractor receives payment from the lender but fails to pay the subcontractors and suppliers that it listed in its draw request as having performed the lienable work for which payment was sought.

The ALTA 32.1 endorsement is designed for use when direct payment is made to subcontractors and suppliers, and payment is made either by the insurer or the insured with the insurer's written approval. The 32.1 provides coverage to the insured against a Mechanic's Lien that is later filed for work that was performed before the Date of Coverage in the endorsement, but "only to the extent that direct payment to the Mechanic’s Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic’s Lien is claimed has been made by the Company or by the Insured with the Company's written approval." There is no coverage "to the extent that the Mechanic’s Lien claimant was not directly paid by the Company or by the Insured with the Company's written approval." In other words, for coverage to be invoked, the Mechanic's Lien must be for work performed before the endorsement's Date of Coverage; the work must have been performed by a contractor, subcontractor or supplier who was actually paid as part of that draw request; and the Mechanic's Lien must be for the same work for which the insurer made payment. There is no coverage for a Mechanic Lien filed by a party who did work before the date of the endorsement, if that party was not paid through the draw request for which the endorsement was issued. There also is no coverage against a Mechanic's Lien filed by a party that was paid with the draw request, even if the work was performed before the endorsement's Date of Coverage, if the work for which the lien was filed was *not* paid for through the draw request. The ALTA 32.1 endorsement thus provides limited construction lien coverage. However, the ALTA 32.1 endorsement does protect the lender against the risk that the insurer inaccurately disbursed the money. It also protects the insured if the lien claimant disputes the amount of the payment, the validity of any waiver it delivered, or asserts that its lien rights were not extinguished because it did not provide a lien waiver.

The ALTA 32.2 endorsement is designed for use when direct payment is made to subcontractors and suppliers, and payment is made by the insured lender. The 32.2 provides coverage to the insured against a Mechanic's Lien that is later filed for work that was performed before the Date of Coverage in the endorsement, but "but only to the extent that direct payment to the Mechanic’s Lien claimant for the charges for the services, labor, materials or equipment for which the Mechanic’s Lien is claimed has been made by the Insured or on the Insured’s behalf on or before Date of Coverage." There is no coverage "to the extent that the Mechanic’s Lien claimant was not directly paid by the Insured or on the Insured’s behalf." In other words, for coverage to be invoked, the Mechanic's Lien must be for work performed before the endorsement's Date of Coverage; the work must have been performed by a contractor, subcontractor or supplier who was actually paid as part of that draw request; and the Mechanic's Lien must be for the same work for which the lender made payment. There is no coverage for a Mechanic Lien filed by a party who did work before the date of the endorsement, if that party was not paid through the draw request for which the endorsement was issued. There also is no coverage against a Mechanic's Lien filed by a person who was paid with the draw request, even if the work was performed before the endorsement's Date of Coverage, if the work for which the lien was filed was *not* paid for through the draw request. The ALTA 32.2 endorsement thus provides limited construction lien coverage.

However, the ALTA 32.2 endorsement does protect the lender insured if the lien claimant disputes the amount of the payment, the validity of any waiver it delivered, or asserts that its lien rights were not extinguished because it did not provide a lien waiver.

The courts have interpreted pending disbursement endorsements a number of times. Several courts have held that the lender does not obtain policy coverage for liens filed for work done in the gap between the last work date for which the draw was submitted and the endorsement date. In *Bankers Trust Co. v. Transamerica Title Ins. Co.*,[26] the construction project was apparently short of money from the beginning. The shortage was made worse when the lender permitted the owner to use draw from the loan account for non-construction purposes. The lender eventually demanded that the owner make up the shortfall, which it failed to do. The lender declared a default, at which time there was a balance of $260,000 in the loan account. Liens of about $300,000 were then filed. The lender refused to use the loan balance to pay the liens. Instead, it demanded that the insurer pay them. The insurer refused, on the basis that it had only given coverage through the disbursement date because the lender had promised in the loan disbursement escrow agreement to continue to fund in subsequent draws. The court characterized the insurer's argument this way:

> Counsel for Transamerica argued that the contractual relationship between Transamerica and Bankers was clear, i.e., that Transamerica simply agreed to guarantee Bankers that any disbursements it made of loan funds advanced to it from Bankers would be paid on valid, proper invoices to those who performed work or services or supplied materials and that none of the disbursements would be made to other than bona fide claimants.[27]

The court agreed that the policy only covered liens for work done in the time period covered by the draw:

> Bankers characterizes the obligation of Transamerica under the disbursement agreement as a responsibility to pay the loan proceeds in such manner as would protect both the borrower and the plaintiff from mechanics' liens to the extent of the funds disbursed. That is accurate. Here, however, the difficulty is that the cost of the work performed was greater than the money made available for payment. Transamerica was obliged to protect against the possibility of plaintiff paying twice for the same work. The defendant did not assume any obligation to pay for this project itself if neither Bankers nor Breaks provided the necessary funds.[28]

Further, the court agreed that the disbursing escrow agreement "clearly contemplated that

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[26] 594 F.2d 231 (10th Cir. 1979).

[27] Id. at 233 (emphasis added).

[28] Id. at 234 (appellate court quoting trial court with approval).

adequate funds were to be made available to Transamerica in order to satisfy claims,"[29] and that the insurer had relied on that promise. Thus, the lender was obligated to advance loan money to pay for liens arising from the "gap" period:

> In effect, it is claimed that by the issuance of a title insurance policy, Transamerica became a guarantor of payment for all work actually performed. That is more than the insurance contract calls for. Where, as here, work was performed and payment was not made up to the amount of the lender's loan commitment, the resulting mechanics' liens must be considered to have been created or suffered by the insured claimant and such liens are expressly excluded from coverage by the language of the title policy.[30]

Bankers Trust was relied on in the second case, *Brown v. St. Paul Title Ins. Corp.*[31] In *Brown*, the disbursing escrow agreement required the insurer to endorse the policy through the date of each disbursement. On the ninth draw, the waivers and contractor statements were dated about two weeks prior to disbursement. The lender stopped funding after that draw, and liens were filed for work done in part during that gap period. The insurer refused to remove the liens, on the basis that the insured had "suffered" or "agreed to" them by halting funding. The court agreed, ruling that the insurer protected through the disbursement date in reliance on the lender's implicit promise to fund through that date with the next draw. The court reasoned:

> While CMIT admittedly was under no obligation to continue funding the project after the default, it seems clear that the parties contemplated that CMIT would provide adequate funds to pay for work completed prior to the default. To hold otherwise would give the insured an unwarranted windfall and would place the title insurer in the untenable position of guaranteeing payment of work for which loan funds were never advanced.[32]

Bankers Trust and *Brown* remain good law.[33] However, they have been distinguished in later

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[29] 594 F.2d at 233.

[30] Id. at 234 (appellate court quoting trial court with approval) (emphasis added).

[31] 634 F.2d 1103 (8th Cir. 1980).

[32] *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103, 1110 (8th Cir. 1980).

[33] One article, Patterson, *Title Insurance and Mechanic's Liens*, 5 A.B.A. Real Property Financing Newsletter 20 (1985), criticized the decisions as imposing too great a limitation on coverage, opining that "if a lender must always disburse all its funds or have sufficient funds to pay all construction costs, then there is no need for insurance against prior liens because none will ever exist." However, the bulk of lien claims do not involve "gap" liens. They arise because of a host of other problems, including that a party is not shown on the contractor's statement or shown but no waivers obtained, or the waiver was forged or obtained by coercion.

cases, in which lien coverage was given without a corresponding disbursing escrow agreement.[34] These cases held that the *Brown* and *Bankers Trust* rule requiring that the lender continue funding was created by the terms of the construction escrow agreement, not the policy. Thus, the later cases found no implied duty to continue funding. For example, one court stated:

> The fact that committed funds under the loan agreement remained undisbursed has no bearing on the potential or actual lien losses under the title policy *unless* or *until* an actual or implied duty arises between the parties to the title policy to provide the funds. In *Bankers Trust* and *Brown*, this duty was impliedly created by the disbursement agreement. However, absent a contractual relationship ancillary to the insurance contract at issue, there was no implied duty between these parties that all committed loan funds must have been expended.[35]

In one later case, the parties had entered into a disbursing escrow agreement.[36] However, the court emphasized in that decision that the agreement stated that its terms did "not affect coverage under the title insurance policy." The court ruled that this phrase released the lender from the obligation to fully fund the construction loan.

In *Home Federal Savings Bank v. Ticor Title Ins. Co.*,[37] the title company issued pending disbursement endorsements with each draw, but there was no separate disbursing agreement between lender and title company. The lender elected not to advance the money to pay Wilhelm, the former general contractor. Wilhelm sued to foreclose its $6 million mechanic's lien. Ticor refused to defend Home Federal. The district court ruled in Ticor's favor, based on *Brown* and *Banker's Trust*. On appeal, the Seventh Circuit found that the insurer had a duty to defend the lender in the mechanic's lien foreclosure action. Because it did not, the court held that it was estopped to deny coverage based on Exclusion 3(a). The court might have stopped there, but continued its analysis anyway. The court reversed the district court's ruling that Exclusion 3(a) barred the claim. It said the *Banker's Trust* ruling that the lender had suffered liens by breaching its agreement to fund the loan in full did not apply:

> In this case, there was no disbursement agreement, and it was Home Federal rather than Ticor that both secured lien waivers and disbursed the funds when due under the

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[34] *American Sav. & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. (Tenn.) 1993); *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. 522 (W.D. Tenn. 1993); *Resolution Trust Corp. v. Ford Mall Associates*, 819 F.Supp. 826 (D.Minn. 1991); *Chicago Title Ins. Co. v. Resolution Trust Co.*, 53 F.3d 899 (8th Cir. 1995); and *Home Federal Savings Bank v. Ticor Title Ins. Co*., 695 F.3d 725 (7th Cir. (Ind.) 2012), reversing 2011 WL 4479080 (S.D.Ind.) (unpublished).

[35] *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. at 528.

[36] *Chicago Title Ins. Co. v. Resolution Trust Co.*, 53 F.3d 899 (8th Cir. 1995).

[37] *Home Federal Savings Bank v. Ticor Title Ins. Co*., 695 F.3d 725 (7th Cir. (Ind.) 2012), reversing 2011 WL 4479080 (S.D.Ind.) (unpublished).

> loan agreement. Unlike in *Bankers Trust* and *Brown*, nothing in the insurance policy or the course of dealings indicates that Home Federal was bound to disburse the entirety of its loan commitment to Altra even if Altra was in default.[38]

A short time after the Seventh Circuit Court of Appeals issued the *Home Federal* decision, however, that court expressed strong reservations about a bright line test in which the insurer may assert Exclusion 3(a) only when it has entered into a separate loan disbursing agreement. In *BB Syndication Services, Inc. v. First American Title Ins. Co.*,[39] the court held that a construction lender "created" or "suffered" mechanic's liens that piled on a project that began with no fixed budget, which the lender allowed to go further out of balance as work progressed, and on which the lender refused to disburse its entire loan amount. The title insurer and lender had entered into a loan disbursing agreement in *BB Syndication*, which distinguished the case from *Home Federal* based on the latter decision's own analysis. However, Justice Sykes noted that the liens piled on simply because the lender stopped funding without telling the contractors that it had done so:

> The liens at issue here relate to outstanding work that remained unpaid when BB Syndication cut off loan disbursements due to insufficient funds to complete the project. As such, the liens arose directly from BB Syndication's action as the insured lender, so coverage seems squarely foreclosed by Exclusion 3(a).

The court said that *American Savings* and its progeny wrongly ignore the fact that it is the lender, not the title insurer, who has the authority to make sure that the project is fully funded at the beginning, and to keep it in balance as construction progresses, and the lender also has the sole ability to inform contractors that it will not pay for work going forward. Together, the court recognized, these are the most common reasons why construction liens are filed, and thus the lender's decisions control the insurer's risk in giving lien coverage, as discussed further in §10.1.5.1. The court concluded that, given the lender's authority to control the construction lien risk, there is no sound basis for the *Home Federal* ruling that Exclusion 3(a) applies only when the lender also enters into a construction disbursing agreement:

> More fundamentally, placing decisive weight on the existence of a disbursement agreement produces anomalous results. Under *Home Federal* a title insurer that also acts as a disbursing agent would not have to cover liens arising from insufficient funds, whereas a title insurer (using the same standard-form policy) that does not act as a disbursing agent would have to cover them. The nondisbursing title insurer would thus be assuming a greater risk. But if a title company is both title insurer and disbursing agent, then it has more control over whether mechanics' liens will arise because it can ensure that loan funds are disbursed to the right people and in the proper amounts.

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[38] 695 F.3d at 734.

[39] 780 F.3d 825 (7th Cir. (Wis.) 2015).

10.1.5 Unrestricted Lien Coverage

In many states, it is common for the title insurer to give a lender making a construction loan to obtain protection against construction liens that is not subject to the terms of pending disbursement endorsements, whether or not there is a disbursing escrow agreement. The circumstances vary widely, and change over time. In some jurisdictions, this coverage is afforded because the lien law says that a mortgage obtains priority over construction liens if it is recorded before the visible commencement of the improvement. In such states, if the lender records the mortgage after the first visible work, it is considered to have "broken" priority. Nonetheless, during times in which the real estate market is relatively healthy, a title insurer will sometimes give unrestricted lien coverage to a lender with broken priority. One court described how construction lien coverage was underwritten in Minnesota during a good real estate market:

> If work has already begun on a project, the title company must decide if it is nonetheless willing to guarantee priority. Such coverage is known as "early start" coverage, meaning that the insurer, fully aware that lien rights may have already been created, nevertheless agrees to indemnify the insured against any losses it may suffer as a result of the prior liens. A title company that agrees to cover an early start will normally protect itself against financial exposure by insisting on disbursing the loan proceeds in order to monitor the project, to ensure that the proper parties get paid and to remain fully informed on the condition of the financing and the progress on the project.[40]

The insurer sometimes gives this coverage based on the fact that it will have the ability to control the collection of lien waivers through a disbursing escrow agreement. In other cases, this "blanket" lien coverage is granted solely on the strength of an indemnity.[41] When unrestricted construction lien coverage is given, based on whatever rationale, reported decisions have admitted few limitations on the coverage given.[42] One court made this comment:

> The simple fact that is controlling in this case is that two sophisticated business entities entered into this contract—the title policy. It insured against losses due to unrecorded liens on this project. It did not exclude lien coverage until all loan funds were expended. It did not exclude liens that arose from work and materials for which

[40] *Resolution Trust Corp. v. Ford Mall Associates,* 819 F.Supp. at 833, fn. 4.

[41] See *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. 1986).

[42] The courts rejected various arguments made by insurers to limit the lien coverage based on policy exclusions in the following decisions: *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. (Tenn.) 1993); *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. 522 (W.D. Tenn. 1993); *Resolution Trust Corp. v. Ford Mall Associates,* 819 F.Supp. 826 (D.Minn. 1991); *Chicago Title Ins. Co. v. Resolution Trust Co.,* 53 F.3d 899 (8th Cir. 1995); and *Home Federal Savings Bank v. Ticor Title Ins. Co*., 695 F.3d 725 (7th Cir. (Ind.) 2012), reversing 2011 WL 4479080 (S.D.Ind.) (unpublished).

loan funds had not already been advanced.[43]

Courts have acknowledged little or no obligation of the lender, even when its disbursement practices caused the liens in full or in part, as one court admitted:

> … [T]he title company accepted the risk of unpaid labor and materialmen's liens. It did this for a fee, relying on the affidavits and guaranty [of the owner]. The fact that this risk has matured cannot now be avoided by the argument that the insured lender must accept additional losses on the loan due to exactly one of the contingencies for which the title policy was acquired—unpaid lien claimants. A smaller loss does not constitute a windfall profit… . The court agrees that the … policy placed the title company in the unenviable position of having to pay off lien claims that under different circumstances might well have been paid by the loan funds, but that is what their contract provides.[44]

Nonetheless, title insurers have consistently raised two coverage defenses, both based on Exclusion 3(a): that liens caused by a shortage in project funding were "created" or "suffered" by the lender, and that the lender will obtain an unearned windfall if the insurer is required to pay for improvements that should have been paid for with money the lender holds or held undisbursed in the loan account. These defenses are discussed in turn below.

10.1.5.1 Failure To Keep Project In Balance

Construction liens often arise because the combined equity and loan funds are not enough to pay for the whole project. The relative obligations of the lender and the escrowee to keep the project in balance are fully discussed at §10.2.3. Two modern decisions have held that, when construction liens arose because the lender failed to keep the project in balance, the lender "created" or "suffered" the risk, negating policy coverage. Earlier decisions either refused to employ this reasoning, or limited its application to situations in which the lender and title insurer entered into a disbursing agreement.

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[43] *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. 522, 531 (W.D. Tenn. 1993).

[44] 840 F.Supp. at 528.

For many years, courts mostly rejected the project in balance argument. In *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*,[45] the insurer removed the construction lien exception based on an indemnity from the owners. The lender paid out its entire loan account. It then paid off lien claimants, sold the property and sued the insurer for the amount of the liens. The trial court held that the lender had created or suffered the lien claims because the lender retained "the 'business' risk that the developer would fail to obtain adequate financing in violation of the loan agreement and that material suppliers consequently would not be paid and would achieve prior liens is one that the lender typically bears."[46] The trial court relied on *Brown v. St. Paul Title Ins. Corp.*[47] The Sixth Circuit reversed. Because American Savings had advanced all of its loan funds, unlike *Brown*, the court reasoned that the lender had fully performed its duties. The court said that the insurer, not the lender, was responsible for paying for work for which neither lender nor borrower had committed any funds. It reasoned:

> [A]llowing American to recover from its insurer would not make Lawyers Title the guarantor of work for which loan funds were committed but never advanced, but rather, the guarantor of work for which loan funds were never committed. ... In essence, the insurer would, among other things, be insuring against the risk that the developer would not fulfill its obligation to obtain sufficient additional financing. This is the type of risk that insurance policies typically cover, the risk that another party, beyond the insured's control would fail to perform its obligations with injury resulting to the insured.[48]

Similarly, in *Chicago Title Ins. Co. v. Resolution Trust Co.*,[49] the lender did various things to accommodate cost overruns, including foregoing some interest payments. Eventually, however, the project was halted and liens were filed. The lender and insurer each paid half of the liens, agreeing to adjudicate their rights later. The lender took title to the project and finished it. The insurer then sued to get back its half of the lien claims. As in *American Savings*, the district court held that the liens were caused by the lender's failure to keep the project in balance, invoking Exclusion 3(a). The Eighth Circuit reversed, refusing to find that the lender had caused the lien claims by not keeping the project in balance. The court emphasized that the lender had eventually paid out more than its original loan amount, and had made other loan concessions as a result of the overruns. In reliance on *American Savings*, the court found that the purpose of construction lien coverage was to cover liens for which the lender had not committed loan funds.

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[45] 793 F.2d 780 (6th Cir. (Tenn.) 1993).

[46] 793 F.2d at 785.

[47] 634 F.2d 1103 (8th Cir. 1980).

[48] 793 F.2d at 786.

[49] 53 F.3d 899 (8th Cir. 1995).

> The insurer's attempt to interpret the language in the agreement broadly would mean the endorsement would provide no coverage unless the insured itself put up sufficient funds to complete the project. Since there would be no need for coverage under those circumstances ... this interpretation would effectively nullify the lien coverage secured by the endorsement.[50]

In the 2012 decision of *Home Federal Savings Bank v. Ticor Title Ins. Co.*,[51] the insurer issued pending disbursement endorsements with each draw, but there was no separate disbursing agreement between lender and title company. The lender elected not to advance the money to pay Wilhelm, the former general contractor. Wilhelm sued to foreclose its $6 million mechanic's lien. The Seventh Circuit found that the insurer had a duty to defend the lender in the mechanic's lien foreclosure action. Because it did not, the court held that it was estopped to deny coverage based on Exclusion 3(a). It also held that the lender was not unjustly enriched even though Ticor was required to pay for the improvements the lender had refused to fund, because the lender did obtain endorsements but there was no disbursing agreement under which the lender had promised to keep funding the project.

However, the rationale of *American Savings*, *Chicago Title v. RTC* and *Home Federal* was thoroughly debunked in *BB Syndication Services, Inc. v. First American Title Ins. Co*.[52] In that decision by the Seventh Circuit, the court held that the construction lender "created" or "suffered" mechanic's liens due to the lack of a fixed budget, made worse when the lender allowed the project to go further out of balance as work progressed, and on which the lender refused to disburse the full loan amount. The court held that the lender has the power to make sure that the project is in balance before work begins, and to keep it that way as construction progresses:

> It was clear early on in the life of [this] project that cost overruns would put the loan out of balance. At that time BB Syndication had only disbursed $5 million in loan funding, yet it kept the spigot open, ultimately releasing more than $61 million in loan funds before declaring the project unfinishable and halting the flow of money. BB Syndication insists that its forbearance demonstrates good faith—a willingness to do everything possible to see the project through—so the fault for the liens cannot be laid at its feet. Perhaps. An alternative interpretation is that its poor business judgment precipitated the liens.
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> Either way, BB Syndication's argument exposes a flaw in the reasoning of *American Savings* and *Chicago Title*. Contrary to the assumption underlying those decisions, construction lenders have significant ability to ensure that the projects they

[50] 53 F.3d at 907.

[51] *Home Federal Savings Bank v. Ticor Title Ins. Co*., 695 F.3d 725 (7th Cir. (Ind.) 2012), reversing 2011 WL 4479080 (S.D.Ind.) (unpublished).

[52] 780 F.3d 825 (7th Cir. (Wis.) 2015).

finance remain economically viable—both at the beginning when deciding whether to finance a project and how much money to commit, and also throughout construction. The contractual arrangements in this case are commonplace and demonstrate the lender's broad authority. As a condition to closing, BB Syndication required Trilogy to submit, for its approval, various documents that would allow it to assess the project's viability before closing the loan... .

The loan agreement also allowed BB Syndication to monitor the project throughout construction to ensure its continued viability. It could request financial reports from Trilogy and conduct monthly on-site inspections of the project. If at any point BB Syndication determined that the loan was out of balance, it could require Trilogy to supply a cash infusion. If the developer's available funds were insufficient to complete the project, BB Syndication could choose to cut off disbursements—or not. BB Syndication had the discretion to continue funding even a doomed project. ...

In short, at the first sign of trouble, BB Syndication could have used the threat of default to force the developer to supply additional funds. If Trilogy was unwilling or unable to do so, BB Syndication's losses would have been less than $5 million—and most likely zero—since the land alone was worth roughly $12 million. Instead, BB Syndication chose to continue funding the project. That was its prerogative, of course, but in the end this risky business decision resulted in $17 million in liens from unpaid work.

BB Syndication now looks to First American to cushion its losses, but this stretches title insurance too far. Finding coverage in this situation—where the insured lender has the sole discretion to either continue or cease funding a project that is or has become unfinishable—would raise a serious question of moral hazard. Most work on a construction project increases its value (and in turn the value of the lender's security interest), but if the title company has to cover the costs while the lender retains the benefit, then the lender obtains a windfall by shifting a business risk to the title insurer. ... Since the amount of unpaid work will depend on the timing of a doomed project's inevitable termination, lenders might strategically delay. That is exactly the type of problem that Exclusion 3(a) is there to prevent.

The line drawn in *American Savings* and *Chicago Title*—that Exclusion 3(a) does not apply if the insured lender has disbursed all of its loan proceeds—does not grapple with this hazard. Knowing that unpaid contractors' claims will be covered by title insurance once the loan proceeds run out may in some circumstances encourage lenders to continue to fund a project even after it becomes clear that it has no chance of succeeding.

A better interpretation is that Exclusion 3(a) excludes coverage for liens that arise as a result of insufficient funds. This interpretation makes the most sense of the respective roles of the insured lender and the title insurer in this context. Only the lender has the ability—and thus duty—to investigate and monitor the construction project's economic viability. When liens arise from insufficient funds, the insured lender has "created" them by failing to discover and prevent cost overruns—either at the beginning of the project or later. This interpretation also has the advantage of being a clear rule that parties can bargain around.[53]

BB Syndication correctly posits that a title insurer does not contract to pay for work for which no money was ever allocated, or improvements built after the lender has stopped making advances. *BB Syndication* also acknowledged in a footnote that the Seventh Circuit's own decision in *Home Federal*, issued just a few years earlier, was fundamentally flawed because it had found the existence of a disbursing agreement to be a necessary predicate for Exclusion 3(a) to apply.

In *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.*,[54] the court adopted the reasoning of *BB Syndication* and expanded on it, to hold that the insured lender suffered or created millions of dollars of mechanic's liens due to its faulty construction loan disbursing practices, reversing a ruling by the district court.

Captiva was the first decision applying Exclusion 3(a) based squarely on the premise that the lender can and ordinarily does exert much influence over the borrower during the course of a construction loan, and thus has the power to keep a project in balance. The Eighth Circuit admitted that the title insurer has no similar authority to keep a project in balance, even when there is a disbursing agreement between the lender and insurer. The court cited numerous authorities and learned treatises that explain these principles.[55] It also quoted from the loan documents for this project to establish the lender's contractual rights to require that the borrower keep the project in balance, which had been a condition to the lender's obligation to continue funding of draws. The court noted that, nonetheless, the *Captiva* project was not in balance when the loan was made, that the lender permitted the deficiency to grow as construction progressed, and that many liens were the result of contractors who continued to work for months after the bank had secretly halted disbursements. Also, the lender never advanced the full amount of the loan.

The Eighth Circuit applied the exclusion although there was no disbursing agreement between lender and title insurer, unlike the facts in *BB Syndication*. The Eighth Circuit said that the district court had construed Exclusion 3(a) too narrowly, as applying only if the lender "engaged in intentional misconduct or inequitable dealings... ." Thus, the trial court had abused its discretion "when it excluded evidence regarding Fidelity's Exclusion 3(a) defense." The court relied on its own prior decision in *Brown v. St. Paul*, to conclude as a matter of law that the exclusion barred coverage:

> We conclude that Exclusion 3(a) can apply under Missouri law even if the insured did not engage in intentional misconduct or inequitable dealings. ... In

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[53] 780 F.3d at 834-836.

[54] 883 F.3d 1038 (8th Cir. (Mo.) 2018).

[55] The court cited, in particular, Michael F. Jones & Rebecca R. Messall, *Mechanic's Lien Title Insurance Coverage for Construction Projects*, 16 Real Estate L.J. 291 (1988). It also recited this quote from 1 Grant S. Nelson et al., *Real Estate Finance Law* § 12.1 (6th ed.), Westlaw: "A construction loan provides funds for the construction of improvements on land. The developer and the lender enter into a construction loan agreement, which sets forth the terms of the loan and "generally incorporates by reference the project's plans and specifications, includes a budget that the developer must follow, and specifies the project completion date."

> *Brown*, we held that the construction lender's cessation of disbursements following the developer's default under the construction loan agreement "created or suffered" the liens that consequently arose due to insufficient funds. 634 F.2d at 1110. "While [the lender] admittedly was under no obligation to continue funding the project after the default, it seems clear that the parties contemplated that [the lender] would provide adequate funds to pay for work completed prior to the default." Id. Requiring the insurer to indemnify the lender "would give the insured an unwarranted windfall and would place the title insurer in the untenable position of guaranteeing payment of work for which loan funds were never advanced." Id.

The court also said it believed that "the Missouri Supreme Court would adopt the well-reasoned analysis of the United States Court of Appeals for the Seventh Circuit in *BB Syndication Services*" that "Exclusion 3(a) excludes coverage for liens that arise as a result of insufficient funds," as quoted above. The Eighth Circuit distinguished its own prior decision in *Chicago Title v. RTC*, which construed Minnesota rather than Missouri law.

Following *Captiva*, courts should no longer hold that Exclusion 3(a) can apply only when there was a disbursing agreement between the lender and title agent or insurer. Also, after *Captiva* and *BB Syndication*, no court should repeat the assertion of *American Savings* that the title insurer is "the guarantor of work for which loan funds were never committed."

10.1.5.2 Unjust Enrichment Or Windfall To Lender

In certain cases decided between 1979 and 2012, title insurers asserted that Exclusion 3(a) should prevent the lender from receiving a windfall by having the insurer pay for improvements, particularly if the lender refused to advance all of the loan money to pay for those same improvements. This argument was based on the valid premise that a construction lien is a lien, but one that has favored status because it represents the cost of the value added to the property by an improvement, and the lender gets that improvement for free when it forecloses.[56]

The windfall principle was accepted by the courts in *Bankers Trust* and *Brown v. St. Paul*.[57] In *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*,[58] the court twisted the principle, holding that an insured lender did not obtain a windfall unless it refused to pay out the full amount of its loan.

Two later decisions went even further, knocking down the *American Savings* principle that a lender must fully fund the loan in order not to receive a windfall. In *Mid-South Title Ins. Corp. v.*

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[56] Once a lender has foreclosed, the issue is no longer the relative priority of the liens. After foreclosure, the lender owns the property, and the insurer is being asked to pay for the improvements that the insured now owns. See *Drilling Service Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972). Every payment by the insurer to a construction lien claimant thus reduces the lender's cost in acquiring the project.

[57] *Bankers Trust Co. v. Transamerica Title Ins. Co.*, 594 F.2d 231 (10th Cir. 1979); *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103, 1110 (8th Cir. 1980).

[58] 793 F.2d 780 (6th Cir. (Tenn.) 1993).

Resolution Trust Corp.,[59] the lender disbursed $8,028,000 of a $9,800,000 loan and then finished the project for an additional $502,000, making a total outlay of about $8,500,000. The liens in dispute totaled about $200,000. The court rejected the windfall argument because there was no disbursing agreement creating a contractual obligation to fund the entire loan. The windfall argument was also rejected in *Resolution Trust Corp. v. Ford Mall Associates*,[60] despite the fact that the lender did not advance the entire loan amount. The court again based its ruling on the fact that the lender had made no commitment to the insurer to advance all of the loan money, and had negotiated for full mechanic lien coverage in its policy.

In *Home Federal Savings Bank v. Ticor Title Ins. Co.*,[61] the insurer issued pending disbursement endorsements with each draw, as in *Brown*, but there was no separate disbursing agreement between lender and title company as in *Bankers Trust*. The lender refused to pay the general contractor, which filed a $6 million mechanic's lien. The Seventh Circuit held that the lender was not unjustly enriched by making Ticor Title pay for the improvements the lender had refused to fund with the loan it had committed to make. The court used this rationale:

> Home Federal paid an extra premium for the mechanic's lien endorsement… . [The Wilhelm lien] would have … reduced the amount of its recovery from the proceeds of the foreclosure sale by $6 million. However dim Wilhelm's prospects of success, that was precisely what Home Federal had insured against in the mechanic's lien endorsement. … Bearing those costs is a risk against which Home Federal had already insured through its policy with Ticor by paying for the mechanic's lien endorsement. As we see the case, Home Federal was seeking only the peace of mind it had paid for, not a windfall.[62]

However, the rationale of *Home Federal* and the earlier decisions was found to be being fundamentally flawed in the later decision by the Seventh Circuit of *BB Syndication Services, Inc. v. First American Title Ins. Co.*,[63] discussed above.

10.1.6 Measure Of Loss--Loan Policy

The loss resulting from a construction lien is measured in the same manner as other types of loan policy losses. A full discussion of the measure of loan policy losses is found at §3.2.4. Certain unusual fact situations warrant mention under this chapter, however.

Dueling mortgage and construction lien foreclosures can force the lender to spend money to

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[59] 840 F.Supp. 522 (W.D. Tenn. 1993).

[60] 819 F.Supp. 826, 833 (D.Minn. 1991).

[61] *Home Federal Savings Bank v. Ticor Title Ins. Co*., 695 F.3d 725 (7th Cir. (Ind.) 2012), reversing 2011 WL 4479080 (S.D.Ind.) (unpublished).

[62] 695 F.3d at 735.

[63] 780 F.3d 825 (7th Cir. (Wis.) 2015).

preserve its position. If the insurer is litigating the validity of the liens or otherwise clearing title, such expenses may be compensable. For example, a lender was found to have suffered a loss when it was forced to redeem the property from a superior construction lien claimant's foreclosure sale, in order to preserve the lien of the insured mortgage.[64] A second mortgagee suffered loss equal to the surplus from the first mortgagee's foreclosure sale, when that surplus was paid to intervening lien claimants.[65]

An insurer has the right to clear title by litigating the validity of the construction liens. See §3.4 for a complete discussion of the right to cure title. However, the lien claimant's foreclosure action can affect the insurer's effort to clear title.[66] There can be a tension between the lender's desire to complete or sell the unfinished project and the insurer's right to protect the insured's lien priority.[67]

10.1.7 Premature Or Voluntary Payment Of Liens By Insured Lender

As stated above, an insured lender does not prove a loss merely on showing that a prior construction lien exists. The lender must also establish that the loan is in default, and that the lender is undersecured as a result of the construction lien. A lender that pays a lien but is unable to show that the lien impaired its security has not proven a loss.[68] The insurer is not required to pay off liens on demand by the insured, or to permit the insured to do so.[69] Such a payment by the lender will ordinarily invoke the voluntary settlement provision, discussed at §2.14.

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[64] *Minnesota Title Ins. & Trust Co. v. Drexel*, 70 F. 194 (8th Cir. (Minn.) 1895).

[65] *American-First Title & Trust Co. v. First Federal Savings & Loan Ass'n of Coffeyville*, 415 P. 2d 930 (Okla. 1965).

[66] In *Trigiani v. American Title Ins. Co.*, 392 Pa.Super 427, 573 A. 2d 230 (Pa.Super. 1990), a claimant's foreclosure sale was held while the insurer was attempting to cure title. The court found that the lender was not required to "throw good money after bad" to preserve its position by bidding at the sale.

[67] In *The Tokai Bank v. Chicago Title Ins. Co.*, 125 F.3d 859 (Table), 1997 WL 632599 (9th Cir. (Cal.)) (unpublished), the insurer defended the lender against construction lien foreclosures under a reservation of rights. When the owner filed bankruptcy, the lender viewed its options as being to have the stay lifted and proceed with foreclosure, provide financing to complete the project, or to support a Section 363(f) sale by the trustee free of liens. The lender obtained appraisals of the unfinished project and elected to support a sale free and clear for a price that matched the appraised value. The buyer finished the project for $8 to $10 million less than the lender itself had estimated as the cost of completion. The lender then sued the insurer for the difference in value. It claimed that the coverage question raised by the reservation of rights had forced it to support a Section 363 sale rather than complete the structure or finance its completion. The court found that the lender decided to back the sale because the appraisals supported the sale price, rather than because of the coverage question. Therefore, the insurer was not liable to the lender for the claimed difference in value.

[68] *Ring v. Home Title Guar. Co.*, 168 So.2d 580 (Fla.App. 1964).

[69] In *Diversified Mortgage Investors v. U.S. Life Title Insurance Co. of New York*, 544 F.2d 571 (2d Cir. 1976), a construction lender wished to settle with lien claimants before it made additional advances. It was denied an injunction prohibiting the insurer from raising the voluntary settlement defense against the lender if it settled.

10.2 Construction Loan Escrows

The second half of this chapter discusses the duties that the escrowee assumes when it disburses loan funds under a construction escrow.[70] General escrow principles are discussed in Chapter 13. As stated above, construction lien laws vary widely. As a result, the construction escrow does not exist everywhere. Such escrows are found primarily in states in which a construction lender receives little or no statutory protection against construction liens.

10.2.1 Nature Of Agreement Generally

Construction escrows vary, but a common procedure is as follows. The owner or contractor delivers to the escrowee a project breakdown, also known as a schedule of values, with or before the first request for an advance (known as a draw). With each draw request, the contractor deposits an affidavit or certificate as to the work completed to date, showing the line items for which payment is sought, together with waivers from each listed subcontractor and supplier. The owner and lender each send written consents to the draw request and direct the escrowee to disburse the loan advance. The draw package may also include an architect's certificate as to the percentage of completion, a separate inspector's statement as to workmanship, an owner's affidavit as to work for which it has separately contracted, invoices for all work for which payment is sought, and a survey (foundation or as-built).

The escrow agreement typically says that the escrowee is to review each draw "package" and notify the lender as to whether or not the insurer is prepared to extend the construction lien policy coverage forward in time through the date of draw funding, and upward in amount to include all advances made to date. This coverage is normally provided by a "pending disbursement" endorsement.[71] See §10.1.4 and following for a complete discussion of the cases construing pending disbursement endorsements. If the escrowee is prepared to issue the endorsement, the lender deposits the amount of the construction draw with the escrowee and payment is made. If the insurer is unwilling to issue an endorsement, the agreement usually provides several options.

In most jurisdictions, the escrowee is liable only to the principal or principals to the escrow or disbursing contract.[72] The construction escrowee is most commonly alleged to have duties of the

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[70] Construction escrows and construction lien liability are further analyzed in Jones & Maessell, *Mechanic's Lien Title Insurance Coverage for Construction Projects*, 16 Real Estate L.J. 291 (1988); Urban, *Future Advances and Title Insurance Coverage*, 15 Wake Forest L. Rev. 329 (1979); Jordan, *Mechanics' Lien Coverage*, Practicing Law Institute, Real Estate Course Handbook (1988); Bohan, *Mechanics' Lien Coverage in Title Insurance Policies,* in *Attorneys' Role in Title Insurance*, A.B.A. Real Property & Trust Section, (1990); Sweat, *Obligatory Advances: Mechanics' Liens and the 1987 Loan Policy,* Practicing Law Institute, Real Estate Course Handbook (1988); J. Patterson, *Title Insurance and Mechanic's Liens,* 5 A.B.A. Real Property Financing Newsletter 20 (1985); Palomar, *Title Insurance Law,* § 6.12, pp. 6-78 to -83.

[71] The form of endorsement varies widely. One form is the ALTA Construction Loan Policy Endorsement A, designed to be used in connection with the Construction Loan Policy.

[72] In *Elsebaei v. Philip R. Seaver Title Co., Inc.*, 2015 WL 7079068 (Mich.App.) (unpublished), the court found that a title company that reviewed construction draw requests and issued pending disbursement endorsements under a contract with the lender did not owe a duty to the borrower-owners, and thus could not be liable to them for the contractor's theft of loan money. The court said that the disbursing agreement was incidental to the title agent's role in giving construction lien coverage to the lender under its title insurance policy. Michigan has held that a title agent is not directly liable to

following types:

1. To verify payment to all subcontractors
2. To keep the project in balance
3. To pay the proper parties
4. To inspect the property

These subjects are discussed in turn below. There is a series of published decisions from Missouri. The author's view is that the cases are indicative of the great deference Missouri statutes and courts give to construction lien claimants, at the expense of owners, lenders and insurers. The more extreme Missouri holdings should not be considered authoritative in states which give a better balance to the competing interests of the parties.

The final portion of this section discusses the escrowee's defenses to negligence claims and sources of recoupment by or against the escrowee.

10.2.2 Paying Subcontractors And Collecting Lien Waivers

Construction projects are typically disbursed in stages, known as draws, as the work progresses. The disbursing instructions tell the escrowee which person or parties to pay with each draw, and identify those documents that are to be received in exchange for payment.

The most common arrangement is for draws to be paid to the general contractor. However, the disbursing agreement sometimes orders the escrowee to pay subcontractors directly, meaning that separate payments are to be made to every person that has provided services, labor or materials during the draw period.[73] The general contractor provides the escrowee with a list of subcontractors and suppliers who have worked to date and showing the total dollar amount of work for which payment is requested. It is common for the general contractor to be required to furnish to the escrowee with each draw lien waivers from the subcontractors and suppliers who have provided services, labor or materials to date. The instructions may require those waivers to be either unconditional or conditional on payment to be received.

The escrowee is liable for losses suffered by an escrow party that were proximately caused by the escrowee's failure to follow its instructions and which were reasonably foreseeable by the escrowee. An instruction to pay subcontractors and suppliers directly was not altered by owner's authorization forms that stated that payment was to be made to the general contractor.[74] A violation

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third parties, including the insured, in relation to the policies that it issues. See *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516 (E.D.Mich. 1993) and *Wormsbacher v. Seaver Title Co.*, 284 Mich.App. 1, 772 N.W.2d 827 (2009).

[73] See Allan R. Burke, *Lien-Free Construction Through Direct Disbursement*, in *Title News*, Volume 62, Number 8 (October 1983), p. 7, for a still-relevant and thorough description of the way in which lenders and title insurers can limit the construction lien risk by paying subcontractors and suppliers directly. ALTA members can retrieve the article from the *Title News* archives at alta.org.

[74] *R and B Kapital Development, LLC v. North Shore Community Bank and Trust Co.*, 358 Ill.App.3d 912, 832 N.E.2d 246, 295 Ill.Dec. 95 (Ill.App. 1 Dist. 2005) (disbursing agreement controls contradictory statement in owner's authorization form).

of instructions is normally a breach unless the parties consent to the change, even if done with the sincere goal of compensating for or avoiding a potential lien problem.[75] However, the construction escrowee is not liable for minor or technical errors that do not cause a loss to the escrow principals.[76]

An escrowee may be found to have made improper disbursements by paying on a draw request that includes a contract extra, change order not approved by all parties to the escrow, or an increase from the original budget for a particular subcontract item.[77] Also, when a lien is filed for work done in the time period for a previous draw, the escrowee may not unilaterally take funds from a later draw to pay the lien claimant.[78]

A Missouri decision found the escrowee liable to a subcontractor for not making sure that he was paid when the escrowee knew that he was on the job, but no request was made for payment of that work.[79] However, Missouri stands alone in making subcontractors third party beneficiaries of the construction disbursing agreement, however, a subject discussed in full at §10.2.6.

Most escrow instructions obligate the escrowee to obtain waivers of lien from the contractor and subcontractors as payments are made. The instructions may state that the waivers are to be for all work done through the time of the payment (current waivers), or through the prior disbursement (draw delay), or some combination of the two. In most circumstances, a forged waiver is of no effect. The escrowee has a duty of reasonable care in reviewing waivers of lien. It may be liable to its principal if reasonable scrutiny of the waiver would reveal that it is a forgery. However, the escrowee is not responsible for loss suffered from a forged waiver that is facially proper and not suspicious looking.[80] In a second case, an errors and omissions carrier denied a duty to defend an

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[75] The construction escrow agreement has been said to create "a responsibility to pay the loan proceeds in such manner as would protect both the borrower and the [lender] from mechanics' liens to the extent of the funds disbursed." *Bankers Trust Co. v. Transamerica Title Ins. Co.*, 594 F.2d 231 (10th Cir. 1979).

[76] In *Meyers v. TrustTexas Bank, S.S.B.*, 2018 WL 6072158 (Tex.App.-Austin) (unpublished), several small communication errors by the title company escrowee and bank in disbursing a construction loan were found not to have caused any loss to the borrowers, who thus were not entitled to recover against the escrowee.

[77] *H.B.I. Corp. v. Jiminez*, 803 S.W.2d 100 (Mo. 1990); *Pioneer Nat'l Title Ins. Co. v. Cranwell*, 369 S.E.2d 678 (Va. 1988).

[78] *Pioneer Nat'l Title Ins. Co. v. Cranwell*, 369 S.E.2d 678 (Va. 1988).

[79] *O'Neil Lumber Co. v. Allied Builders Corp.*, 663 S.W.2d 326 (Mo.App. 1983); *Title Ins. Co. of Minn. v. Construction Escrow Service*, Inc. 675 S.W.2d 881 (Mo.App. 1984). In *Hoida, Inc. v. M & I Midstate Bank*, 688 N.W.2d 691, 2004 WI App 191 (Wis.App. 2004), the court found that the escrowee had a duty to a subcontractor "to refrain from any act which [would] cause foreseeable harm," and that it "was foreseeable that the failure to obtain lien waivers could harm subcontractors." Nonetheless, the court found that recovery by the subcontractor against the agent should be denied on grounds of public policy. The court found that the legislature had achieved a delicate but deliberate balance in the state construction lien law between the rights of owners and contractors. It noted that the subcontractor had lien rights, which it chose not to employ, and thus it would be repugnant to give it an additional means of recovery. This holding was affirmed on appeal, and the above language cited with approval, by the state supreme court in *Hoida, Inc. v. M & I Midstate Bank*, 291 Wis.2d 283, 717 N.W.2d 17, 2006 WI 69 (Wis. 2006).

[80] *Fantino v. Lenders Title and Guar. Co.*, 303 Ill.App.3d 204, 707 N.E.2d 756, 236 Ill.Dec. 629 (Ill.App. 2 Dist. 1999).

agent against a claim based on the failure to spot a fraudulent waiver. The E & O policy excluded coverage when the agent failed to obtain "appropriate" waivers of lien. The court found the policy ambiguous because "appropriate" was not a defined term. The policy:

> … neither indicates from whose perspective or at what time we determine whether the lien waivers were appropriate. It is unclear whether appropriateness is determined by reference to purpose or simply form. From Cherryland's perspective at the time it obtained the waivers, the lien waivers were suitable, fit, or proper because they were indeed lien waivers from the contractor before payment. ... [T]he exclusion [must be] measured from the escrow agent's view at the time it obtains the lien waivers. Cherryland therefore obtained appropriate lien waivers from O'Brien even though the lien waivers were later found to be fraudulent.[81]

Insured purchasers of newly-constructed houses sometimes claim there is an implied escrow or other duty of the insurer to verify that all potential lien claimants have been paid. This claim sometimes arises when the insurer has not acted as escrowee during construction, and does not insure the purchaser against inchoate lien rights. There is no such implied duty to verify payment. See §10.1 regarding construction lien coverage and the construction lien standard exception.

The general contractor sometimes resents the escrowee's direct communication with subcontractors and suppliers, and the loss of its control over them when those parties are paid directly by the escrowee. The escrowee has the right to communicate with subs and suppliers in order to orchestrate payment in exchange for waivers. An escrowee was found not liable to the builder for disclosing information about the sale price of the home, which allegedly caused the subcontractor to refuse to accept a discounted payment for his work.[82]

Similarly, in *Creative Hardwood Floors, Inc. v. Schafer,*[83] the construction lender appointed a title agency to disburse its construction loan funds for a house to be built for the owners. The work was not finished when the last draw was requested. The draw was funded, but the contractor went out of business, and did not pay Creative Hardwood Floors, which filed a lien and a foreclosure action. The owners claimed that an employee of the title agency assured them that it was common practice to submit a final draw request before work was done, and that the work would be done. The employee denied making the statements. The Schafers sued the agency and lender on various theories, including negligent misrepresentation. The lender obtained summary judgment. The cause of action against the title agent was not at issue in the appeal.

In *Gordon v. New Mexico Title Co.,*[84] the insurer conducted the escrow for the permanent

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[81] *Simpson v. Title Industry Assurance Co., et al.*, 590 N.W.2d 282 (Table), 224 Wis.2d 644, 1999 WL 19307 (Wis.App.) (unpublished).

[82] *Wilcher v. AmeriTitle, Inc.*, 212 Or.App. 498, 157 P.3d 790 (2007).

[83] 1998 WL 515783, 1998 Ohio App. LEXIS 1959 (Ohio App. 5 Dist.) (unpublished).

[84] 77 N.M. 217, 421 P.2d 433 (1966).

loan on a new house. It accepted affidavits from the purchaser and the builder to the effect that all work was complete and all laborers paid. Liens were later filed. The insurer was sued, on the theory that local custom and practice created an implied duty of the escrowee to investigate whether or not all lien claimants had really been paid, rather than to rely on affidavits. The appellate court reversed a judgment against the insurer. It found no proof of such a custom and practice, and therefore no such duty. In fact, the evidence at trial showed that the insurer had previously conducted loan escrows with the same builder in which it relied on the builder's affidavit without further investigation. The *Gordon* case illustrates the fact that, when a project goes awry, purchasers and lenders sometimes seek to create implied duties of the escrowee in order to obtain recovery for project debts.[85]

10.2.3 Keeping Project In Balance

FORM 73, Appendix A
Construction escrow negligence

The construction escrowee is not responsible for keeping the construction project in balance.[86] When the escrowee is also the title insurer, its policy liability can be seriously affected by the fact that the project gets out of balance. That subject is addressed in §10.1.5.

The shortage of money to pay for the project is a common source of construction lien problems. This can occur in a number of ways, including: the lack of a fixed-price contract,[87] the lender's failure to insist on an accurate and complete schedule of values based on final plans and specifications before the project commences,[88] the lack of an adequate contingency reserve,[89] the

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[85] See §10.2.4 below discussing the alleged implied duty to inspect the premises on behalf of the homeowner, addressed in *Frieberger v. Lawyers Title Ins. Co.*, 831 S.W.2d 731 (Mo.App. 1992).

[86] *Nichols v. Chicago Title Ins. Co.*, 107 Ohio App.3d 684, 669 N.E.2d 323 (Ct.App. 8 Dist. 1995).

[87] "There are several methods of fixing the cost of a construction project with the builder or contractor. The most common are the simple, fixed price contract, the cost plus fixed fee arrangement, and cost plus fixed fee with a guaranteed maximum 'upset' price. ...Even when the contractor has agreed with the owner on a fixed or maximum cost, cost control and budgeting should still concern the owner, just as it does the construction lender. The project should not be allowed to become out of balance, that is, the cost to complete must never exceed the undisbursed sum agreed to or budgeted for the project. While it is true that the economic risk of cost overruns is assumed by the contractor in a fixed or guaranteed maximum-cost arrangement, unapproved extras and probable overruns are still a serious danger sign for the owner. The contractor may not be able to sustain the economic loss, which could lead to financial failure and suspension of the work. At the very least, a general contractor that perceives that cost overruns have eliminated its profit on a job and are likely to result in a loss may lose enthusiasm to proceed diligently and competently with the work." Richard Harris, *Construction and Development Financing*, Warren, Gorham & Lamont, ¶ 7.1[a], pp. 7-3 -4.

[88] "To facilitate the computation of the amount to be paid under progress payments in a fixed-price contract, the contractor is generally required to submit to the design professional a schedule of values before the first application for payment. This schedule, when approved, constitutes an agreed valuation of designated portions of the work. The aggregate of the schedule should be the contract price." Justin Sweet, *Legal Aspects of Architecture, Engineering, and the Construction Process*, Fourth Edition, § 26.02(B), p. 478. Similarly, another construction lending text states: "The lender should require that the disbursements for the project be based upon a budget approved by both the borrower and

owner's failure to obtain additional money when the project budget increases, change orders that increase the cost, construction delays, increases in the cost of materials, subcontractors who fold and whose work must be done by new parties at increased cost, contractor diversion of funds, or change of construction conditions.

The lender, not the title insurer, is responsible for analyzing the project cost before making the construction loan. A banking practices handbook states:

> The bank next determines if there are sufficient funds available to complete the development. This is critical, as one of the primary requirements is that all funds necessary to complete, including a reasonable contingency, must be available at the time the loan records.[90]

Further, it is the lender that has the obligation of keeping the loan in balance as work progresses:

> From the time administration commences with the execution and recording of the construction mortgage, the prudent construction lender will carefully monitor the project as though the lender might one day become its owner. It will have its own architect ... perform an oversight function, reviewing plans and specifications, work in progress, draw requests, and myriad other matters. It will carefully and continuously monitor the loan to confirm that it remains "in balance" at all times.[91]

The owner has the same obligation as the lender to keep the project in balance.[92] The escrowee, by

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the lender." John G. Cameron, Jr., *A Practitioner's Guide to Construction Law*, § 1.02(b)(2), p. 1-7.

[89] "Finally, the lender must consider that despite the most candid presentation and the most careful evaluation of projected costs, there are inherent uncertainties in the construction process that cannot be eliminated. *Inclusion of an adequate contingency reserve in project costs is critical.* While the amount of the reserve will depend on the type of project and the degree to which costs are fixed at the time the loan is underwritten and disbursed, a reserve of 5 percent of both hard and soft costs has been a rule of thumb." Alvin L. Arnold, *Construction and Development Financing*, (Second Edition), § 3.03[2][a], p. 3-13 (emphasis added).

[90] R. Harris, *Construction and Development Financing*, § 4.20 (Warren, Gorham & Lamont, 1982) (1987 Supp.), quoted in Jones & Maessell, *Mechanic's Lien Title Insurance Coverage for Construction Projects*, 16 Real Estate L.J. 291, 293 (1988).

[91] Jones & Maessell, *Mechanic's Lien Title Insurance Coverage for Construction Projects*, 16 Real Estate L.J. 291, 293 (1988).

[92] See *Nichols v. Chicago Title Ins. Co.*, 107 Ohio App.3d 684, 669 N.E.2d 323 (Ohio App. 8 Dist. 1995). In that case, the owner took the lowest of three bids to build his house. There was a significant price differential, and the owner had reason to believe that it was not possible to build the house for the low bid amount. The owner eventually fired the contractor and paid $125,000 above the original contract price to complete the house. The owner sought to make the insurer-escrowee or lender pay the difference. The court ruled that the overruns were not "the 'natural and necessary consequence of' nor 'proximately caused by' an alleged breach of duty by Chicago Title" or the lender." Rather, the "only rational explanation for there being insufficient funds to complete construction of the house is that the construction price was incorrectly calculated by the architect or builder in the first place." Further, the insurer-escrowee did not become

contrast, is not responsible for keeping track of the budget unless the agreement says so.[93] Thus, if the escrowee complies with all written instructions, and issues pending disbursement endorsements limited to dates and amounts disbursed, it is not liable as escrowee if liens are filed because the project is underfunded.[94] However, a statement in the disbursing agreement that the escrowee was not responsible for assuring that there will be sufficient funds available for completion of the project was found not to place an obligation on the lender to fund a shortage, or to "enforce" the loan agreement by obligating the owner to produce the additional money.[95] Also, when the escrow specifically required the insurer-escrowee to obtain additional owner equity funds if the contract amount changed, the escrowee violated that instruction by accepting change orders without requiring the owners to deposit funds to cover the increase in the contract amount.[96]

10.2.4 Inspection Of Property

The escrowee's duties regarding inspections of the property, if any, are derived from the disbursing agreement. The disburser has no implied duty to inspect the property or have it inspected.[97] When the construction escrow agreement stated that the escrowee "has not been employed and has no responsibility to supervise construction or determine adequacy of design and compliance with plans and specifications," the court ruled that the escrow was not ambiguous, and "Lawyers Title did not owe a duty to homeowners to inspect to insure work was proceeding in a workmanlike manner before disbursing funds."[98] If the escrowee or lender perform inspections, they

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liable for the cost overruns by not advising the owner that funds were being held back with draws based on the inspector's percentage-of-completion assessments. "Nothing in the loan agreement prohibited Chicago Title from disbursing less than the amount shown on the draw request." Id. at 330.

[93] See Jones & Maessell, *Mechanic's Lien Title Insurance Coverage for Construction Projects*, 16 Real Estate L.J. 291 (1988). Also, in *Nichols v. Chicago Title Ins. Co.*, 1995 Ohio App. LEXIS 5297, the owner claimed that the insurer was obligated to keep track of a builder which was running over budget on a fixed-price contract. The owner argued that, if the escrowee had warned the owner of the cost overruns, it could have scaled back the project. The court disagreed, noting that no such express duty existed under the escrow instructions, and that the escrowee had complied with instructions in making disbursement. In addition, the owner had approved draw requests, which gave it equal knowledge of the cost overruns.

[94] See *Bankers Trust Co. v. Transamerica Title Ins. Co.*, 594 F.2d 231 (10th Cir. 1979) and *Brown v. St. Paul Title Ins. Corp.*, 634 F.2d 1103 (8th Cir. 1980).

[95] *Chicago Title Ins. Co. v. Resolution Trust Co.*, 53 F.3d 899, 907 (8th Cir. 1995).

[96] *H.B.I. Corp. v. Jiminez and Ticor Title Ins. Co.*, 803 S.W.2d 100 (Mo. 1990).

[97] *Frieberger v. Lawyers Title Ins. Co.*, 831 S.W.2d 731 (Mo.App. 1992); *Rosario v. Absolute Construction*, 178 Wis.2d 590, 506 N.W.2d 170 (Table), 1993 WL 266240, 1993 Wis.App. LEXIS 905 (unpublished); *Fantino v. Lenders Title and Guar. Co.*, 303 Ill.App.3d 204, 707 N.E.2d 756, 236 Ill.Dec. 629 (Ill.App. 2 Dist. 1999); *231 W. Scott, LLC v. Lakeside Bank*, 80 N.E.3d 753, 414 Ill.Dec. 610, 2017 IL App (1st) 161131 (Ill.App. 1 Dist. 2017) (relying on *Fantino*).

[98] *Frieberger v. Lawyers Title Co. of Missouri*, 831 S.W.2d 731, 734 (Mo.App. 1992).

are not done for the benefit of the owner unless such is the explicit agreement. [99]

The insurer-escrowee also has no duty to determine that improvements have reached the intended stage of completion, or that the improvement has been built according to plans and specifications. A Texas court, however, found an escrowee to have a general "duty of loyalty" to the lender in connection with inspections. That duty, the court suggested, might have been breached by escrowee's failure to note from a survey that construction had commenced prior to recording of the insured mortgage, rendering it subordinate to construction liens. The court did not find that the escrowee had a duty under the escrow to assure the lender that it had a first lien, however. In addition, the court found that any breach by escrowee would have to be weighed against the lender's own knowledge of its loss of priority, since the lender also received the survey.[100]

The insurer also does not have a duty to inspect the property that is implied from the title insurance policy.[101] When the insurer removed the standard exceptions for the lender and noted in its file that the property had been "inspected," the insured owner was not an intended beneficiary of the loan policy contract, and had no cause of action against the insurer for failing to inspect and discover that the building slab encroached.[102]

10.2.5 Claims By Title Insurer Against Escrowee

The construction escrowee may assert the same types of defenses to liability as it has under other forms of escrows. See §13.11 for a full discussion of an escrowee's defenses. The escrowee may also assert claims against third parties.

An insurer may recoup its policy loss from an agent-escrowee that caused the loss by its escrow negligence. In *Pioneer Nat'l Title Ins. Co. v. Cranwell*,[103] an insurer was found to have a cause of action against its approved attorney for negligent disbursement of escrow funds.

Frequently, one insurer disburses a construction loan but a second insurer is asked to insure the permanent financing or the purchaser of the recently-completed house. In *Title Ins. Co. of Minn. v. Construction Escrow Service*,[104] the construction escrow was handled by an independent escrow company, which certified that construction was complete and that full payment had been made. The

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[99] *Zlatanov v. Bank One, N.A.*, 2005 WL 32952 (Cal.App. 6 Dist.) (unpublished) (bank's independent inspector owed no duty to the home owner on the theory that the inspector estimated completion percentages too generously, and owners should have contracted for their own inspections); *M & I Bank of Southern Wisconsin v. Poehling*, 277 Wis.2d 873, 690 N.W.2d 885 (Table), 2005 WI App 1 (Wis.App.) (unpublished) (title company inspections not performed for benefit of owners, and lender had no duty to arrange for inspections for owners' benefit).

[100] *First Federal Sav. & Loan Assn. of Beaumont v. Stewart Title Co.*, 732 S.W.2d 98 (Tex.App. 1987).

[101] *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (Cal.App. 1 Dist. 1978); *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo.App. 1991); *Sterling v. Stewart Title Guar. Co.*, 822 S.W.2d 1 (1991).

[102] *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (Cal.App. 1 Dist. 1978).

[103] 369 S.E.2d 678 (Va. 1988).

[104] 675 S.W. 2d 881 (Mo.App. 1981).

insurer on the construction loan relied on the certification in issuing its policy giving construction lien coverage. Liens were filed, and the title insurer was permitted to recover against the escrowee. The insurer was not a party to the escrow. However, the court found that the insurer was "an intimate and essential party to the entire transaction" and therefore could sue because of the misrepresentation in the certification to recover the amount of the liens paid.

10.2.6 Escrowee's Duties To Lien Claimants

The relationship between the escrowee and the contractor and subcontractors is determined primarily by the escrow agreement. A lien claimant or general contractor is not a third party beneficiary of the agreement in most jurisdictions.[105] Similarly, in a Texas case decided in federal court, a lien claimant sought to enforce a construction lien indemnity given to the insurer, as a third party beneficiary. The court found that the claimant was not automatically barred because it was not a party to the indemnity agreement. Again, the agreement clearly stated who the intended beneficiaries were, and the claimant was not on the list, and that expression of intent was binding on the claimant. The court refused to find a third party beneficiary obligation "by implication."[106] Wisconsin has also held that, as a matter of public policy, a disburser is not liable to lien claimants even when negligent, because the lien claimants have a statutory remedy that protects them.[107]

Missouri cases, by contrast, have held that the general contractor is a third party beneficiary, and may sue for negligent disbursement.[108] However, Missouri has an extremely strong bent toward favoring lien claimants and its decisions in this area have not been followed by other courts.

There are numerous factors which militate against the general contractor as a third party beneficiary. In the typical situation, these would include that the contractor is not a signatory, that the agreement's stated purpose is to allow the insurer-escrowee sufficient control over funding for it to give construction lien coverage to the lender, that the agreement states who the intended

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[105] *Superior Construction Services, Inc. v. Moore*, 2007 WL 1816096 (Minn.App.) (unpublished) (bank escrowee disbursing insurance proceeds for repairs owed no duty of care to contractors to assure that they would be paid, and was not liable when they waived lien rights but owner failed to pay them); *P.E.M. Construction & Development Co., Inc. v. EnCap Gold Holdings, LLC*, 2011 WL 3802244 (N.J.Super.A.D.) (unpublished) (subcontractor was not intended third-party beneficiary of construction project escrow, and was not entitled to be paid from it, particularly when conditions for disbursement had not been met); *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302 (Utah 1983) (contractor not in privity with construction loan disburser and disburser owes it no duty other than to refrain from misrepresenting the facts). In *Bescor, Inc. v. Chicago Title & Trust Co.*, 113 Ill.App.3d 65, 68 Ill.Dec. 812, 446 N.E.2d 1209 (Ill.App. 5 Dist. 1983), the court held that a subcontractor was not a third party beneficiary of the construction escrow, and that "a fair reading of the balance of the agreement shows that its foremost purpose was to protect the security interests of the lender against possible mechanics' lien claims." Thus, it said, "we do not believe it plausible that the subcontractors, including Bescor, were any more than mere incidental beneficiaries of the express trust." 446 N.E.2d at 1214.

[106] *Goldberg v. R.J. Longo Construction Co.*, 54 F.3d 243 (5th Cir. 1995).

[107] *Hoida, Inc. v. M & I Midstate Bank*, 291 Wis.2d 283, 717 N.W.2d 17, 2006 WI 69 (Wis. 2006).

[108] *O'Neil Lumber Co. v. Allied Builders Corp.*, 663 S.W. 2d 326 (Mo.App. 1983); *H.B.I. Corp. v. Jiminez and Ticor Title Ins. Co.*, 803 S.W.2d 100 (Mo. 1990).

beneficiaries are, and that the contractor has not sought to be made a party to the agreement.

The escrowee has a lesser duty, if any, to subcontractors and material suppliers. It is not in privity with these claimants.[109] Subcontractors are not owed a fiduciary duty, and are not third party beneficiaries.[110] The escrowee is not a trustee holding funds for the sole benefit of the claimants.[111]

The escrowee does, however, have a duty to give accurate information to a lien claimant if the insurer might reasonably expect that the lien claimant will rely on that information. One court held that an escrowee may be liable for negligent misrepresentation to subcontractors, based on the following reasoning:

> while it was not the 'end and aim' of Arizona Title's business in its capacity as Builder's Control escrow agent to give out information as to the amount of construction funds it had on hand, it was the end and aim of its business to see to it that the contractors got paid for their work out of whatever funds were available. As the builder's disbursing agent to the contractors, Arizona Title was necessarily and intimately involved with the contractors in the most vital kind of business relationship.[112]

The escrowee told subcontractors there was enough money in its possession to finish the job, when it knew or should have known that there was not. The court explained that the escrowee:

> … did not owe the contractors the duty of making any calculations to ascertain whether sufficient funds would or would not be available to pay the contractors for their work. In other words, Arizona Title had no duty to speak or respond to the contractors' inquiries at all. But if it chose to speak, we think that under all of the circumstances its business relationship with the contractors carried with it a duty to exercise reasonable care in making representations about presently ascertainable facts.[113]

The court further held that the escrowee, because it is not in privity with subcontractors, may only be liable to the party to whom a misrepresentation is made, and not others who might also act on that information unbeknownst to the escrowee.

In a closing or post-closing escrow, a lien claimant that is to be paid from the escrow has the

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[109] See *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz.App. 486, 484 P.2d 639 (Ariz.App. 1971), and *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302 (Utah 1983), which approved the *O'Malley* analysis.

[110] *Bescor, Inc. v. Chicago Title and Trust Co.*, 113 Ill.App.3d 65, 446 N.E.2d 1209, 1213 (1983).

[111] In *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz.App. 486, 484 P.2d 639 (1971), the trial court granted the escrowee summary judgment on this issue, which was not the subject of the appeal.

[112] *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 484 P.2d at 645.

[113] Id.

same status as other non-party payees. In most jurisdictions, an escrowee has no duty to non-party payees. The subject is fully discussed at §13.4. In *Joe Keresztury Homes, Inc. v. Commerce Land Title of San Antonio, Inc.*,[114] an escrow agreement created because of a dispute with a drywaller stated that the escrowee had the right, "at its sole election and discretion," to deliver the funds to the drywaller. The lien was not resolved, and the lien claimant sued. The escrowee then paid the drywaller. All claims were dropped except the builder's suit against the escrowee, in which it claimed attorney's fees incurred in the suit and the difference between the escrowed amount and what the builder thought it should have received. The court found that the escrow language left the "decision to the discretion of" the escrowee, and failure to release the funds sooner was not a breach of the agreement. However, when the lien claimant is a party to the escrow, the escrowee is responsible for failing to follow its instructions, as with any other principal. In a case involving escrow instructions given for the closing of a sale of the property, a New York case held an escrowee responsible to a mechanic lien claimant for "failing to follow closing instructions received from" the claimant, as a result of which the lien claimant did not get paid.[115]

10.2.7 Recovery By Escrowee Against Other Parties

Insurer-escrowees often take indemnities as security for the granting of construction lien coverage. The indemnity may specify what action the owner or contractor must take when a construction lien claim is made. In addition, insurer-escrowees almost always rely on owner and/or contractor affidavits. Owner's affidavits are used to assure the insurer that all workmen have been paid. Contractor affidavits are supplied with each draw and state that the named parties are the only ones who have done work. See §5.10.2 for a complete discussion of recovery under construction lien indemnities.

10.2.8 Punchlist And Completion Escrows

When property is sold before a newly-built structure has been completed, it is common for the parties to enter into a "punchlist" or completion escrow. The escrowee holds a certain sum to be released to the builder after the improvement is completed. Although these escrows go by many names, a punchlist escrow is commonly understood to be one in which a list of repairs (the punchlist) are to be made. The escrow provides says that the builder will receive the escrowed funds when the repairs are made. A completion escrow is used when a portion of the work is not finished when the sale from the builder closes. On residential construction, this is often landscaping or paving that cannot be performed until the ground has settled or a harsh weather season has passed. Money is also deposited on completion escrows, to pay for the remaining work as it is performed. If the escrowee is also the title insurer, it often wishes to control the escrow in order to exchange payment of the escrowed funds for construction lien waivers, especially if it has protected against inchoate construction lien rights.

The most common dispute about a punchlist or completion escrow is the conditions for the

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[114] 1998 WL 130245 (Tex.App.-San Antonio) (unpublished).

[115] *F & C General Contractors Corp. v. Atlantic Mutual Mortgage Corp.*, 268 A.D.2d 556, 703 N.Y.S.2d 196 (N.Y.A.D. 2 Dept. 2000).

release of the escrowed money. In *Maratea v. Greater Metropolitan Abst. Corp.*,[116] punchlist escrow instructions contained a drop-dead date for return of the funds, but also said that the money was to be paid out in exchange for evidence that the punchlist work to be performed. The seller paid the contractors, and demanded the return of the escrowed money, only to learn that the title company escrowee had already paid out the money to settle the same claims. The court found that the plaintiff had a good cause of action, especially since the title company escrowee "proffered no explanation for the 90-day period set forth in the agreement."

In *Joe Keresztury Homes, Inc. v. Commerce Land Title of San Antonio, Inc.*,[117] an escrow agreement created because of a dispute with a drywaller stated that the escrowee had the right, "at its sole election and discretion," to deliver the funds to the drywaller. The lien was not resolved, and the lien claimant sued. The escrowee then paid the drywaller. All claims were dropped except the builder's suit against the escrowee, in which it claimed attorney's fees incurred in the suit and the difference between the escrowed amount and what the builder thought it should have received. The court found that the escrow language left the "decision to the discretion of" the escrowee, and failure to release the funds sooner was not a breach of the agreement.

The damages for failure to complete a punchlist escrow have been held to be the cost of performing the work, even if that cost is greater than the amount which the parties agreed to escrow. In *Cater v. Barker*,[118] the parties entered into a punchlist escrow that called for the seller of an existing residence (not new construction) to deposit money into escrow, to be returned to the seller after she had made certain post-closing repairs. The seller did not make the repairs, and insisted that her sole duty was to deposit the money. The buyer sued for the cost of completing the work, which was triple the amount escrowed. The appeals court affirmed a judgment in that amount.

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[116] 305 A.D.2d 381, 759 N.Y.S.2d 162 (N.Y.A.D. 2 Dept. 2003).

[117] 1998 WL 130245 (Tex.App.-San Antonio) (unpublished).

[118] 172 N.C.App. 441, 617 S.E.2d 113 (N.C.App. 2005), aff'd per curiam, 360 N.C. 357, 625 S.E.2d 778 (N.C. 2006).

11 Exclusions

Certain matters are excluded from the coverage of the title policy. The title insurance policy contains exclusions of two types. The first type of exclusion concerns matters that do not affect title, but are sufficiently related to make it desirable to affirmatively state that the policy provides no protection against those subjects. An exclusion in this class is Exclusion 1 in the 2006 ALTA policies, for governmental regulation of the use of property.

The second type of exclusion negates coverage as to matters that affect title, but that do not properly invoke a right to insurance protection. Several of these exclusions hinge on the insured's own conduct. They include, for example, defects created or agreed to by the insured (Exclusion 3(a)), off-record matters known to the insured (Exclusion 3(b)), and those that do not cause a loss (Exclusion 3(c)).

The insured bears the burden of proving that a matter falls within the covered risks of the policy. The insurer has the burden to show that the matter is excluded. See §9.1.3.1 for a discussion of the general principles employed in the interpretation of insurance contracts.

11.1 Land Use Laws, Police Power And Eminent Domain

Exclusion 1 removes coverage against various forms of governmental regulation of the use of the property.[1] Exclusion 2 eliminates coverage for the government's right to take property by

[1] "The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of: 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 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. (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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."

condemnation or eminent domain.[2]

Exclusion 1 exists to confirm that matters of land use regulation are not covered by the policy, since they have to do with governmental control over the use of the property rather than its title. Also, most of the permits, approvals and enforcement documents pertaining to land use regulations are not found in the real estate records; they are not searched by title insurers. This is not happenstance, but evidence that the statutory scheme is to separate land title documents from land use records. Because land use records do not affect title, title insurers do not examine them. A title insurance commitment or policy is not a zoning or building code due diligence report, or a substitute for that due diligence.

Exclusion 2, for eminent domain rights, exists for a different reason than Exclusion 1. The condemnation of property causes a transfer of its title. It might seem strange to consider that a title insurance policy does not protect against the possibility that all or some of the property whose title is insured has already been condemned by the government (or by a private entity, in those jurisdictions that confer condemnation powers on private businesses such as utilities and railroads). However, as is explained below, in many states there is no public record evidencing the taking of property by condemnation. Thus, Exclusion 2 exists to limit the Covered Risks to the extent that the insurer is unable to eliminate the risk of such a title transfer by an accurate search and examination of the real estate records.

The policy forms have evolved to limit these exclusions so that there is now some coverage for the effect of recorded land use or condemnation notices.[3] The successive policy changes to Exclusion 1 reflect the tension between the fundamental principle that a title insurance policy insures only title, but various types of instruments about land use are recorded for the purpose of informing purchasers and lenders. Buyers and lenders wish to be informed of these non-title recorded notices, but the policy is not an information product, and certainly not intended to inform people about matters for which there is no coverage.

At the insistence of influential customer groups, particularly lenders and attorneys, the policy forms have been altered incrementally toward the offering of limited coverage for recorded instruments that concern non-title issues. The coverages provide the rationale for the transmittal of information, albeit in the form of exclusions (exceptions). In other words, there is coverage only in the event the insurer fails to exclude a recorded notice, of a type for which the limited coverage is

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[2] "The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of: … 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." In *Property Hackers, LLC v. Stewart Title Ins. Co.*, 96 A.D.3d 818, 949 N.Y.S.2d 70, 2012 N.Y. Slip Op. 04728 (N.Y.A.D. 2 Dept. 2012), rev.den. 20 N.Y.3d 853, 982 N.E.2d 92, 2012 N.Y. Slip Op. 93255 (Table) (N.Y. Dec 11, 2012) (unpublished), the court held that the policy did not protect against the post-policy condemnation of the insured parcel.

[3] For an excellent discussion of the policy revisions since 1970, including the 1987 exclusion language changes, see Robert S. Bozarth, *Choosing a Title Insurance Policy Form*, in Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders, Practicing Law Institute N-448 1999, p. 15. See also Joyce D. Palomar, *Title Insurance Law*, 2014-2015 Edition, §§ 5:9, 5:10 and 6:3, West/Thomson Reuters.

provided, in Schedule B of the policy.

The policy evolution began with the 1984 ALTA policy forms, which added the following as subpart (d) to Exclusion 1:

> The effect of any violation of the matters excluded under (a), (b) or (c) above, unless notice of a defect, lien or encumbrance resulting from a violation has been recorded at Date of Policy in those records in which under state statutes deeds, mortgages, lis pendens, liens or other title encumbrances must be recorded in order to impart constructive notice to purchasers of the land for value and without knowledge; provided, however, that without limitation, such records shall not be construed to include records in any of the offices of federal, state or local environmental protection, zoning, building, health or public safety authorities.

The 1987 form ALTA policies revised this term again, with the description of public records found in (d) moving from the exclusion to the definitions section.[4] Limiting language was added to Exclusion 1(c) to say that it does not apply "to the extent that a notice of the enforcement thereof or 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." Exclusion 2, for eminent domain, was similarly amended in 1987.[5]

The ALTA also made a change in the definition of public records in the 1987 policies. The rather expansive phrase "records in any of the offices of federal, state or local environmental protection, zoning, building, health or public safety authorities" was replaced by a definition that referred to 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," and which excluded environmental liens.

Exclusions 1(a) and 1(b) of the 1992 ALTA policies excluded governmental regulation "except to the extent that a notice of the enforcement thereof or 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 1992 policies contained a definition of "public records" that was slightly different from prior versions. See §9.12 for a complete discussion of that term and its definition.

The official ALTA commentary about the 2006 policy states that "[i]t was initially believed that the 1992 policy would provide "coverage by reason of the exception" to the exclusions. In fact, the Vermont Supreme Court held, in *New England Federal Credit Union v. Stewart Title Guar. Co.*,[6] that the exception to Exclusion 1 *was* an affirmative coverage, and that the lack of a permit on file at

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[4] Id. at 30.

[5] "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."

[6] 171 Vt. 326, 765 A.2d 450 (Vt. 2000).

a state office was "a notice" of the "enforcement" of the subdivision law that triggered that coverage. However, the 2002 California decision of *Elysian Investment Group, LLC v. Stewart Title Guar. Co.*[7] said essentially the opposite, ruling that:

> Elysian cannot rely upon an exclusion to coverage to extend coverage. … [T]he Notice of substandard dwelling did not affect title. It therefore did not give rise to coverage under the basic insuring provisions of the policy, and the exclusion does not expand that coverage to include the Notice."

The *Elysian* decision followed the conventional principle that an insurance policy exclusion cannot provide an affirmative coverage. A respected insurance treatise states this rule of construction:

> If there is no coverage under the terms of the insurance clause, coverage cannot be created based on the exceptions or qualifications contained in the exclusions.[8]

In reaction to *Elysian*, the drafters of the 2006 ALTA policies created the limited coverages found in Covered Risks 5, 6, 7 and 8 and modified Exclusions 1 and 2 to negate coverage for land use regulations and eminent domain except to the extent of those coverages. There is a general discussion of those covered risks at §9.9.2. However, the sections below combine the cases that have construed both the exclusions and the 2006 Covered Risks, which are two parts of the same subject.

11.1.1 Building Code Ordinances

FORM 36, Appendix A
Building code violation

Exclusion 1 of the 2006 ALTA policies removes coverage for violations of or non-compliance with building codes, except to the extent of the coverage provided by Covered Risk 5. That Covered Risk, new to the 2006 ALTA policies, protects against loss or damage caused by the "violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to (a) the occupancy, use, or enjoyment of the Land … if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice." The Homeowner's Policy provides affirmative assurances concerning building code violations. See a discussion of that policy's covered risks at §9.14.2, and its exclusions at §11.10. See §9.12 regarding the definition of "public records" in the policy.

[7] 105 Cal.App.4th 315, 129 Cal.Rptr.2d 372 (Cal.App. 2 Dist. 2002).

[8] Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 6:2, p. 6-87, Thomson Reuters.

Exclusions

This section discusses both the cases that have construed the exclusion and those that have construed Covered Risk 5, because they are two parts of the same subject.

Exclusion 1 removes any suggestion that the policy provides coverage for violations of or non-compliance with building codes.[9] It also establishes that there is no coverage for the effect of the lack of a building permit for an improvement located on the property, or other permits or consents that an owner is required by law to obtain in order to build a structure.[10] The exclusion also bars claims based on other types of building code violations.[11]

The protection against notices of violation or enforcement that appear in the public records provides a small limitation on the scope of the exclusion.[12] For example, in *Hon Realty Corp. v. First*

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[9] *Arapahoe Land Title, Inc. v. Contract Financing, Ltd.*, 28 Colo.App. 393, 472 P.2d 754 (1970) (code violation); *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951) (building permit refusal); *Witkowski v. Richard W. Endlar Ins. Agency, Inc*., 81 Mass.App.Ct. 785, 968 N.E.2d 922 (Mass.App. 2012) (exclusion applied when insured condominium unit destroyed by flood after policy date and building code prevented insured from rebuilding unit); *Johnson v. Law Office of Schwartz*, 145 A.D.3d 608, 46 N.Y.S.3d 1, 2016 N.Y. Slip Op. 08931 (N.Y.A.D. 1 Dept. 2016) (Exclusion 1 bars coverage for the lack of an occupancy permit for the property). See also, 40 A.L.R.2d 1238; *Northern California Community Development Corp. v. First American Title Ins. Co*., 2019 WL 1397040 (Cal.App. 3 Dist.) (unpublished) (no coverage for failed land development, which was due in part to lack of building permits).

[10] *Chu v. Chicago Title Ins. Co.*, 89 App.Div.2d 574, 452 N.Y.S.2d 229 (1982) (lack of a certificate of occupancy); *Chudy v. William Raveis Real Estate, Inc.*, 2010 WL 5188445 (Conn.Super.) (unpublished) (former owner's failure to obtain building permits excluded); *Somerset Savings Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 649 N.E.2d 1123 (1995) (exclusion applies to bar coverage for claim based on insured's failure to obtain consent from the commonwealth's secretary of transportation to build on former railroad land, as required by statute); *Kremer v. Lawyers Title Ins. Corp.*, 177 Vt. 553, 861 A.2d 1103, 2004 VT 91 (Vt. 2004) (exclusion applied to failure to obtain plumbing permit; lack of a permit was not an encumbrance on title; court said it was not clear that permit was required, and that "it is not the duty of the title insurer to make up for the shortcomings of a town's septic regulations."); *Culley v. Bank of America, N.A.*, ___ F.Supp.3d ___, 2019 WL 1430124 (D.Mass. 2019) (permanent citation not yet available) (no coverage for lack of septic system permit or certificate of occupancy for newly-built home).

[11] In *Kokinis v. First American Title Ins. Co.*, 68 Mass.App.Ct. 1106, 860 N.E.2d 978, 2007 WL 328795 (Mass.App.Ct.) (unpublished), the court held that the mere delivery to closing of a municipal lien certificate showing a sewer charge did not cause the title insurance policy to cover the cost of complying with a municipal code requirement to hook up to municipal sewer after the home's septic system failed. The court held that the building code exclusion applied, and that there was no defect in the title to the land. However, in *Radovanov v. Land Title Co. of America, Inc*., 189 Ill.App.3d 433, 545 N.E.2d 351, 136 Ill.Dec. 827 (Ill.App. 1 Dist. 1989), the court held that a building code violation suit pending at the date of policy rendered title unmarketable, and found that the building code exclusion was inconsistent with the marketability coverage. See §9.8 regarding the coverage for marketability of title.

[12] In *Property Hackers, LLC v. Stewart Title Ins. Co.*, 96 A.D.3d 818, 949 N.Y.S.2d 70, 2012 N.Y. Slip Op. 04728 (N.Y.A.D. 2 Dept. 2012), app.den. 20 N.Y.3d 853, 982 N.E.2d 92, 2012 N.Y. Slip Op. 93255 (Table) (N.Y. Dec 11, 2012) (unpublished), the court held that the policy did not protect against the post-policy condemnation of the insured parcel. No notice of the exercise of the condemnation power had been recorded in the real estate records as of the date of policy, and thus the exception to the exclusion did not apply. In *First American Title Ins. Co. v. McGonigle*, 2013 WL 1087353 (D.Kan.) (unpublished); 2013 WL 1092893 (D.Kan.) (unpublished), a recorded notice informing owners of their obligation to keep a dam in repair was found not to be a notice of violation or enforcement that would trigger Covered Risk 5 of the 2006 ALTA Owner's policy. The court also rejected the insureds' argument that "covered risk 5 applies to current violations and the language in exclusion 1 is only applicable to future violations." The court said "the language in exclusion 1 applies to violations of Kansas law that were present, but not recorded, on the date the policy went into effect." The dam was in violation of state regulations on the date of policy, but no notice of violation had been

American Title Ins. Co.,[13] a Florida court found that a building code order filed in the city records was not a notice of violation for which the exclusion's exception would provide any recovery to the insured. A notice of enforcement was recorded with the Miami-Dade County clerk of court two weeks after closing. The court held that neither the city records nor the statutory scheme permitting the recording of such notices were "public records" under the policy terms.[14]

There is a limited spectrum of recorded instruments that serve as notices of violation or the intent to enforce a building code.[15] The California case of *Elysian Investment Group, LLC v. Stewart Title Guar. Co.*[16] said that a recorded "notice of substandard dwelling" did not trigger the coverage. That notice stated that a modification to the building failed to meet building code was not a notice of violation or enforcement, and warned that the city may take action to bring the building up to code, the cost of which "would be assessed as a lien against the property." An unrecorded order had been issued pursuant to the code. The insured claimed policy coverage, based on the prior decision of *1119 Delaware v. Continental Land Title Co.*[17] That court had found that Exclusion 1 did not negate coverage for a recorded conditional use permit. The insurer relied on *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*,[18] which found that the policy does not protect against physical conditions affecting the property but not its title. The *Elysian* court ruled that the building code notice was not an encumbrance on title. It also distinguished *1119 Delaware*:

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recorded, so Covered Risk 5 was not invoked and Exclusion 1 negated coverage. In *Glenn v. First American Title Ins. Co*., 2009 WL 1830745 (Mich.App.) (per curiam) (unpublished), a condemnation list kept at the city building department office was determined not to be a public record under the definition found in the Homeowner's policy. Therefore, the effect of the demolition order was excluded.

[13] 2008 WL 4078762, 291 Fed.Appx. 951 (11th Cir. (Fla.) 2008) (unpublished).

[14] The court said "It is clear that the 'public records' definition contemplated only the inclusion of those records filed under a state recording statute and not those general public records that may be available from, for example, a public records request with the state or a local municipality." 2008 WL at *2.

[15] In *Stockton Mortgage, Inc. v. Tope*, 233 Cal.App.4th 437, 183 Cal.Rptr.3d 186 (Cal.App. 3 Dist. 2014), reh.den. (Jan. 13, 2015), rev.den. (March 25, 2015), the court found that a recorded notice of abatement identifying various building code violations at the property was not a notice of violation that triggered Covered Risk 5, based principally on *Elysian Investment Group, LLC v. Stewart Title Guar. Co*., 105 Cal.App.4th 315, 129 Cal.Rptr.2d 372 (Cal.App. 2 Dist. 2002), which found that a "notice of substandard condition" did not invoke the coverage. The *Stockton* court also held that the notice of abatement was not a lien or encumbrance on title, and the lack of an exception in the policy did not obligate the insurer to pay to bring the property up to code. In *Federal Deposit Ins. Corp. v. Commonwealth Land Title Ins. Co*., 902 F.Supp.2d 1048 (N.D. Ohio 2012), an Ohio court found that the lis pendens recorded in connection with an action for the appointment of a 7-A administrator to collect rent at an apartment building in New York City was a notice of violation of the city building code. The court bolstered this suspect ruling with the finding that the insurer "was aware of the appointment" of the administrator. An earlier decision by a New York court had held that the appointment of a 7-A administrator was not a defect in title and was not covered by the policy. *Zev Cohen, LLC v. Fidelity Nat'l Title Ins. Co*., 15 Misc.3d 798, 831 N.Y.S.2d 689 (N.Y.Sup. 2007).

[16] 105 Cal.App.4th 315, 129 Cal.Rptr.2d 372 (Cal.App. 2 Dist. 2002).

[17] 16 Cal.App. 4th 992, 20 Cal.Rptr.2d 438 (Cal.App. 2 Dist. 1993).

[18] 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991).

> Unlike the Notice at issue in the present case, the CUP amounted to a governmentally imposed encumbrance on title because it limited the right of the owner to convey the property. In addition, the CUP applied only to that specific property, whereas the restrictions at issue here governed all similar property.[19]

The court said the refused to find a duty to recite the notice simply because the exception to the exclusion refers to notices in the real estate records:

> Elysian cannot rely upon an exclusion to coverage to extend coverage. … Unlike an assessment lien, for example, the Notice of substandard dwelling did not affect title. It therefore did not give rise to coverage under the basic insuring provisions of the policy, and the exclusion does not expand that coverage to include the Notice.
>
> Even if the exclusion could be understood as granting coverage based upon the reasonable expectation of the insured, the Notice of substandard dwelling arguably does not fall within the exception to the exclusion.[20]

The court also found that the notice was a warning, not a notice of "enforcement":

> Enforcement … required further action on the part of the city. … Had the Department repaired the property and assessed the costs against the homeowner, the Board of Public Works could ultimately have recorded the assessment as a lien. … Title insurance does not insure against future events. …It is not enough that subsequent events might result in enforcement ultimately affecting title. … As discussed above, the Notice was not a notice of enforcement under municipal procedures. The Notice was instead a warning, preliminary to any formal enforcement action.[21]

Also, even a policy that contains Covered Risk 5 does not provide coverage against building code violations that are evidenced by municipal databases of code violations, when there is no statute granting those records the status of public records that impart notice to buyers of real estate.[22]

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[19] 105 Cal.App.4th at 323, 129 Cal.Rptr.2d at 378.

[20] 105 Cal.App.4th at 324, 129 Cal.Rptr.2d at 379.

[21] 105 Cal.App.4th at 322, 325; 129 Cal.Rptr.2d at 377, 379-80.

[22] In *Glenn v. First American Title Ins. Co.*, 2009 WL 1830745 (Mich.App.) (per curiam) (unpublished), a condemnation list kept at the city building department office was determined not to be a public record under the definition found in the Homeowner's policy. Therefore, the effect of the demolition order was excluded. In *Logan v. Barretto*, 251 A.D.2d 552, 675 N.Y.S.2d 102 (N.Y.A.D. 2 Dept. 1998), the seller had received two notices that sewage had been discharged onto the surface of the property in violation of the county sanitary code. The court found on summary judgment that the insurer had no duty to search for and disclose this violation, because it was not within the ambit of the policy: "Here, the appellants' standard title insurance policy afforded the plaintiffs coverage for loss

Covered Risk 5 also does not provide protection against recorded instruments that do not have to do with a building code, such as a designation that the parcel is in a special district or contains a historic structure.[23] For example, *Dave Robbins Construction, LLC v. First American Title Ins. Co.*[24] held that Covered Risk 5 was not invoked by the fact that the property had been placed on a historical register, in a set of heritage registry records promulgated by law. The insured received a stop-work order when he began construction, and archeological artifacts were discovered on the property, which delayed construction. The insured argued that the covered risk was invoked because "the stop-work order amounts to enforcement of governmental regulations." The court said that interpretation would unfasten the covered risk from its mooring to matters affecting the title to the property:

> …coverage exists for damage from regulation enforcement only "if a notice, describing any part of the Land, is recorded in the Public Records setting forth the ... intention to enforce [.]" Here, … there were no notices of violation or intent to take enforcement action recorded with the county auditor.
>
> DRC claims no such notices need be recorded with the county recorder, because the term "Public Records" as used in the policy includes all records on file with all governmental agencies, including the list of properties kept in the Washington heritage register… . We disagree. … Contrary to DRC's argument, there is nothing in RCW 27.34 declaring the purpose of the Washington heritage register is to impart constructive notice of matters relating to real property to potential purchasers… .[25]

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occasioned by a defect in title, including liens or encumbrances on the title, or unmarketability of the title. Contrary to the plaintiffs' contention, the notices of non-compliance issued by the County Department of Health are not encumbrances on the title, and do not render title unmarketable. '[M]arketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property'... . Since the Sanitary Code provisions regulate the manner in which the property can be used and do not impair title, the damages claimed by the plaintiffs do not fall within the scope of the title insurance policy." 675 N.Y.S.2d at 103.

[23] In *McGonagle v. Stewart Title Guar. Co*., 432 S.W.3d 535 (Tex.App. -Dallas 2014), the court found that a recorded instrument instructing the owner that a house on the property was historic and would have to be moved rather than torn down was not an encumbrance on title. Thus, the removal of an exception for restrictive covenants of record did not create coverage for the effect of that instrument. However, the policy apparently did not contain Covered Risk 5, and the court did not discuss the exception to Exclusion 1 as found in the 1992 ALTA policy.

[24] 158 Wash.App. 895, 249 P.3d 625 (Wash.App. Div. 1 2010).

[25] 158 Wash.App. at 904, 249 P.3d at 628-9.

11.1.2 Zoning And Other Use Regulation

FORM 35, Appendix A
Zoning ordinance violation

Exclusion 1 of the 1992 and 2006 ALTA policies removes coverage for violations of zoning ordinances, which regulate the use of the property, not its title.[26] Covered Risk 5 of the 2006 ALTA policies protects against loss or damage caused by the "violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to (a) the occupancy, use, or enjoyment of the Land; [or] (b) the character, dimensions, or location of any improvement erected on the Land… if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice." Exclusion 1 in the 2006 ALTA policies is correspondingly limited so as not to negate Covered Risk 5. See §9.12 regarding the definition of "public records" in the policy. The ALTA Homeowner's Policy provides limited assurances as to certain zoning matters. See a discussion of that policy's covered risks at §9.14.2, and its exclusions at §11.10.

This section discusses both the cases that have construed the exclusion and those that have construed Covered Risk 5, because they are two parts of the same subject.

Exclusion 1 negates coverage for restrictions on use of the property that are imposed by zoning ordinances.[27] For example, a setback requirement imposed by a municipality on a subdivision

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[26] Exclusion 1 of the 2006 ALTA policies excludes from coverage any loss caused by "(a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the Land… ." The ALTA Homeowner's Policy excludes zoning matters at Exclusion 1(b). Exclusion 1 of the ALTA Residential Policy negates coverage for governmental regulation of "land use," which includes zoning.

[27] *First American Title Ins. Co. v. Grafton Partners, LLC*, 2009 WL 792263 (D.Mass.) (unpublished); *Bronen v. New York Abstract Co.*, 19 A.D.2d 821, 243 N.Y.S.2d 664 (1963); *Marine Midland Bank v. Virginia Woods, Ltd*., 151 Misc.2d 915, 574 N.Y.S.2d 485 (Putnam Cty.Sup.Ct. 1991); *Marriott Financial Services, Inc. v. Capitol Funds, Inc*., 288 N.C. 122, 217 S.E.2d 551 (1975), affirming 23 N.C.App. 377, 209 S.E.2d 423 (1974); *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996). In *Notaro Homes, Inc. v. Chicago Title Ins. Co*., 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), the court found a zoning matter excluded, and held: "The title insurance policy insures against defects or clouds in the title to the land, not the land itself." 722 N.E.2d at 213, 242 Ill.Dec. at 724. In *Batra v. Electronic Land Services, Inc*., 41 Misc.3d 1211(A), 2013 WL 5607243 (N.Y.Sup.), 2013 N.Y. Slip Op. 51644 (U) (unpublished), the court also dismissed a claim by the insured due to a change in zoning that occurred just before closing, saying that zoning is removed from coverage under Exclusion 1, and thus there could be no duty to disclose a fact about a subject that is excluded from coverage. Similarly, the violation of a zoning setback line by a deck was found to be excluded in *Wolf v. Commonwealth Land Title Ins. Co.*, 690 N.Y.S.2d 880, 180 Misc.2d 307, 1999 N.Y. Slip Op. 99238 (N.Y.A.D. 1 Dept. 1999). The court said that, "[s]ince zoning laws regulate the manner in which the property can be used and do not impair title, the damages claimed by plaintiffs do not fall within the scope of the title insurance policy… ." Also, in *Manor Healthcare Corp. v. Guzzo-Greco*, 1988 U.S.Dist. LEXIS 11965 (N.D.Ill.), aff'd on other grounds, 894 F.2d 919 (7th Cir. 1990), an annexation fee imposed by a zoning ordinance was found to be excluded, even if evidence of the fee was obtainable as a public record. Further, because the fee was excluded from policy coverage, the insurer was not negligent in tort liability for not disclosing it. In *Gibbs v. Williams*, 2015 WL 5440628 (W.D.Wis. 2015) (unpublished), the court held that an attorney for the insureds did not commit malpractice by failing to submit a claim

lot in connection with a zoning variance was found to be an excluded zoning matter, and not an "easement," invoking the exclusion:

> The 45-foot setback was created by a resolution of a board of adjustment and was indicated on a subdivision plan that was never recorded or required to be recorded. Because this claim of loss arises out of the exercise of the police power..., the exclusion applies.[28]

The zoning exclusion has been found to be a reasonable limitation on policy coverage.[29]

Various other use restrictions imposed by ordinance have also been found to fall under the zoning exclusion.[30] Exclusion 1 also negates coverage for the effect of a wetlands designation[31] and rights that are imposed on the use of the property based on the common law.[32] However, the exclusion does not encompass regulations that affect the vesting of title to real estate, and which do

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notice to the insurer concerning a recorded use restriction prohibiting use of the property for a business, because a county zoning ordinance also prohibited the property's use as a resort. The court held that, because the policy included Exclusion 1, the insureds "could not recover under the title policy." In *JBGR LLC v. Chicago Title Ins. Co*., 88 N.Y.S.3d 806, 62 Misc.3d 313, 2018 N.Y. Slip Op. 28357 (Suffolk Cty. 2018), the court found that a limitation on the number of buildable lots in a development, adopted as a condition to the rezoning of the property, was excluded from coverage under Exclusion 1(a), and that the lack of coverage was not affected by the fact that a document had been recorded that recited the limitation.

[28] *Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.J. Super. 1995).

[29] In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), the court said: "[The title insurer] was entitled to exclude coverage of zoning ordinances from the title policy. Plaintiff has not cited a case that holds that a title insurer is prohibited from excluding certain recorded instruments such as zoning ordinances from coverage." 722 N.E.2d at 214, 242 Ill.Dec. at 725.

[30] In *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp*., 152 F.3d 275 (4th Cir. N.C. 1998), ordinances which prohibited certain uses of property within a designated distance from the shore of a river were found not to affect title and to be excluded by Exclusion 1. In *Sonnett v. First American Title Ins. Co*., 309 P.3d 799, 2013 WY 106 (Wyo. 2013), the court found that a "master plan" of use restrictions that an owner imposed on his own property in order to get a zoning change were part of the zoning use conditions, not a declaration of restrictions, and therefore were excluded from coverage.

[31] *Manley v. Cost Control Marketing & Management, Inc*., 583 A.2d 442 (Pa.Super.Ct. 1990).

[32] In *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175 (M.D.Fla.) (unpublished), the court held that the public's right to use the beaches along the Atlantic Ocean fell under Exclusion 1, for governmental regulation of the use of the land. In *City of Daytona Beach v. Tona-Rama, Inc*., 294 So.2d 73 (Fla. 1974), the Florida high court recognized the public's rights in beaches along the ocean but held that "[t]his right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself." The *Kahama* court said that the public's rights have been labeled by Florida courts as emanating from the "law of custom," the "common law" or a "source of law" but, whatever the source of those rights, they are not a title interest in the property and are a regulation on the property's use. This ruling is similar to the holding in *R.W. Docks & Slips v. Chicago Title Ins. Co.*, 2001 WL 856431 (Minn.App.) (unpublished) that the state's authority to regulate the use of the bed of Lake Superior, based on the public trust doctrine, was excluded from coverage.

not merely regulate the property's use.[33]

A zoning ordinance does not spill out of the exclusion just because the insured labels its violation as rendering title unmarketable.[34] In *Notaro Homes, Inc. v. Chicago Title Ins. Co.*,[35] the court conducted a painstaking analysis, after which it concluded that a zoning ordinance limiting the number of dwelling units on the property was not a lien or encumbrance. Thus, the ordinance would not release a purchaser from the obligation to buy, and the policy definition of marketability was not met. Rather, the court found that the insured had "confused marketability of title with marketability of land."[36] The court distinguished *Radovanov v. Land Title Company of America, Inc.*,[37] which had found that a lawsuit for violation of building code orders made title unmarketable, thus allowing an end-run around the building code ordinance exclusion. See §9.8.2 for a complete discussion of the difference between marketability of title and the salability of the property.

Covered Risk 5 is not invoked by zoning documents that are not recorded.[38] Therefore, as explained in *Haw River Land & Timber Co. v. Lawyers Title Ins. Corp.*,[39]

> in order to be contained in the "public records," as used in the ALTA title policy, a notice of enforcement or of an encumbrance would have to be recorded in one of these public records designed to put purchasers of real property on constructive

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[33] In *212 Marin Boulevard, LLC v. Chicago Title Ins. Co*., 2014 WL 8849641 (N.J.A.D. 2015) (unpublished), cert.den. 223 N.J. 280 (Oct. 5, 2015), the insured took title to a parcel by a deed issued by a railroad. Later, the deed was attacked as failing to grant good title because the railroad did not get authority to abandon the rail line from the Surface Transportation Board, and certain governmental bodies had rails-to-trails rights in the land. The insurer said that the STB abandonment rules merely regulated the property's use, invoking Exclusion 1, but the court disagreed, because the lack of an abandonment order divests the grantee of the title passed by the railroad's deed.

[34] In *JBGR LLC v. Chicago Title Ins. Co*., 88 N.Y.S.3d 806, 62 Misc.3d 313, 2018 N.Y. Slip Op. 28357 (Suffolk Cty. 2018), the court found that a limitation on the number of buildable lots in a development, adopted as a condition to the rezoning of the property, was excluded from coverage under Exclusion 1(a). The court said the zoning restriction did not render title unmarketable.

[35] 309 Ill.App.3d 246, 722 N.W.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), reh.den., app.den. 189 Ill.2d 661, 731 N.E.2d 765, 246 Ill.Dec. 916 (2000).

[36] 309 Ill.App.3d at 253, 722 N.W.2d at 213, 242 Ill.Dec. at 724.

[37] 189 Ill.App.3d 433, 545 N.E.2d 351, 136 Ill.Dec. 827 (Ill.App. 1 Dist. 1989).

[38] See *Aldrich v. Hawrylo*, 656 A.2d 1304, 1309 (N.Y. Super. 1995), which acknowledged that general-application police power regulations are excluded because they "cannot be ascertained from an examination of the title records." However, in *Whitlock v. Stewart Title Guar. Co.*, 2011 WL 4549367 (D.S.C.) (unpublished), the court held that zoning records were in fact "public records," which term the court found "patently ambiguous" despite the policy definition. It relied on *New England Federal Credit Union v. Stewart Title Guar. Co.*, 171 Vt. 326, 765 A.2d 450 (Vt. 2000) as authority for the notion that the policy definition was ambiguous. See §9.12 for a complete discussion of that definition. *Whitlock* was followed in a second decision involving the same zoning ordinances and nearly identical facts, in *Lyons v. Fidelity Nat'l Title Ins. Co*., 415 S.C. 115, 781 S.E.2d 126 (S.C.App. 2015).

[39] 152 F.3d 275 (4th Cir. (N.C.) 1998).

notice about matters affecting title to the property which they are purchasing.[40]

The *Haw River* court stated:

> [I]n North Carolina, as elsewhere, zoning or environmental laws of general application, which are not recorded against specific parcels of property, are generally excluded from standard-form ALTA title insurance policies.

Thus, even though the ordinances in question in *Haw River* were filed in a book in the office of the register of deeds, they did not impart constructive notice as to the title to the land, and were excluded from coverage. See §9.12 for a discussion of "public records" as defined in the policies.

The assurance of Covered Risk 5 is limited to recorded instruments that inform the purchaser of the intent to enforce a zoning ordinance violation, which does not encompass records evidencing a property's zoning classification or a conditional use permit.[41] The court found that the mere recording of a zoning ordinance was not an act of enforcement, in *Notaro Homes, Inc. v. Chicago Title Ins. Co.*[42] That court declared:

> Moreover, Black's Law Dictionary defines "enforcement" thusly: "The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command." Black's Law Dictionary 528 (6th ed.1990). We find nothing in that definition that supports the view that recording the amendment is an act of enforcement. Further, the subject zoning ordinance expressly states that the ordinance shall be "in full force and effect from and after its passage and approval according to law." Thus, the recording of the amendment adds nothing in terms of its enforcement.[43]

The court distinguished *1119 Delaware v. Continental Land Title Co.*,[44] which held that a conditional use permit was a restriction affecting title, because that conditional use permit was recorded pursuant to a law that provided that such a notice would impart constructive notice. The

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[40] The phrase "one of these public records" referred to the dockets and indices that North Carolina statutes declare as imparting constructive notice to purchasers: the Registration of Titles book, lien book, Record of Lis Pendens, judgment docket and Book of Wills.

[41] In *JBGR LLC v. Chicago Title Ins. Co*., 88 N.Y.S.3d 806, 62 Misc.3d 313, 2018 N.Y. Slip Op. 28357 (Suffolk Cty. 2018), the court found that a limitation on the number of buildable lots in a development, adopted as a condition to the rezoning of the property, was excluded from coverage under Exclusion 1(a). It also said that the lack of coverage was not affected by the fact that a document had been recorded that recited the limitation, because the recorded instrument did not affect title.

[42] 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999).

[43] 309 Ill.App.3d at 255, 722 N.E.2d at 214, 242 Ill.Dec. at 724.

[44] 16 Cal.App. 4th 992, 20 Cal.Rptr.2d 438 (Cal.App. 2 Dist. 1993).

1119 Delaware court had apparently been strongly influenced by the fact that the legislative history for the statute it was construing had been supported by the California Land Title Association, and that organization had stated in support of its passage that the law would:

> ...enable persons dealing with real property to be apprised of the fact of any restrictions on the owner's ability to convey the real property which have been imposed by a municipality. This will be accomplished by requiring such restrictions to be recorded in a manner which will impart construction notice.[45]

The *Notaro Homes* court contrasted that unusual circumstance with the fact that zoning ordinances of general application are not recorded in the chain of title, and do not affect specific named parcels of land.

Finally, although Exclusion 1 specifically includes building and zoning ordinances, its greater subject is "laws and regulations ... restricting or regulating ... the ... use or enjoyment of the land." This applies to non-zoning laws of general application that restrict or regulate the property's use. In *Security Union Title Ins. Co. v. Usnick*,[46] the court found that treaty provisions allowing Native Americans to take shellfish from tidelands in the State of Washington were excluded:

> The insurers note that treaties between the United States government and American Indian tribes are part of the "supreme Law of the Land." U.S. Const. Art. VI. They say that the purpose of the "law" exclusion is to protect the insurers from defects in title which cannot be discovered in the public records for a particular parcel, since they have general application, and because legal interpretation is by nature unpredictable. This, they say, is as true for rights based in treaties as in laws or regulations.

In response, the insureds who claimed coverage argued that the treaties created private rather than governmental rights. However, the court said, "many governmental restrictions on land and land use inure to third parties." The *Usnick* court relied on *Dyer & Moody, Inc. v. Dynamic Constructors, Inc.*[47] That decision also involved a law that did not fit neatly under the heading of either building code or zoning, but which regulated the use of land. In *Dyer*, the insured filled in a drainage ditch on his property. Judgment was entered against him for the cost of a drain pipe to be built on his land to replace the ditch, because Louisiana law prohibits tampering with a natural servitude. The seller's title insurer asserted that state civil code that imposed the burden on the owner did not affect title and was excluded under Exclusion 1. The court agreed on both counts:

> It is clear from the nature of the present lawsuit that "title" is in no way involved. The

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[45] 20 Cal.Rptr.2d at 445.

[46] Dec. 15, 1998, case no's C97-1986L and C98-1445L, U.S.Dist.Ct. W.D.Wash. (unpublished).

[47] 357 So.2d 615 (La. 1978).

> fact that an owner of the subject property obstructed a natural servitude of drainage did not create a defect in the title to the subject property. … Louisiana Civil Code Article 660 restricts the building of any work that would prevent the natural running or flow of water; and, consequently, restricts the use or enjoyment of the land within the express exclusionary clause of the subject title insurance policy.[48]

11.1.3 Subdivision Laws

FORM 37, Appendix A
Subdivision law violation

Exclusion 1 of the 1992 and 2006 ALTA policies removes coverage for the effect or a violation of a subdivision law or ordinance, which regulates the use of the property, not its title. Covered Risk 5 of the 2006 ALTA policies protects against loss or damage caused by the "violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to … (c) the subdivision of land… if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice." Exclusion 1 in the 2006 ALTA policies is correspondingly limited so as not to negate Covered Risk 5. The ALTA Homeowner's Policy provides a limited assurance as to violations of subdivision laws. See a discussion of that policy's covered risks at §9.14.2, and its exclusions at §11.10.

This section discusses both the cases that have construed the exclusion and those that have construed Covered Risk 5, because they are two parts of the same subject.

Exclusion 1 removes coverage for loss or damage due to the fact that the insured parcel was created by an illegal land division, whether by a deed,[49] mortgage[50] or a subdivision plat for which the necessary approvals and permits were not obtained.[51] The exclusion applies even if the effect of

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[48] 357 So.2d at 619.

[49] *Whaley v. First American Title Co. of the Mid-West*, 2004 WL 316978 (Tenn.App. 2004) (unpublished) (policy does not protect against effect of illegal land division effected by a deed).

[50] *C & G Farms Inc. v. First American Title Ins. Co*., 2018 WL 1281847 (Ariz.App. 1 Div.) (unpublished) (no policy coverage when insured lenders each received deeds of trust on different parts of a 40-acre tract without the benefit of a subdivision plat or any governmental approval for the land division); *Security Service Federal Credit Union v. First American Title Ins. Co*., 585 Fed.Appx. 591, 2014 WL 5438805 (9th Cir. (Cal.) 2014) (unpublished) (loan policy did not protect lender against seller's failure to obtain permission to subdivide parcel, especially since lender had taken back all subdivided on foreclosure land and could sell it as one parcel). However, in *First Alliance Bank v. Mississippi Valley Title Ins. Co. (In re Evans)*, 2012 WL 2374237 (Bkcy.S.D.Miss.) (unpublished), an insurer that cleared title for a lender on parcels that were created by an illegal subdivision was found to be obligated to obtain approval for the subdivision; the policy exclusion was not applicable, because the insurer was taking action under its separate covenant to clear title diligently..

[51] *Busch v. Nervik*, 38 Wash.App. 541, 687 P.2d 872 (1984); *Nishiyama v. Safeco Title Ins. Co.*, 85 Cal.App.3d Supp. 1, 149 Cal.Rptr. 355 (1978); *Northern California Community Development Corp. v. First American Title Ins. Co*., 2019

the subdivision law violation is to render the conveyance to the insured void.[52] The exclusion also applies to negate coverage for loss or damage suffered by the insured due to the owner's lack of a right to further divide the insured parcel, which lack of right was evidenced by a recorded instrument.[53]

Exclusion 1 also negates coverage for the claimed diminution in the value of the land due to its failure to comply with a subdivision law or ordinance, including the effect of that violation on the owner's ability to obtain other permits for its use.[54] However, under a 2006 ALTA policy that contains Covered Risk 5 or a 1992 ALTA policy with the exception to the exclusion, the insurer is responsible for diminution or the cost to cure if a notice of violation or the intent to enforce the subdivision regulation was in the public records on the date of policy.[55] Vermont has held that the

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WL 1397040 (Cal.App. 3 Dist.) (unpublished) (no coverage for failed land development, which was due in part to lack of compliance with subdivision ordinances).

[52] *Whaley v. First American Title Co. of the Mid-West*, 2004 WL 316978 (Tenn.App. 2004) (unpublished) (policy does not protect against effect of illegal land division); *Yellowstone II Development Group, Inc. v. First American Title Ins. Co.*, 2001 MT 41, 304 Mont. 223, 20 P.3d 755 (Mont. 2001) (policy does not assure compliance with subdivision laws or right to make further subdivisions). In *Insured Titles, Inc. v. McDonald*, 275 Mont. 111, 911 P.2d 209 (1996), Ownership of America received a deed describing land as a lot in a plat which was never recorded. The "platted" land was thus never divided on the tax roll. The insured, McDonald, obtained a deed from Ownership to the entire parcel, by capitalizing on the lack of a valid description for the unplatted lot. The court ruled that the deed to Ownership was void because it violated the state subdivision law, and thus Ownership had no title to transfer to McDonald. In McDonald's suit on the policy, the court found that Exclusion 1 negated coverage against the defect in the deed.

[53] *Yellowstone II Development Group, Inc. v. First American Title Ins. Co.*, 2001 MT 41, 304 Mont. 223, 20 P.3d 755 (Mont. 2001) (policy does not assure compliance with subdivision laws or right to make further subdivisions, even though title agent was aware that right to divide property was important factor to insured); *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d 596 (Cal.App. 6 Dist. 2011) (exclusion applied to recorded notice of intent to merge parcels, not excepted in the policy, which the court found was pursuant to subdivision ordinances and did not affect title).

[54] In *Hocking v. Title Ins. & Trust Co.*, 37 Cal.2d 644, 234 P.2d 625 (1951), the policy was found not to cover claimed diminution in value caused by the subdivider's failure to post bonds for street improvements, which in turn caused the municipality to refuse to issue a building permit. In *Lauritzen v. First American Title Ins. Co*., 424 P.3d 1043, 2018 UT App 58 (Utah App. 2018), a subdivision plat was amended to correct a boundary line. The court held that a modified setback line imposed on the amended plat did not affect title or create a loss payable under the policy.

[55] *Yellowstone II Development Group, Inc. v. First American Title Ins. Co.*, 2001 MT 41, 304 Mont. 223, 20 P.3d 755 (Mont. 2001) (policy does not assure compliance with subdivision laws or right to make further subdivisions, even though title agent was aware that right to divide property was important factor to insured); *Whaley v. First American Title Co. of the Mid-West*, 2004 WL 316978 (Tenn.App. 2004) (unpublished) (policy does not protect against effect of illegal land division); *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d 596 (Cal.App. 6 Dist. 2011) (exclusion applied to recorded notice of intent to merge parcels, not excepted in the policy, which the court found was pursuant to subdivision ordinances and did not affect title); *Security Service Fed. Credit Union v. First American Title Ins. Co*., 2012 WL 5954815 (C.D.Cal.) (unpublished) (loan policy did not protect lender against seller's failure to obtain permission to subdivide parcel, especially since lender had taken back all subdivided on foreclosure land and could sell it as one parcel, relying on *Dollinger*). However, in *First Alliance Bank v. Mississippi Valley Title Ins. Co. (In re Evans)*, 2012 WL 2374237 (Bkcy.S.D.Miss.) (unpublished), when the policy insured a mortgage on a parcel created by an illegal subdivision, and the insurer resolved a covered lien problem by conveying the property to the insured lender, the court found that the obligation to clear title diligently was a separate contractual

lack of a subdivision permit issued by a state agency is "a notice" of violation in the "public records" (meaning the records in Montpelier of permits issued), and thus that the coverage was invoked.[56]

When the insured owns all of the parcels that were created by an unpermitted land division, the insurer has the further argument that the insured may cure the subdivision regulation violation, and has incurred no loss, which courts have found to support the finding that the insured has not suffered "actual monetary loss or damage" due to the land division.[57] The policy does not give the

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undertaking, and that the insurer violated that duty and the implied covenant of good faith and fair dealing by delivering title without first obtaining approval for the subdivision. The court held that the policy exclusion was not applicable, because the insurer was taking action under its separate covenant to clear title diligently. In *New England Federal Credit Union v. Stewart Title Guar. Co.*, 171 Vt. 326, 765 A.2d 450 (Vt. 2000), the land was divided by the sale of part of the parcel. The owners got a deferral of the subdivision permit requirement because they retained a vacant parcel of less than ten acres. Later, however, they sold the retained parcel, and a remote grantee built a house on it. He got a building permit, but no subdivision permit. A policy was issued to his lender, New England Federal, which took title on foreclosure. New England Federal then sold the property "at a decreased value of $10,734" because of the lack of a permit. The court found that the exception to Exclusion as recited in the lender's 1992 ALTA Loan policy applied, affording coverage for the diminution in value.

[56] *New England Federal Credit Union v. Stewart Title Guar. Co*., 171 Vt. 326, 765 A.2d 450 (Vt. 2000). The court highlighted the tug of war over the policy's definition of "public records" by asserting that it would not have reached the same result had the 1992 ALTA policy retained the definition found in the 1984 policy, which read "those records in which under state statutes, deeds, mortgages, lis pendens, liens or other title encumbrances must be recorded in order to impart constructive notice to purchasers of the land...[but that,] without limitation, such records shall not be construed to include records in any of the offices of federal, state or local environmental protection, zoning, building, health or public safety authorities." The court noted that the last phrase, which was dropped from the 1992 definition, had been the basis for the decision in *Somerset Savings Bank v. Chicago Title Ins. Co*., 420 Mass. 422, 649 N.E.2d 1123, 1126 (Mass. 1995), that held that Exclusion 1 negated coverage for the failure to obtain a permit from the commonwealth's secretary of transportation to build on former railroad land, as required by statute. The Vermont legislature later amended the subdivision law to require recording of subdivision permits in the real estate records, and declaring that the failure to obtain or record a permit does not affect the marketability of title. 18 V.S.A. §§ 1218(d)(1), 1221a(a), which should render the ruling in *New England Federal* a historical anomaly. In addition, the Vermont high court refused to extend *New England Federal*, however, in *Kremer v. Lawyers Title Ins. Corp.*, 177 Vt. 553, 861 A.2d 1103, 2004 VT 91 (Vt. 2004). In *Kremer*, the sellers to the insureds failed to get a plumbing permit for an addition that overloaded the septic system, causing it to fail. The insureds sued under the policy, on the theory that the failure to get a septic permit was an encumbrance that should have been shown on the title policy. The Kremers invoked the toxic logic of *New England Federal* that there is coverage for the lack of a permit unless there is an exception in the policy. The only real distinction from *New England Federal* was the type of permit and where the permit records were located (at the town rather than the state). Rather than revisit the coverage issue, however, the court concluded that it was not clear that a septic permit was required, and that "it is not the duty of the title insurer to make up for the shortcomings of a town's septic regulations." 177 Vt. at 556, 861 A.2d at 1107.

[57] *Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, 199 Cal.App.4th 1132, 131 Cal.Rptr.3d 596 (Cal.App. 6 Dist. 2011) (exclusion applied to recorded notice of intent to merge parcels, not excepted in the policy, which the court found was pursuant to subdivision ordinances and did not affect title); *Security Service Fed. Credit Union v. First American Title Ins. Co*., 2012 WL 5954815 (C.D.Cal.) (unpublished) (loan policy did not protect lender against seller's failure to obtain permission to subdivide parcel, especially since lender had taken back all subdivided on foreclosure land and could sell it as one parcel, relying on *Dollinger*). However, in *Burgess v. Stewart Title Guar. Co.,* 65 Va. Cir. 311, 2004 WL 1713732 (Va.Cir.Ct. 2004), when the policy described the property as being two separate lots, but the municipality took the position that there was only one parcel, the trial court refused to dismiss an insured's claim of unmarketable title. It said that "the number of lots to be conveyed is a core issue relating to the legally recognized rights

assurance that land may be divided, or that an existing division is valid and permitted. If the policy contains Covered Risk 5, it protects only against the loss caused by a recorded notice of violation, which is the negative obverse of such an assurance of compliance. Further, since in most jurisdictions even a permit that has been granted is not a vested property right, a property owner can have no vested right in a land division for which the necessary permits were *not* obtained.

If the insured is unable to record the conveyance to be insured because the recorder identified the land as being described as an illegal parcel, the issue is usually more about escrow or closing duties. The exclusion may or may not apply.[58]

Many state laws provide rescission as a remedy for a person who buys land that has already been subdivided without the necessary permits. A borrower's threat to rescind the purchase due to an alleged illegal subdivision did not invoke the coverage of a policy issued to the borrower's lender, in large part because the borrower did not actually rescind.[59] When the insured rescinds and is repaid the purchase price in exchange for a reconveyance, the policy terminates and the insured does not suffer a loss compensable under the policy. Thus, when an insured owner submits a claim based on an illegal subdivision of land, in addition to raising the exclusion, the insurer will typically explain to the insured that no loss would be payable in any event, because the insured may exercise his or her remedy of rescission.

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of the parties." The insurer correctly argued on demurrer that it used the existing legal descriptions, the issue of one parcel versus two does not make title unmarketable, and that the policy does not assure the existence of more than one parcel. The court did not rest its decision on Exclusion 1.

[58] In *Countrywide Home Loans, Inc. v. Commonwealth Land Title Ins. Co.*, 2011 WL 666188 (W.D.Pa.) (unpublished), a deed and the insured mortgage were rejected for recording because they conveyed a parcel created by a land division map that has not been approved and filed. The court did not directly reach the issue of the exclusion's applicability, but did find a duty to defend the insured lender in a quiet title action premised on the defect in the land division. The court said the subdivision exclusion *may* not apply.

[59] *Security Service Fed. Credit Union v. First American Title Ins. Co*., 2012 WL 5954815 (C.D.Cal.) (unpublished).

11.1.4 Environmental Liens

FORM 34, Appendix A
Presence of hazardous material not an encumbrance

Exclusion 1(a) of the ALTA policies excludes regulation "relating to ... environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations," unless "a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice." Covered Risk 5 of the 2006 ALTA policies protects against loss or damage caused by the "violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to … (d) environmental protection… if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice." Before the 1987 form of the ALTA policy, no such exclusion existed specifically for environmental matters.[60] Until the 2006 ALTA policy, there was no Covered Risk pertaining to "environmental protection."

This section discusses both the cases that have construed the exclusion and those that have construed Covered Risk 5, because they are two parts of the same subject.

Even before there was any affirmative assurance about "environmental protection," insureds advanced several arguments as to why the policy should provide coverage against environmental contamination or possible inchoate liens.

The first assertion was that the physical presence of hazardous substances on the property renders its title unmarketable. In *Chicago Title Ins. Co. v. Kumar*,[61] the hazardous material was discovered shortly after purchase, and the insured ordered to clean it up. The insured argued that the clean-up order rendered title unmarketable. The court held that, while the property may not have much market value, its title was not unmarketable as of policy date. The same ruling was made in *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*[62] See the discussion in §9.8.2 of the marketability argument raised by these cases.

Another argument advanced by insureds was that a super-priority environmental clean-up law rendered the presence of hazardous waste on the property a latent "encumbrance" or "cloud" on title. The insureds asserted that the waste itself was on the property on the policy date, and the waste was what led to the possibility of a lien being filed. In each case, the court rejected this argument, holding that no lien existed on policy date, and the physical presence of a substance is not an "encumbrance" or "cloud" on title.[63]

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[60] For a complete history of the exclusion, see Joyce D. Palomar, *Title Insurance Law*, 2014-2015 Edition, Chapter 16 (written by Robert S. Bozarth), West/Thomson Reuters.

[61] 24 Mass.App.Ct. 53, 506 N.E.2d 154 (Mass.App. 1987).

[62] 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991).

[63] *Chicago Title Ins. Co. v. Kumar*, 24 Mass.App.Ct. 53, 506 N.E.2d 154 (1987); *Lick Mill Creek Apartments v.*

In *Lick Mill Creek Apartments v. Chicago Title Ins. Co.*,[64] an endorsement issued to a lender was found to insure the lender only that its lien had priority over any lien for environmental clean-up expense. The lender had come into title after foreclosure, and then received notice of the state's intent to clean up the property. The lender sued for payment of the cleanup expense. The court held that no lien had been filed, and thus the coverage of the endorsement could not have been triggered. It also rejected an argument, couched in terms of public policy, that the endorsement should be read broadly to assist in the statute's stated purpose of ensuring immediate response to pollution.

Because the mere presence of hazardous material is not considered to be a defect in title under the policy, the *Lick Mill* court specifically held that it was not necessary to determine whether or not Exclusion 1(a) of the 1970 form ALTA policy applied. It ruled that the insured had no reasonable expectation of coverage against environmental cleanup charges based on the fact that it obtained a 1970 form policy and two 1987 form policies in the same transaction, containing different exclusions.

No decision has been issued that interprets the "environmental protection" assurance found in Covered Risk 5 of the 2006 ALTA policies.[65]

Chicago Title Ins. Co., 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991); *South Shore Bank v. Stewart Title Guar. Co*., 688 F.Supp. 803 (D.Mass. 1988). See also *Holly Hill Holdings v. Lowman*, 30 Conn.App. 204, 619 A.2d 853 (Conn.App. 1993), also finding that hazardous waste does not render title unmarketable, but in the context of a suit between buyer and seller. See also, Gosfield, *Environmental Contamination and Title Conveyance*, 25 Real Estate Review 55, No. 2, Summer, 1994.

[64] 231 Cal.App.3d 1654, 283 Cal.Rptr. 231 (Cal.App. 6 Dist. 1991).

[65] A New Jersey case concerned a recorded notice that fill (not contaminated property) had improperly been dumped on protected wetlands. The New Jersey Department of Environmental Protection recorded the notice of violation with the Somerset County Clerk. The First American policy did not except the recorded notice of violation. The notice was not discovered in the title search because it "did not name the property owner, and was not attached to or noted on the deed to the property…" The NJDEP sued the insured, an operator and the former owners to require them to restore the wetlands. The sellers and operator jointly agreed to do so, an estimated cost of $2.3 million. First American was sued for policy limits of $300,000. The trial court held that the notice of violation was a "public record." First American appealed certain issues, but voluntarily dismissed its appeal about that ruling. Thus, the appeals court did not rule on the scope of the covered risk or the exclusion. *New Jersey Dep't of Environmental Protection v. DiFlorio*, 2007 WL 4553046 (N.J.Super.A.D.) (unpublished).

11.1.5 Police Power And Eminent Domain

FORM 33, Appendix A
Police power exclusion

FORM 72, Appendix A
Police power--denial of permit

Exclusions 1(b) and 2 of the 2006 ALTA policies negate coverage for "any governmental police power" and "rights of eminent domain." The police power exclusion, 1(b), states that it "does not modify or limit the coverage provided under Covered Risk 6." The eminent domain exclusion, 2, makes the same statement in relation to Covered Risks 7 and 8.

In the 2006 ALTA policies, Covered Risk 6, conversely, indemnifies the insured against loss caused by "[a]n enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice." Covered Risk 7 protects against an exercise of the right of eminent domain "if a notice of the exercise, describing any part of the Land, is recorded in the Public Records." Covered Risk 8 protects against "[a]ny taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge." See §9.9.2 for a discussion of these Covered Risks.

The 1992 ALTA policies contained very similar language, except that the Covered Risks appeared as exceptions to the exclusions.

This section discusses both the cases that have construed Exclusion 1(a) and those that have construed Covered Risk 6, because they are two parts of the same subject.

The police power exclusion applies to government's right to exercise control over real estate for public purposes or needs, on subjects other than building code, zoning, subdivision and other ordinances and laws listed in Exclusion 1(a).[66] The police power exclusion applied to a resolution

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[66] In *Commonwealth Land Title Ins. Co. v. OMG Americas, Inc*., 2012 WL 4856391 (D. Utah) (unpublished), the court held that the exclusion was not invoked when the Bureau of Indian Affairs asserted that a lease that it had signed only five years before was invalid because the signers lacked the authority to bind the agency. The court said the BIA's termination of the lease "was based on procedural defects and not an exercise of police power." In *R.W. Docks & Slips v. Chicago Title Ins. Co*., 2001 WL 856431 (Minn.App.) (unpublished), rev.den., the insurer had issued policies on marina condominium units. The policy contained exceptions for rights of the public in submerged lands, and governmental rights to regulate the surface. The court found that the policy did not have a duty to prosecute an appeal from the denial of a dredging permit in which the state DNR had threatened to claim that the condominium regime violated the public trust doctrine. The court found that the insurer was not obligated to defend "Docks's title in or use of Lake Superior's bed against Wisconsin's right to regulate" because the policy did not claim to assure that Docks owned the bed of Lake Superior. Further, Chicago Title could not have warranted that Docks owned title to Lake Superior's bed because Wisconsin law does not allow private citizens to own any part of Lake Superior's bed. Under its public trust doctrine, the state holds the beds of navigable waters, including Lake Superior, in trust for all of its citizens." Similarly, in *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175 (M.D.Fla.) (unpublished), the court held that the public's right to use the beaches along the Atlantic Ocean fell under Exclusion 1, for governmental regulation of the use of the land. In *City of Daytona Beach v. Tona-Rama, Inc*., 294 So.2d 73 (Fla. 1974), the Florida high court recognized the public's rights in beaches along the ocean but held that "[t]his right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself." The *Kahama* court said that the public's rights have been labeled by Florida

prohibiting vehicular access to the insured property, when such access was found to be "contrary to the public peace, safety and welfare" of the local citizenry.[67] The exclusion also negates any coverage against loss claimed because the insured property has been designated a wetland.[68] The police power exclusion may also defeat liability for loss of title because of a drug forfeiture. Forfeitures are discussed in detail in §9.13. However, the policy power exclusion does not bar coverage for governmental action that attacks the validity of the title conveyed to the insured.[69]

Exclusion 2 is for "[r]ights of eminent domain," with the important caveat that the exclusion "does not modify or limit the coverage provided under Covered Risk 7 or 8." The eminent domain exclusion negates coverage for a taking of all or some of the insured parcel that has already occurred as of the policy date.[70] A condemnation is an involuntary transfer of title. If Exclusion 2 were not modified by Covered Risks 7 and 8, the policy would provide no indemnity for the loss of the insured land on condemnation. This exclusion has existed for decades because, in many jurisdictions, condemnation actions are conducted by administrative agencies without the filing of any document in the real estate records. A title insurer has no way of limiting the risk of this type of failure of title by the searching of real estate records.

Exclusion 2 is limited, however, by Covered Risks 7 and 8. Covered Risk 7 is for eminent

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courts as emanating from the "law of custom," the "common law" or a "source of law" but, whatever the source those rights, they are not a title interest in the property and are a regulation on the property's use.

[67] *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975); aff'g 23 N.C.App. 377, 209 S.E.2d 423 (1974).

[68] In *Manley v. Cost Control Marketing and Managements Inc.*, the court stated: "The [trial] court ... acknowledged that a wetland designation is a governmental regulation restricting the use and enjoyment of the land and regulating the character, dimension and location of improvements erected on the land, a matter not disputed by Appellant. ... Appellant's allegation regarding [the title agent's] knowledge or ability to learn of the wetlands designation is irrelevant in view of the policy language." 583 A.2d 442, 444 (Sup.Ct.Pa. 1990).

[69] In *212 Marin Boulevard, LLC v. Chicago Title Ins. Co*., 2014 WL 8849641 (N.J.A.D. 2015) (unpublished), cert.den. 223 N.J. 280 (Oct. 5, 2015), the insured took title to a parcel by a deed issued by a railroad. Later, the deed was attacked as failing to grant good title because the railroad did not get authority to abandon the rail line from the Surface Transportation Board, and certain governmental bodies had rails-to-trails rights in the land. The insurer said that the assertion of the lack of an STB abandonment order invoked the police power exclusion. The court disagreed. It said that, "in essence, the intent of this exclusion was to preclude coverage when governmental police power has been exercised or threatened with regard to the property or its structures; it places the burden on the recipient of title to investigate the effect of local ordinances and land resolutions on the property." The court said that "Jersey City claims the conveyances to plaintiffs were void; it is not seeking or attempting to exercise its police power regarding plaintiffs' anticipated use of the property."

[70] See Raymond J. Werner, *The Basics of Title Insurance*, in *Title Insurance: The Lawyer's Expanding Role*, ABA Section of Real Property, Probate and Trust Law, at p. 3. Mr. Werner states: "The policy also excludes coverage for the loss resulting from the exercise of eminent domain rights unless notice of the exercise of such rights appears in the public records at the date of policy. Again, the exclusion recognizes the fact that real estate is by nature subject to the exercise of the right of eminent domain and there is no way to protect against the exercise of that right. However, this exclusion would not apply if a document such as a lis pendens relating to a pending eminent domain proceeding has been filed in the public records at the date of policy."

domain, and Covered Risk 8 is for "takings." In most contexts, those terms are used interchangeably. Further, the two covered risks are both tied to the one exclusion, for "rights of eminent domain." This could be interpreted as a suggestion that the policy drafters viewed eminent domain and takings as two different subjects. The reality is more mundane. Exclusion 2 of the 1970 ALTA policies was for rights of eminent domain "unless notice of the exercise of such rights appears in the public records at Date of Policy." The exclusion was modified in 1987 to append to that phrase the additional phrase "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." The "unless…" phrase and the "but not excluding…" phrase both limited the exclusion for "rights of eminent domain," making a very ungainly policy term. When the exceptions to the exclusion were excised and converted to covered risks, they were simply turned into two coverages instead of one.

Covered Risk 7 refers to a recorded notice of the "exercise" of eminent domain, which may include notices about an intended condemnation that has not yet occurred. The 1970 policy that incorporated that language followed a New York decision from 1962, one of the few that has ever discussed policy coverage and condemnations. In that case, *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.,*[71] the insured home builder discovered after it had bought a lot in 1960 that the town had adopted an acquisition map in 1950 that showed its intent to acquire the front 14 feet of the parcel. The town refused to include that strip in setting the setback line as part of Ascot's request for a building permit, even though it had not paid for the land yet. Ascot said that it lost the home buyer as a result. Although *Ascot* was premised on the zoning exclusion, it has always been discussed in relation to the eminent domain exclusion, because that was the true subject of the acquisition map. Thus, it seems likely that the carve-out for "notice of the exercise of" eminent domain in the public records was prompted by *Ascot.* Still, the acquisition map in *Ascot Homes* was not what would normally be considered a notice of exercise, and thus would likely not invoke Covered Risk 7. That map did not "exercise" the condemnation power. It was common practice in the mid-twentieth century for a city to adopt a resolution or map notifying owners that it intended to widen certain roads some day and to record or file the resolution or map. Many of those roads were never widened to the stated widths. However, as in *Ascot*, those resolutions served to force owners to build their houses far enough away from the right-of-way so that the municipality would not have to buy the buildings or pay large condemnation awards if they condemned the widened street path. Such resolutions are not the exercise of condemnation powers, which require payment of awards.

Covered Risk 8, by contrast, refers to takings that have already occurred on the policy date. The coverage protects the insured only if there was adequate notice of the condemnation to bind a bona fide purchaser but the land was still included in the policy (and thus the sale). This would presumably occur only if the insurer failed to discover the condemnation notice in its title search. Covered Risk 8 also followed a New York decision on condemnation, the 1981 chapter of the *Smirlock* litigation saga.[72] In that decision, the court held that the insured was protected against the effect of the condemnation of adjoining streets that had occurred two years before the purchase. The

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[71] *Ascot Homes, Inc. v. Lawyers Mortgage & Title Co.*, 37 Misc.2d 41, 237 N.Y.S.2d 179 (1962).

[72] *L. Smirlock Realty Corp. v. Title Guarantee Co*., 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650, 17 A.L.R. 4th 1067 (1981).

court said that the insurer's "title searchers failed to check the master card on file at the Nassau County Clerk's office covering the applicable section and block which would have revealed these condemnations." [The policy did not insure the title to the streets, which were not owned by the insured. It assured "the ordinary rights of access and egress belonging to abutting owners."] The streets were blocked off, the insured's lucrative tenant left, and the insured lost the property in foreclosure. The *Smirlock* court held that the insured was entitled to indemnity due to the insurer's failure to locate the evidence of the prior condemnation. ALTA modified the exclusion six years later, in 1987. Again, however, the language change is unremarkable, since the *Smirlock* decision found coverage under the older New York Bureau of Title Underwriters form of policy.

Thus, there is nothing to suggest that Covered Risks 7 and 8 have increased the scope of policy coverage for either notices of the exercise of condemnation powers or of completed condemnations, compared to the coverage that existed under earlier policy forms. Rather, it appears that the covered risks serve to confirm the existence of those limited coverages.

The eminent domain coverages are limited to condemnation rights or actions that had occurred before the policy date. There is no coverage for a post-policy condemnation of the property.[73] However, if a post-policy condemnation action causes or reveals a dispute about the ownership of the property, and thus the right to the condemnation award, the adverse claim of title may invoke a duty to defend or indemnify.[74] See §11.5 for a discussion of the post-policy exclusion.

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[73] In *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), the insured sued the insurer in part because the town took actions to assert title to, condemn and lay out a public road on the insured's property after the date of policy. The court said that those actions fell under the condemnation and post-policy exclusions. Although the subject of the claim was condemnation, the most applicable exclusion was for post-policy matters.

[74] In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, the holder of a deed of trust that was not excepted in the policy was made a defendant in a post-policy condemnation action. The condemnor alleged that the lender might be entitled to all or part of the award. When the lender filed an answer asserting that it should get all of the money based on its deeds of trust, and denied that the insured had "any superior right, title, or interest in the real property," the court found that the insurer had a duty to defend the insured from the attack on its title. The court also found that the post-policy exclusion did not apply, because the lender claimed an interest based on a deed of trust that existed before the policy date. This decision was based on the reasoning that the issue of whether or not there is a duty to defend the insured may depend not on the nature of the lawsuit but on a claim in the action by an adverse party that attacks title as insured. It said: "[t]rue, exclusion No. 2 provides there is no coverage for eminent domain actions, and certainly, we see no reason why a title company should have to defend against a public entity’s statutory right to take property. It is a different matter altogether, however, to suggest that, once an eminent domain action has been initiated, there is no coverage with respect to title claims asserted by another defendant to that action."

11.2 Created, Suffered, Assumed Or Agreed To

Exclusion 3(a) of the standard ALTA policies states that the insurer is not liable for matters that the insured has caused ("created"),[75] permitted ("suffered"), taken subject to ("assumed")[76] or to which it has consented to be bound ("agreed to"). This exclusion covers both unrecorded rights and instruments and matters appearing in the public records.[77] The exclusion has been found to be unambiguous, and therefore not susceptible to modification under the doctrine of reasonable expectations.[78] This provision is often referred to as the "own acts," "acts of the insured" or even the "your own darned fault" exclusion. It makes plain that there is no coverage for those matters that affect title due to the insured's actions, such as an easement granted by the insured.

The word "create" means to "bring into being; to cause to exist."[79] The word is not laden with connotations about the intent of the creator, or the nature of the created thing as being good or bad. Nonetheless, "created" in this context has been interpreted in three ways, the descriptions varying by the layers of intent that are assumed.

The most straightforward definition of the word "created" is that the insured took some conscious and deliberate action, resulting in the fact, contract, instrument or event that is or gave rise to the defect in title, encumbrance, lien or other matter for which he or she seeks indemnity or defense. Many jurisdictions have adopted this view, including many of the states that have considered the issue recently.[80]

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[75] See *Interpreting the Term "Created" in Policy Exclusion 3(a)*, by Leopold Z. Sher and Kerry J. Miller, in the 1998 edition of the Real Estate Law and Practice Course Handbook Series by Practicing Law Institute, PLI Order No. N0-001G.

[76] In *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780 (6th Cir. (Tenn.) 1986), the words "assume" and "agreed" were illustrated as follows: "'Assume', under the definition requires knowledge of the specific title defect assumed ... And 'agreed to' carries connotations of 'contracted', requiring knowledge by the insured of the extent and amount of the claim against the insured's title." 793 F.2d at 784 [quoted with approval in *Inavest Enterprises v. TRW Title Ins. of New York, Inc.*, 189 A.D. 2d 111, 595 N.Y.S. 2d 837 (N.Y.A.D. 3 Dept. 1993)].

[77] In *JBGR LLC v. Chicago Title Ins. Co*., 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished), the court rejected the insured's argument that Exclusions 3(a) and 3(b) should be spliced together, causing Exclusion 3(a) to apply only to matters that are not recorded. The court said: "Exclusion 3(a), unlike exclusion 3(b), does not contain any language indicating that it does not apply if the defect, lien, or encumbrance is recorded in public records." See the later decision at 88 N.Y.S.3d 806, 62 Misc.3d 313, 2018 N.Y. Slip Op. 28357 (Suffolk Cty. 2018).

[78] *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996); *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co*., 2016 WL 4370052 (W.D.N.C. 2016) (unpublished).

[79] *First American Title Ins. Co. v. DJ Mortgage, LLC*, 328 Ga.App. 249, 761 S.E.2d 811 (Ga.App. 2014). In *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co.*, 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), the court used the Merriam-Webster dictionary definition of "create," which is "to bring into being, to cause to exist, to produce."

[80] The most widely cited modern decision adopting this view is *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp*., 793 F.2d 780 (6th Cir. (Tenn.) 1986). That court held that the exclusion applies when "the insured either expressly or impliedly assumed or agreed to the defects or encumbrances," quoting from *Brown v. St. Paul Title Ins. Corp*., 634 F.2d 1103, 1107-8, n. 8 (8th Cir. 1980). *Keown v. W. Jersey Title and Guar. Co.,* 161 N.J.Super. 19, 25, 390 A.2d 715 (App.Div.1978) stated: "..the word 'create' connotes 'the idea of knowledge, the performance of some affirmative act by

the insured, a conscious or deliberate causation,'" quoting *Feldman v. Urban Commercial, Inc.*, 87 N.J.Super. 520, 532 (App.Div. 1965). In *Mark Twain Kansas City Bank v. Lawyers Title Ins. Corp.*, 807 F.Supp. 84 (E.D.Mo. 1992), the court said the lender had "created" the circumstance that rendered its lien void, by delivering the loan money to a party other than the borrower. The court refused to impose the intentional misconduct standard, finding the exclusion triggered by proof of the fact that "the Bank knew or should have known that this transfer was not proper." In *Rosen v. Nations Title Ins. Co*., 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714 (Cal.App. 2 Dist. 1997), under similar facts, the court held that the insured "created" the subordination of its lien by delivering its loan funds to a party other than as directed by the bankruptcy court order that authorized the loan. In *First American Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 187 P.3d 1107 (2008), the court explained why it adopted the lower standard of proof this way: "Some hold the insured must merely have intended the act that caused the title defect; others require the insured to have intended the defect itself. …[T]he exclusion is not ambiguous and …it applies whenever the insured intended the act causing the defect, not only when the insured intended the defect or when the insured engaged in misconduct. Title insurance principally protects against unknown and unknowable risks caused by third-party conduct, not intentional acts of the policyholder. Otherwise, the insured would be able to use title insurance to make windfall profits. … We also reject the purchasers' proposed rule that the exclusion applies only when the insured's conduct was unknown to the title insurer. That rule would undesirably deny title insurers the power to define the scope of coverage by excluding recognized risks." In *Action Acquisitions*, the court rejected the notion that "created" applies only when the insured is guilty of deliberate wrongful conduct. In that case, the insured bought the insured property by bidding $3,500 at auction. The sale was set aside because the bid was too low. The court held that the bid "was an intentional, affirmative act that resulted in the sale being set aside." Further, if the exclusion were not applicable, "the policy would effectively guarantee the purchasers a windfall profit of possibly more than $200,000, even though they paid only $3,500 and later lost title for paying a grossly inadequate price." The court said that, although an insurer could conceivably agree to give such a coverage, "it is not consistent with the 'created risk' exception, the other policy language, or the general nature of title insurance." In *City of East Providence v. First American Title Ins. Co.*, 2011 WL 5527604 (D.R.I.) (unpublished), adopting findings of 2011 WL 5521246 (D.R.I.) (unpublished), the title insurer was not required to defend a breach of contract action brought by the seller. The court rejected the city's argument that it was not guilty of misconduct or fraud, and thus the exclusion should not apply. Citing *East West Financial*, the court rejected that narrow view of the exclusion, because that decision says that the exclusion applies both to misconduct and when "the insured either expressly or impliedly assumed or agreed to the defects or encumbrances." California also follows the rule that an insured has "created" a title defect by intentional and deliberate conduct, and that the insurer is not required to establish that the insured intended to have defective title as a result. See *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal.App. 3d 658, 172 Cal.Rptr. 248 (Cal.App. 2 Dist. 1981) ("We believe the word 'created' means conscious, deliberate causation [which may be] susceptible of the significance of bringing out a result inadvertently or negligently"); *Transamerica Title Ins. Co. v. Alaska Federal Savings & Loan Ass'n,* 833 F.2d 775 (9th Cir. 1987); *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co*., 217 Cal.App.4th 62, 157 Cal.Rptr.3d 664 (Cal.App. 2 Dist. 2013) (exclusion applied when insured was accused of deliberate but legal conduct that wrongly forced a co-owner out of title). In *RNT Holdings, LLC v. United General Title Ins. Co*., 230 Cal.App.4th 1289, 179 Cal.Rptr.3d 175 (Cal.App. 2 Dist. 2014), the court said the exclusion was invoked by the insured's attorney's intentional and deliberate acts that caused the defect. It said: "[t]hat she may not had intended to bring about a defect through her conduct, or may not have known that any defect might occur, is immaterial to the application of exclusion 3(a), as there was no suggestion in *Safeco Title* that the broker intended his pre-sale conduct to provoke the owners' tort action against him, or knew that the action would occur." *RNT* distinguished the older case of *Hansen v. Western Title Ins. Co*., 220 Cal.App.2d 531, 33 Cal.Rptr. 668, 98 A.L.R.2d 520 (Cal.App. 1 Dist. 1963), which refused to apply the exclusion as to a matter the insured had contracted to accept, because the insurer drafted the contract and it was ambiguous. *Hansen* had said: "we limit our ruling to a case in which the insured did not intentionally produce the claim and in which the insurer itself had opportunity to know of the defect." In *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co*., 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), the court held that the insured lender had "created" and "suffered" the attack on the insured deed of trust by a junior lien holder asserting that the insured entity was controlled by the borrower property owner, and that the lien was a strategic device intended to frustrate the junior lender's ability to foreclose on the property. The court refused to find that the term "created" required evidence of evil motive or tortious conduct.

Other courts state that the term "created" requires evidence not only that the insured acted consciously and deliberately, but also that he or she actually intended to cause the resulting adverse claim or defect in title.[81] Some courts that use either the first or second definition of "created" have made the contrast that a person cannot be said to have acted consciously and deliberately if the person's actions were merely inadvertent, careless or negligent, which would take away the element of intentionality.[82]

Under the third position about what the insurer must prove to establish that an insured "created" a title defect, the courts say that the actions must have been conscious, deliberate and intentional, and also that "the insured is guilty of some misconduct or breach of its obligations which give rise to the defect, lien, or encumbrance."[83] Misconduct or breach of obligations is not found in

[81] In *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976), the court accepted the definition of "created" as referring to "a conscious, deliberate causation or an affirmative act which actually results in the adverse claim or defect." 72 Wis.2d at 512. The court found the exclusion inapplicable because the insured had intentionally misplaced a fence, but had not intended to create a boundary dispute by doing so. *First American Title Ins. Co. v. Kessler*, 452 So.2d 35, 39 (Fla.App. 3 Dist. 1984) also defined "created" as "a conscious, deliberate causation or an affirmative action which actually results in the adverse claim or defect." In *Regions Bank v. Commonwealth Land Title Ins. Co.*, 977 F.Supp.2d 1237, 24 Fla. L. Weekly Fed. D 192 (S.D.Fla. 2013), the court cited *Kessler* and other cases as support for its finding that a lender did not "create" an instrument merely by knowing about it. *Transamerica Title Ins. Co. v. Alaska Fed. Savings and Loan Ass'n*, 833 F.2d 775 (9th Cir. 1987) applied the exclusion when the insured's deed was recharacterized as an equitable lien, since such a claim fails without proof of intent. In *Sims v. Sperry*, 835 P.2d 565 (Colo.App. 1992), the court acknowledged that some states require proof that the insured intended to cause the title defect, while others require only a deliberate act but no proof that the insured intended to cause the defect. It found the exclusion ambiguous because there are two interpretations of it that have been advanced, and therefore adopted the view most favorable to the insured. In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), the Colorado court refused to hold that the insured "created" a competing deed of trust based solely on the other lender's assertion that the insured had knowledge of the lien, because Colorado requires proof of a conscious, deliberate act that was "intended to bring about the conflicting claim," not merely an inadvertent or negligent act. Older cases include *Feldman v. Urban Commercial, Inc*., 78 N.J.Super. 520, 189 A.2d 467 (Ch. 1963), aff'd, 87 N.J.Super 391, 209 A.2d 640 (App. Div. 1965); and *First Nat'l Bank & Trust Co. of Port Chester v. New York Title Ins. Co*., 171 Misc. 854, 12 N.Y.S.2d 703 (Sup.Ct. 1939).

[82] *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal.App. 3d 658, 172 Cal.Rptr. 248 (Cal.App. 1981) ("We believe the word 'created' means conscious, deliberate causation [which may be] susceptible of the significance of bringing out a result inadvertently or negligently"); *Resolution Trust Corp v. Ford Mall Associates*, 819 F Supp 826 (D.Minn. 1991); *Griffin v. Chicago Title Ins. Co*., 2010 WL 1141205 (D.Md.) (unpublished). In *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), the court refused to hold that the insured "created" a competing deed of trust based solely on the other lender's assertion that the insured had knowledge of the lien, because Colorado interprets the word "created" as requiring proof that the insured took a conscious, deliberate, and affirmative act and "intended to bring about the conflicting claim," and that his or her actions were not merely inadvertent or negligent.

[83] *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp*., 793 F.2d 780, 785 (6th Cir. (Tenn.) 1986), quoted with approval in *Fifth Third Mortgage Co. v. Chicago Title Ins. Co.*, 758 F.Supp.2d 476 (S.D. Ohio 2010), later decision 692 F.3d 507 (6th Cir. (Ohio) 2012); *Mid-South Title Ins. Corp. v. Resolution Trust Corp*., 840 F.Supp. 522 (W.D.Tenn. 1993); *Lawyers Title Ins. Corp. v. First Federal Savings Bank & Trust*, 744 F. Supp. 778 (E.D.Mich. 1990); *Mercantile-Safe Deposit & Trust Co. v. Chicago Title Ins. Co.*, 2007 WL 892103 (D.Md. 2007) (unpublished); *Dare Investments, LLC v. Chicago Title Ins. Co.*, 2011 WL 2600594 (D.N.J.) (unpublished); *Home Federal Savings Bank v. Ticor Title Ins. Co.*, 695 F.3d 725 (7th Cir. (Ind.) 2012) (reciting this standard for "created" but applying the term "agreed to"); *First*

any definition of "created," whether lay or legal. The decisions that have added this misconduct element do so based on faulty logic. They posit that, because the "created" exclusion has been applied to bar coverage when the insured is guilty of misconduct or a criminal act, the term may *only* be invoked by that type of conduct.[84] Some courts have even used this heightened definition of the word "created" to cancel the exclusion even as to the insured's own debts. For example, in *Archambo v. Lawyers Title Ins. Corp*,[85] a lien for federal taxes owed by the individual insured was found not to be excluded because the insured had not been accused of misconduct in allowing the lien to be filed.

The other terms in Exclusion 3(a) do not carry with them the connotation that the insured must be guilty of deliberate misconduct, or that he or she deliberately did something that was intended to create the title defect, even in those jurisdictions that apply the misconduct standard to the term "created."[86]

Assembly Church of West Plains v. Ticor Title Ins. Co., 872 S.W.2d 577 (Mo.App. S.D. 1994); and *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished). The intentional misconduct standard was labeled the "majority" view in *Griffin v. Chicago Title Ins. Co*., 2010 WL 1141205 (D.Md.) (unpublished). The *Griffin* court drew a line between "knowing and intentional conduct by the insured that results in a title defect or encumbrance" and "mere negligence," without accounting for the broad spectrum of deliberate conduct that lies between those poles. *Griffin* was decided on a motion to dismiss, and the court did not enter judgment in the insured's favor. In *Associated Bank, N.A. v. Stewart Title Guar. Co*., 881 F.Supp.2d 1058 (D.Minn. 2012), the borrower asserted that various people were guilty of fraud or misrepresentation, but did not single out the insured. The court found that the exclusion did not clearly negate a duty to defend the insured. See also Joel E. Smith, Annotation, *Title Insurance: Exclusion of Liability for Defects, Liens, or Encumbrances Created, Suffered, Assumed, or Agreed to by the Insured,* 87 A.L.R.3d 515 (1978).

[84] This misconception appears to have emanated from a predecessor to the present A.L.R. article on the subject. It is repeated in a more current version. See Joel E. Smith, Annotation, *Title Insurance: Exclusion of Liability for Defects, Liens, or Encumbrances Created, Suffered, Assumed, or Agreed to by the Insured,* 87 A.L.R.3d 515 (1978). The most widely cited decision that adopted this definition is *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp*., 793 F.2d 780 (6th Cir. (Tenn.) 1986). Missouri appeared to adopt the *American Savings* rationale in *First Assembly Church of West Plains v. Ticor Title Ins. Co*., 872 S.W.2d 577 (Mo.App. S.D. 1994). However, in *Captiva Lake Investments, LLC v. Fidelity Nat'l Title Ins. Co.*, 883 F.3d 1038 (8th Cir. (Mo.) 2018), the court overturned a trial court ruling that the exclusion could not be triggered by negligence, mismanagement, "downright stupidity or recklessness," saying that this would create too narrow a definition. The court said that, in fact, *First Assembly* had rejected that narrow interpretation of the word "created." The court said that "[w]hen [mechanic's] liens arise from insufficient funds, the insured lender has 'created' them by failing to discover and prevent cost overruns—either at the beginning of the project or later." The *Captiva* court said the insurer was not required to prove either intentional misconduct or inequitable dealings.

[85] *Archambo v. Lawyers Title Ins. Corp*., 646 N.W.2d 170 (Mich. 2002). A later Michigan case, *CDJ Builders, LLC v. Fidelity Nat'l Title Ins. Co*., 2012 WL 6150208 (E.D.Mich.) (unpublished), held that Exclusion 3(a) did not remove coverage for a construction lien that had been incurred by two of the three members of the insured LLC before they contributed the land to the new entity, and on which they had paid to defend the lien foreclosure action, because the members claimed not to "remember" the lien at the time they ordered the new policy. The court cited *American Savings* to support its ruling that Exclusion 3(a) applies only to "intentional misconduct or inequitable dealings by the insured." However, it did not cite to *Archambo*.

[86] In *First American Title Ins. Co. v. Lane Powell PC,* 764 F.3d 114 (1st Cir. (Mass.) 2014), the court found that although *American Savings* and *Chicago Title Ins. Co. v. Resolution Trust Corp*., 53 F.3d 899 (8th Cir. 1995) said that an assertion that a matter was "created" by the insured requires proof of "inequitable conduct," those same courts did not attach that standard to any of the other terms in Exclusion 3(a). The court said "…contrary to Lane Powell's rather

Courts have interpreted the term "suffered" by use of the definition of "suffer" from Black's Law Dictionary, which is "to allow, to admit, or to permit."[87] One court built on that definition by stating that "[t]he word 'suffered'... has been deemed to be synonymous with the word 'permit' and to imply [the] power to prohibit or prevent."[88] The term "suffered" is often applied to a nonconsensual lien and other matter that attaches to the property because of the insured's own interest in it, such as a judgment or federal tax lien. An insured may also "suffer" a title defect by electing to close on the transaction knowing that the matter very likely attaches or will attach to the property.[89]

There is considerable overlap between the terms "suffered" and "assumed." One court said that "assumed" requires proof that the insured "had actual, subjective knowledge of the ... issue and appreciated its effect."[90] Other courts have also said that the insured must have a certain level of

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nearsighted reading, Chicago Title does not stand for the proposition that, in order for Exclusion 3(a) to apply, the insurer must show intentional misconduct on the part of the insured. Though our sister circuit recognized that other courts have taken slightly varying views on the matter, it squarely held that Exclusion 3(a) 'bars coverage where there has been misconduct or inequitable behavior on the part of the lender' as well as 'where the lender assumes or agrees to liens, or where the lender stands to receive an inequitable windfall.'" Similarly, in *Beneficial Mutual Savings Bank v. Stewart Title Guar. Co.*, 36 F.Supp.3d 537 (E.D.Pa. 2014), the court rejected the insured's suggestion that a misconduct element be grafted onto the phrase "agreed to" based on *American Savings*. That court also found that *American Savings* added the misconduct element only to its definition of "created."

[87] In *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co*., 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), the court applied that definition and the further comment in Black's that to "suffer an act to be done by a person who can prevent it, is to permit or consent to it; to approve it and not hinder it... ." The court ruled that the insured had "suffered" the claim that its lien was a sham, intended to frustrate a junior lien holder's ability to foreclose on the property.

[88] *Archambo v. Lawyers Title Ins. Corp*., 2002 WL 31013194 (Mich.App.) (unpublished); later decision, *Archambo v. Lawyers Title Ins. Corp*., 646 N.W.2d 170 (Mich. 2002). The *Archambo* court found that the insured had not "suffered" a federal tax lien against himself because he had no power to prohibit or prevent it from attaching (ignoring the fact that every person has the power to avoid a tax lien by paying the tax when due). In *Regions Bank v. Commonwealth Land Title Ins. Co*., 977 F.Supp.2d 1237, 24 Fla. L. Weekly Fed. D 192 (S.D.Fla. 2013), the court defined "suffers" as "the power to prohibit or prevent [the defect] which has not been exercised although the insured has full knowledge of what is to be done with the intention that it be done," and finding that an insured's knowledge of certain facts did not cause it to suffer a risk that its lien would lose its priority. The court in *Keown v. West Jersey Title and Guaranty Co.* found that "[t]he term 'suffer' implies the power to prevent or hinder, and includes knowledge of what is to be done under the sufferance and permission, and the intention that what is done is to be done." 161 N.J.Super. 19, 26, 390 A.2d 715 (App.Div. 1978). *Keown* was quoted with approval in *Dare Investments, LLC v. Chicago Title Ins. Co.*, 2011 WL 2600594 (D.N.J.) (unpublished).

[89] *First Nat'l Bank of Jeanerette v. Lawyers Title Ins. Corp.*, 2010 WL 3734056 (W.D.La.) (unpublished), findings adopted in 2010 WL 3734020 (W.D.La.) (unpublished) (lender "suffered" federal tax lien against property by closing on loan with knowledge from credit report and automated loan underwriting report that the tax lien existed, although not shown in title commitment). Note, however, that *Duncan v. First American Title Ins. Co.*, 1994 WL 2010 (Tex.App.-Houston (14 Dist.)) (unpublished) found that an insured "assumed" or "agreed to" and encumbrance by taking title subject to it.

[90] *Cynergy, LLC v. First American Title Ins. Co*., 706 F.3d 1321 (11th Cir. (Ga.) 2013). The court supplied this further definition of "assumed" from state law: "In its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk arising from what the defendant is to do or leave undone."

knowledge about a title issue and some affirmative act in order to be deemed to have "assumed" the matter.[91] Other courts have supplied similar definitions of "suffered" and "assumed."[92] Most courts and real estate attorneys would consider "assumed" rather than "suffered" to be the most descriptive term when an insured takes title subject to an existing lien granted by or imposed against a former owner.[93] However, the term "suffered" may also be applied in such a circumstance.[94]

The phrase "agreed to" has been more often described than defined by the courts. Perhaps the most common statement is the following:

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[91] In *3 West 16th Street, LLC v. Commonwealth Land Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 1397135 (S.D.N.Y. 2019) (permanent citation not yet available), the court held that an insured had not "assumed" a contract under which it had agreed to convey part of its building to a synagogue after the structure was renovated, even though it had "agreed to" do so, invoking the latter term in Exclusion 3(a). The court said that New York follows the rule that "knowledge of an encumbrance, by itself, does not constitute an assumption of that encumbrance or an agreement to it," citing *Glickman v. Home Title Guar. Co*., 178 N.Y.S.2d 281 (Sup. Ct. 1958), aff'd, 185 N.Y.S.2d 756 (2d Dep't 1959). The court also quoted a non-title insurance decision that held that "an assumption of an obligation or an agreement to an obligation in connection with the purchase of real estate generally requires some affirmative act by the party to be charged."

[92] In *Fidelity Nat'l Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848 (5th Cir. (Tex.) 2014), the court found that an insured buyer, Doubletree, had not contracted to take title subject to a flowage easement despite the fact that its purchase contract, deed and policy all said the buyer would take title subject to the easement, because the insured obtained a survey that put the boundary of the easement in the wrong place. The court said that the sales agreement and other documents described the flowage easement as qualified by the phrase "and shown on survey." Thus, it concluded, Doubletree did not agree to buy the property subject to the flowage easement wherever it might actually be. Thus, Doubletree "did not have the requisite intent" for the exclusion to apply. It said that, "if Doubletree intended to acquire the property with the flowage easement as a title defect, it only intended to do so to the extent that the easement was shown on the survey." The court distinguished *Duncan v. First American Title Ins. Co.*, 1994 WL 2010 (Tex.App.-Houston (14 Dist.)) (unpublished), which held that an insured assumed or agreed to an encumbrance by taking title subject to it. In *Citigroup Global Markets Realty Corp. v. Stewart Title Guar. Co*., 417 S.W.3d 592 (Tex.App.-Houston (14 Dist.) 2013), when the officers of the insured owner were aware of a decree by Mexico's president declaring the insured property to be within a national park, the jury properly found that the insured "knew and assumed or agreed to the effects of" the decree.

[93] *Marr v. Commonwealth Land Title Ins. Co.*, 2009 WL 5125624 (W.D.Ky.) (unpublished) (by taking his interest with full knowledge of prior liens, insured "assumed the risk that those liens would be superior to his, and … Commonwealth was therefore under no duty to indemnify him").

[94] In *Murnan v. Stewart Title Guar. Co*., 585 F.Supp.2d 825 (E.D.Va. 2008), vacated in part and replaced by 607 F.Supp.2d 745 (E.D.Va. 2009), aff'd by 2010 WL 1227268, 374 Fed.Appx. 459, 105 A.F.T.R.2d 2010-1756 (4th Cir. (Va.) 2010) (unpublished), the court found that an insured "suffered" rather than "assumed" a federal tax lien against herself individually when she conveyed to herself as trustee of a revocable trust, and thus Exclusion 3(a) negated coverage for the lien. The tax lien was against Alexandra Murnan individually. She obtained a policy when she conveyed to herself as trustee of a trust. In the later decision, the court reversed its earlier finding that 3(a) did not apply. The later decision held that "when, acting as Trustee, [Murnan] purchased the Property, she essentially 'permit[ted]' the liens to attach to the Property and thus suffered the liens on the Property." 607 F.Supp.2d at 746. See also *Moser v. Fidelity Nat'l Title Ins. Co*., 2018 WL 1413346 (E.D.Tex. 2018) (unpublished) (insured allowed judgment lien against him to attach to insured parcel). See §11.2.1 for a full discussion of Exclusion 3(a) as applied to liens against the insured or that the insured assumes by contract.

> And "agreed to" carries connotations of "contracted," requiring full knowledge by the insured of the extent and amount of the claim against the insured's title. As with the other terms, this definition implies some degree of intent.[95]

Other courts have developed similar statements, with the primary differentiation between them being in the exact phrasing of the amount and type of knowledge the insured must have had at the time it agreed to or contracted for the matter.[96]

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[95] *American Savings & Loan Ass'n v. Lawyers Title Ins. Corp.*, 793 F.2d 780, 784 (6th Cir. (Tenn.) 1986). That statement has been quoted in many decisions, including by the following: *Ticor Title Ins. Co. v. FFCA/IIP 1988 Property Co*., 898 F.Supp. 633 (N.D.Ind. 1995); *JBGR LLC v. Chicago Title Ins. Co.*, 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished); *First Nat'l Bank of Minneapolis v. Fidelity Nat'l Title Ins. Co.*, 572 F.2d 155 (8th Cir. (Minn.) 1978); *National Credit Union Administration v. Ticor Title Ins. Co.*, 873 F.Supp. 718 (D.Mass. 1995); *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co*., 2011 WL 611802 (E.D.Pa.) (unpublished); and *Northwest Savings Bank v. Fidelity Nat'l Title Ins. Co*., 2017 WL 253080 (Pa.Super.) (unpublished).

[96] In *Beneficial Mutual Savings Bank v. Stewart Title Guar. Co*., 36 F.Supp.3d 537 (E.D.Pa. 2014), the court said that it "construes the term 'agreed' as carrying connotations of contracted and requiring full knowledge by the insured of the extent and amount of the claim against the insured's title." The bank argued, based on the "full knowledge" phrase from *American Savings*, that the exclusion should not apply because there were a number of smaller facts that it did not know, such as the correct name of the senior lender. The court said the bank sought to interpret the exclusion too finely: "[a]ssuming arguendo that Lender actually was mistaken as to whether it was First Cornerstone Bank or Prior Lender that held the Prior Mortgage, this lack of knowledge would not change the outcome. For Exclusion 3(a) to apply, Lender did not need to know every detail of the Defect." In *First Nat'l Bank of Minneapolis v. Fidelity Nat'l Title Ins. Co.*, 572 F.2d 155 (8th Cir. (Minn.) 1978), the court said that the insurer must show knowledge and agreement by the insured: "[t]he resolution of that issue is one of fact, not law. First National's knowledge that prior encumbrances existed will not absolve the insurer from liability for them unless the insurer also establishes by a preponderance of the evidence that the bank agreed that its mortgage would occupy a secondary position to the purchase money mortgages." 572 F.2d at 162-3. In *First American Title Ins. Co. v. Lane Powell PC*, 764 F.3d 114 (1st Cir. (Mass.) 2014), the court held that knowledge is sufficient: "[a]n insured party 'assumes' or 'agrees' to a lien pursuant to Exclusion 3(a) when it takes property that is subject to an existing encumbrance it has knowledge of. It based its decision largely on *National Credit Union Administration v. Ticor Title Ins. Co.*, 873 F.Supp. 718 (D.Mass. 1995), which applied the exclusion when the insured lender's officers were fully aware of the competing lien and agreed that the new lien would be subordinate. The *Lane Powell* court also emphasized the important point that Exclusion 3(a) exists to bar an inequitable windfall. If the court raises the proof burden too high, the insured will be able to collect insurance even "where the lender assumes or agrees to liens, or where the lender stands to receive an inequitable windfall." For that proposition, it relied on *Chicago Title Ins. Co. v. Resolution Trust Corp*., 53 F.3d 899 (8th Cir.1995). In *Bank of America, N.A. v. Chicago Title Ins. Co*., 2017 WL 2215012 (N.D.Ill.) (unpublished), the court held on a motion to dismiss that the insured may have "agreed to" having its mortgage be subordinate to a development agreement by acquiescing in recording instructions that told the insurer to record the development agreement before the mortgage.

11.2.1 Liens Agreed To Or Assumed In Purchase Agreement

FORM 84, Appendix A
Assumed or agreed to in purchase contract

An insured obtains no coverage against a non-consensual lien that attaches to the insured property solely due to the fact that the insured became its owner, which lien is considered to have been suffered or allowed by the insured.[97] The principle that one may not purchase insurance that obligates the insurer to pay one's own valid debts is buttressed by the doctrine that an insurance policy is intended to protect against a fortuity—a peril or risk that results from accident, chance or an Act of God. An existing lien representing a valid debt owed by the insured is not a fortuity for which title insurance was designed to afford protection.[98]

When an insured purchaser intentionally contracts to take title subject to a particular lien or encumbrance, a claim against the insurer based on that lien is barred by Exclusion 3(a) because the insured "assumed" or "agreed to" take title subject to the lien.[99] New York courts have been

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[97] *Moser v. Fidelity Nat'l Title Ins. Co*., 2018 WL 1413346 (E.D.Tex. 2018) (unpublished) (judgment lien against the insured that attached to the property when the insured took title was allowed by the insured and excluded, despite insured's fond hope that property would be exempt homestead); *Murnan v. Stewart Title Guar. Co.*, 585 F.Supp.2d 825 (E.D.Va. 2008), vacated in part and replaced by 607 F.Supp.2d 745 (E.D.Va. 2009), aff'd in 2010 WL 1227268, 374 Fed.Appx. 459, 105 A.F.T.R.2d 2010-1756 (4th Cir.(Va.) 2010) (unpublished) (insured suffered federal tax lien against herself, invoking Exclusion 3(a), despite fact that exception for lien was removed from policy). One seriously muddled decision refused to employ the exclusion, on the premise that the insured had not created the federal tax lien because his business partner was in charge of paying the bills, which entitled him to have his tax debt paid by the title insurer, in *Archambo v. Lawyers Title Ins. Corp*., 2002 WL 31013194 (Mich.App.) (unpublished). In *Cole-Parker v. Fidelity Nat'l Title Ins. Co.*, 2018 WL 3340474 (N.J.A.D.) (unpublished), a judgment became a lien against property when the insured owner took title. The commitment excepted the judgment and the debt was paid from closing, but not released. The insured sued the insurer because of the unreleased lien. The insurer sought summary judgment based on Exclusion 3(a), but the court dismissed the case based on the statute of limitations without reaching the issue.

[98] The court applied the fortuity doctrine in *Moser v. Fidelity Nat'l Title Ins. Co*., 2018 WL 1413346 (E.D.Tex. 2018) (unpublished), saying: "'The fortuity doctrine relieves insurers from covering certain behaviors that the insured undertook prior to purchasing the policy.' *RLI Ins. Co. v. Maxxon Sw. Inc*., 108 F.App'x. 194, 198 (5th Cir. 2004). 'Under the fortuity doctrine, an insured cannot obtain coverage for something that has already begun and which is known (or should have been known) to have begun.' ... The fortuity doctrine bars coverage for 'known losses' and 'losses in progress.' *Warrantech Corp. v. Steadfast Ins. Co*., 210 S.W.3d 760, 766 (Tex. App.—Fort Worth 2006, pet. denied) ... A 'known loss' is a loss the insured knew had occurred before the insured entered into the contract for insurance. ... A 'loss in progress' is a progressive loss the insured knew or should have known was ongoing when the insured entered into the contract for insurance." The court labeled the judgment lien against the insured as a known loss. One of the few other title insurance decisions to refer to the concept of fortuity was *Kirwan v. Chicago Title Ins. Co*., 9 Neb.App. 372, 612 N.W.2d 515 (2000), in which the insureds concealed from the insurer the fact that a person claimed a part interest in the property before closing, and then made a claim under the policy based on that claim. The court said that the insureds' demand for coverage was "tantamount to a driver buying automobile insurance on Monday and complaining because the insurance company will not cover the accident occurring 2 days before on Saturday."

[99] *Marr v. Commonwealth Land Title Ins. Co.*, 2009 WL 5125624 (W.D.Ky.) (unpublished) (by taking his interest with full knowledge of prior liens, insured "assumed the risk that those liens would be superior to his, and … Commonwealth was therefore under no duty to indemnify him"). In *Bradford v. Thompson*, 460 S.W.2d 932

especially stringent about the evidence that the insured consciously assumed the debt or lien before the exclusion applies.[100] The exclusion does not bar coverage for a lien when the insured agreed to accept title without warranties or representations, but also without having consciously assumed any known liens.[101]

When the insured contracts to take title subject to a particular lien, the insured does not suffer a loss due to the lien, because the court may presume that the insured took the lien into account in setting the purchase price. Thus, the no-loss exclusion, 3(c), also applies, as is discussed at §11.4.1.

A court may refuse to apply the exclusion unless the insurer can prove a close relationship between the liens assumed and a reduction in the purchase price.[102] Similarly, the statement in an exchange agreement that the purchaser agreed to take title "subject to" all "assessments" did not establish that the insured had the requisite knowledge to have "agreed to" a special assessment that was not excepted in the commitment.[103] The insurer also attempted to show conscious assumption of

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(Tex.App. Tyler, 1970); aff'd in part and rev'd in part, 470 S.W.2d 633 (Tex. 1971), Exclusion 3(a) applied when the insured was aware of a second deed of trust before he purchased, his deed recited that title was taken subject to the mortgage, and he had made post-closing payments on the loan. The court said the insured had "assumed" the obligation of the lien and debt. Also, in *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*, 956 F.Supp. 989 (S.D.Ala. 1997), the deed recited six state tax liens to which the property was subject and the insured ordered the title insurance policy after the deed was delivered. The commitment did not except the liens. The court applied the exclusion, saying: "Common sense dictates that Global 'assumed or agreed to' such defects in title by taking the land subject to the tax liens." In *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp*., 361 F.2d 764, 769 (8th Cir. 1966), an insured was found to have "assumed" mortgages not excepted in the commitment when it purchased the property before getting title evidence, the principals of the insured were sophisticated real estate developers, no cash consideration was paid, the property was in foreclosure (suggesting that it was encumbered), and the purchase contract said that "Grantee accepts property described above subject to mortgages, liens, and indebtedness of all nature, and agrees to make payment on same, without any recourse against Grantors."

[100] In *Empire Development Co. v. Title Guarantee & Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918), construing a policy long since out of use, the insured's knowledge of an assessment before closing was found not to be equivalent to the deliberate assumption of a tax lien. New York courts have also refused to apply the exclusion when the purchase agreement said the buyer would take title subject to assessments that were not specifically identified. See *Ackley v. Lawyers Title Insurance Corp.*, 16 Misc.2d 402, 182 N.Y.S.2d 76 (1958); *Glickman v. Home Title Guaranty Co.*, 8 Misc.2d 303, 167 N.Y.S.2d 793 (1957); 15 Misc.2d 167, 178 N.Y.S.2d 281 (Sup. 1958), aff'd 8 A.D.2d 629, 185 N.Y.S.2d 756 (Sup.Ct.App.Div. 1959). Contra: *Palliser v. Title Ins. Co. of New York,* 61 Misc. 490, 115 N.Y.S. 545 (Sup. Ct. 1908).

[101] In *Bragman v. Commonwealth Land Title Ins. Co*., 421 F.Supp. 99 (E.D.Pa. 1976), the insured purchased the property at a sheriff's sale. The deed was issued subject to real estate taxes. The court held that the purchaser did not "suffer" or "assume" the tax liability as a normal incident of ownership in an auction purchase. However, the court held that the policy did not protect the insured against the portion of the taxes accrued after the insured purchased the property.

[102] In *Inavest Enterprises v. TRW Title Ins. of New York, Inc.*, 189 A.D. 2d 111, 595 N.Y.S. 2d 837 (N.Y.A.D. 3 Dept. 1993), the insured partnership obligated itself in the purchase agreement to "pay all arrears in taxes," and the court duly noted that several of the partners were real estate brokers and the partners paid a reduced price in part because they knew that there were delinquent taxes. However, the court said the insurer was required to prove that the partners had actual knowledge of the exact tax amounts that they were agreeing to pay in order for the exclusion to apply.

[103] *Arizona Title Ins. & Trust Co. v. Smith*, 21 Ariz.App. 371, 519 P.2d 860 (1974).

the assessment by the seller's testimony that he had informed the insured, that a listing sheet referred to the assessment, and by imputing the buyer's agent's actual knowledge to the insured. The court refused to apply the exclusion, saying:

> The company relies heavily upon the fact that the exchange contract mentioned the word "assessments" three times--once in typewriting and twice in the printed form. We cannot say as a matter of law that the insured had knowledge of the assessment merely because he signed this agreement when the document contained neither the total amount due on the assessment nor the yearly payment on it, but only the word "assessments."[104]

When the title insurance commitment excepts a lien but that exception is removed from the policy, the insurer must establish that the insured expected to take title subject to the lien and that the removal of the exception was merely accidental. In *Hilliard Properties, Inc. v. Commonwealth Land Title Ins. Co.*,[105] the commitment excepted a special assessment but the exception did not appear in the policy. The court refused to apply Exclusion 3(a) based on this circular analysis:

> Although Commonwealth argues that Hilliard, through its purchase agreements buying and selling the property, assumed the obligation to pay the assessment, the policy stated that no special assessments were attached to the property. In construing contracts, specific provisions are generally read to negate conflicting general provisions. [citation omitted] Here, the policy specifically provided coverage against the special assessments, where the exclusion terms were of a general nature. Accordingly, the assessment was insured against.[106]

11.2.2 Other Title Issues Assumed or Agreed To In Purchase Agreement

When the owner insured agrees in the purchase contract to take the property subject to a certain easement, restriction or other matter affecting title, the issue is excluded from policy coverage as a matter "assume" or "agreed to" by the insured.[107] To invoke the exclusion as to a recorded easement or restriction not shown on the policy, the insurer must show that the insured had the requisite level of intent in the particular jurisdiction in contracting to take title subject to the encumbrance.[108]

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[104] 21 Ariz.App. at 374, 519 P.2d at 863.

[105] 1997 WL 781727 (Ohio App. 8 Dist.) (unpublished), app.den., 81 Ohio St.3d 1503, 691 N.E.2d 1062 (Table).

[106] Id. at 4.

[107] In *3 West 16th Street, LLC v. Commonwealth Land Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 1397135 (S.D.N.Y. 2019) (permanent citation not yet available), the court found that the title insurer was not required to defend the insured in a lawsuit brought by a synagogue to enforce an agreement to donate part of the insured building to it after the building was renovated. The insured had signed that contract. The court said the contract fell under the term "agreed to" in Exclusion 3(a). The court cited a venerable New York decision construing a policy that predated the ALTA forms, *Brick Realty Corp. v. Title Guarantee & Trust Co*., 291 N.Y.S. 637 (City Ct. 1936), which said that the policy "did not insure

The exclusion was held to apply when the purchaser was made aware of restrictions before the purchase agreement was signed, and the restrictions were indirectly referenced in the commitment. The buyer's own attorney acted as closer for the insurer, stating in his "closing report" that the restrictions should be shown in the policy, which they were.[109] Similarly, the insurer was held not liable for any loss for the apparently accidental characterization of a condominium unit title as being in fee simple rather than a lease. The court noted that the insured accepted the lease and had received the condominium declaration and other documents, all of which accurately showed the interest as a leasehold. In addition, the policy was only ordered after the sale was closed; thus, the insured did not rely on the inadvertent reference to fee simple when he closed the sale.[110] Likewise,

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plaintiff against the consequences of its own acts ... and [the insurer] was not obliged to defend any suit attacking plaintiff's title ... if based upon acts claimed to have been committed by plaintiff." However, the court said that the plaintiff's claim was not a matter "assumed" by the insured, saying that the insured had not "assumed the risk" of the synagogue's claims "simply because it acquired the Building with knowledge of their claims." The court said that New York follows the rule that "knowledge of an encumbrance, by itself, does not constitute an assumption of that encumbrance or an agreement to it." It said that rule emanates from *Glickman v. Home Title Guar. Co*., 178 N.Y.S.2d 281 (Sup. Ct. 1958), aff'd, 185 N.Y.S.2d 756 (N.Y.A.D. 2 Dep't 1959). In *In re Pazzo Pazzo, Inc*., ___ B.R. ___, 2019 WL 6699694 (Bkcy.N.J. 2019) (not yet released for publication), the court held that the insured had both assumed and agreed to take title subject to a lease and option because, in an amendment to the purchase contract, the insured had negotiated substantial concessions from the seller concerning those possible rights in the property. The court said that, although the insured convinced the insurer to remove exceptions for the lease and option based on recorded instruments and representations that they had been terminated, it was not entitled to receive insurance coverage against the same risks for which it had received a $300,000 discount in the purchase price, plus other protections. In construing the exclusion, the court looked to the *American Savings & Loan Association* decision, which said that the term "assume" requires "knowledge of the specific title defect assumed" and "agreed to" carries "connotations of 'contracted,' requiring full knowledge by the insured of the extent and amount of the claim against the insured's title," with "some degree of intent." 793 F.2d 780, 784-5 (6th Cir. 1986). The court said the amended purchase contract invoked both terms.

[108] In *Fidelity Nat'l Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848 (5th Cir. (Tex.) 2014), the court found that an insured buyer, Doubletree, had not contracted to take title subject to a flowage easement despite the fact that its purchase contract, deed and policy all said the buyer would take title subject to the easement, because the insured obtained a survey that put the boundary of the easement in the wrong place. The court said that the sales agreement and other documents described the flowage easement as qualified by the phrase "and shown on survey." Thus, it concluded, Doubletree did not agree to buy the property subject to the flowage easement wherever it might actually be. Thus, Doubletree "did not have the requisite intent" for the exclusion to apply. It said that, "if Doubletree intended to acquire the property with the flowage easement as a title defect, it only intended to do so to the extent that the easement was shown on the survey." The court imposed a higher burden of intent than had been imposed in the case it distinguished, *Duncan v. First American Title Ins. Co.*, 1994 WL 2010 (Tex.App.-Houston (14 Dist.)) (unpublished), which held that an insured assumed or agreed to an encumbrance by contracting to take title subject to it. In *JBGR LLC v. Chicago Title Ins. Co*., 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished), the court found, on a motion to dismiss, that the exclusion applies when "the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property," and may apply to the declaration of restrictions at issue in the case. In *Eleazer v. First American Title Ins. Co*., 2017 WL 1137215 (Wash.App. 1 Div.) (unpublished), insureds who signed a purchase contract in which they agreed to grant an easement to the seller for a septic system built on the land being sold "agreed to" that encumbrance and the recorded instrument that disclosed the septic system's existence.

[109] *Sullivan v. Tomgil Building Corp.*, 46 Misc.2d 613, 260 N.Y.S.2d 465 (Sup. Ct. 1965).

[110] *Rudolph v. Title & Trust Co. of Fla.*, 402 So.2d 1275 (Fla.App. 1981).

an insured's purchase agreement said that "[t]he property is also sold subject to easements, if any created, or to be created, prior to or after conveyance of title ... which may be placed on record by the Seller after execution hereof for the benefit of this property and/or community of which it is a part."[111] The seller recorded an easement over the insured property after policy date. At trial, the insured argued that the insurer was responsible if the easement was binding. On appeal that argument was dropped, with the insured conceding that, if the easement was binding on it, the matter was "agreed to" by the insured and thus excluded.[112] Also, in *Riffle v. United General Title Ins. Co.*,[113] there was no loss payable when the insured bought the property with knowledge of the title defect, the purchase price was adjusted accordingly, and the insured did not establish diminution in value beyond the reduction in sale price. The insured claimed policy limits when its access easement was found to be invalid. The trial court found, however, that "the access problem was taken into account when negotiating the sale price." Further, the property was not valueless, since the partners could get there by boat, and their intended use was recreational and not commercial. It noted that damage evidence must "allow findings from established facts and not by conjecture." Thus, the court was unwilling to award policy limits as a default measure of loss without proof of actual damage suffered. Further, the court impliedly invoked Exclusion 3(a) by hold that "[a]ppellants received what they bargained for and cannot now claim that they have suffered damages."

However, a general or boilerplate reference to restrictions or easements is not enough to establish the required conscious assumption of a matter. The mere fact that the seller's deed excepted "restrictive covenants" was found not to show the required intent. "The exceptions in the deed run in favor of the grantor. They are not for the benefit of the title company."[114] Also, there was found not to be sufficient intent to purchase subject to a mineral reservation based solely on the fact that it was noted in the title opinion letter prepared by the purchaser's attorney. The insured was assisted by testimony that a later purchaser rejected title because of the reservation. In addition, an unsigned endorsement setting out the reservation was found in the insurer's file, which apparently reinforced for the court that the insurer could have disclosed the matter but for its own negligence.[115]

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[111] *Carstensen v. Chrisland Corp.*, 247 Va. 433, 442 S.E.2d 660, 664 (Va. 1994).

[112] Id. at 665, n. 2.

[113] 64 Ark.App. 185, 984 S.W.2d 47 (1998).

[114] *Holly Hotel Co. v. Title Guarantee & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1933).

[115] *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc*., 544 So. 2d 1070 (Fla.App. 1989).

11.2.3 Reformation Of Policy To Remove Parcel Or Alter Terms

FORM 21, Appendix A
Land erroneously included in policy and deed

An insurance policy may be reformed like other types of contracts. The party seeking reformation must present clear and convincing evidence that there was a mutual mistake made by the parties in drafting the contract and that the parties had a meeting of the minds on a definite intention before the contract was drafted.[116]

A title insurance policy may be reformed to excise from Schedule A or C a parcel of land that was included in the policy by mutual mistake.[117]

The mistaken inclusion of land in the policy which the parties did not intend to make part of the transaction also invokes Exclusions 3(a) and 3(c), as a matter "agreed to" by the insured and one for which the insured suffers no loss.[118] In *Cohen v. Security Title & Guaranty Co.*,[119] for example, Schedule A of the policy was incorrect because it "included more property than the plaintiffs had intended to buy and the sellers had intended to sell." The insureds had discovered the error the day before closing and failed to inform either seller or insurer. Then, shortly after closing, they demanded compensation for their "loss." The court held that the insureds had "agreed to" accept title without the extra land, and that coverage was negated due to the "insured's own intentional misconduct or inequitable dealings." Also, in *Lawyers Title Ins. Corp. v. Golf Links Development Corp.*,[120] the legal description was reformed in both the deed and the policy to remove a parcel

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[116] *BAPCO LLC v. Fidelity Nat'l Title Ins. Co.*, 2019 WL 5576863 (Ariz.App. 1 Div.) (unpublished), citing *A.I.D. Ins. Services v. Riley*, 25 Ariz. App. 132, 135 (1975).

[117] In *Lawyers Title Ins. Corp. v. Golf Links Development Corp.*, 87 F.Supp.2d 505 (W.D.N.C. 1999), the legal description was reformed in both the deed and the policy to remove a parcel accidentally conveyed to the insured. The court found the mistake to be mutual because the insured also erred, by failing to notice and correct the error during its due diligence period. In *Fidelity Nat'l Title Ins. Co. v. Wooden*, ___ F.Supp.3d ___, 2019 WL 175134 (N.D.Ala. 2019) (permanent citation not yet available), the court said it would need to hear trial testimony to decide if the insureds "agreed to" receive title to a large parcel with or without the one lot that had been previously sold, on which there is located a house. The seller bank sought to reform the deed to remove the lot and the title insurer sought, in the same lawsuit, to reform the policy. The insurer asserted that the insureds agreed to buy the property without the lot, and had not suffered a loss because they do not own the house.

[118] *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 209 P.3d 859 (Wash. 2009); *Knispel v. Transnation Title Ins. Co.*, 2012 WL 5334083 (Cal.App. 2 Dist.) (unpublished) (policy reformed to remove parcel that seller had sold the prior year, when contract included many parcels and the one at issue was not indicated on map attached to purchase agreement and was included by accident in title commitment and deed). In *Demetrio v. Stewart Title Ins. Co.*, 124 A.D.3d 824, 3 N.Y.S.3d 75 (N.Y.A.D. 2 Dept. 2015), app.den. 25 N.Y.3d 906 (May 12, 2015), when the policy described the insured property as one lot, but incorporated by reference a metes and bounds description that encompassed seven lots, the policy insured only the one lot that the insured purchased, and the insured suffered no damage due to the "loss" of the land for which it paid nothing.

[119] *Cohen v. Security Title & Guaranty Co.*, 212 Conn. 436, 562 A.2d 510 (Conn. 1989).

[120] 87 F.Supp.2d 505 (W.D.N.C. 1999).

accidentally conveyed to the insured. The court held that Exclusions 3(a) and 3(c) also applied.

See §8.3 concerning claims in which the insured asserts that it intended to take title to a parcel or interest not conveyed or insured, §8.4 for a discussion of policy reformation to remove a parcel conveyed by mutual mistake, and §11.4 for similar cases decided under the "no loss" exclusion.

An insurer is also entitled to reform the policy to remove a parcel that was conveyed to the insured due to the tortious act of the insured, such as the insured's alteration of the deed to include property the seller did not intend to convey.[121] For example, in *Insured Titles, Inc. v. McDonald,*[122] the insured prepared the quit claim deed used to confirm a tax title. He intentionally included more land than the then-owner had been conveyed, increasing the land conveyed from two acres to more than 12. The appeals court upheld the ruling of the trial court that "McDonald's alteration of the legal description illustrated his knowledge of the discrepancy regarding the size of the parcel and demonstrated that the defect in the description was one 'created, ... or agreed to by the insured claimant.'"[123]

However, when the grantor sues to reform the deed to the insured to remove a parcel, but the insured denies that the parties made a mutual mistake and alleges that he or she intended to purchase the disputed parcel, the insurer may have a duty to defend the insured, although it will not have a duty to indemnify if the seller proves reformation.[124] For example, in *Penney v. Capitol City Transfer, Inc.*,[125] the insurer was not entitled to deny the insured's defense based on extrinsic evidence that the land in dispute was only mistakenly included in the policy. However, the exclusion typically does not apply when the seller makes a unilateral mistake in selling land he or she does not own.[126]

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[121] In *Queens Organization, LLC v. First American Title Ins. Co*., 172 A.D.3d 932, 99 N.Y.S.3d 411 (N.Y.A.D. 2 Dept. 2019), the court held that the title insurer was not required to defend its insured in a lawsuit claiming that the insured altered the deed to add itself as the grantee of a half interest in the property.

[122] 275 Mont. 111, 911 P.2d 209 (1996).

[123] 911 P.2d at 213.

[124] In *Summer Pond Properties, Inc. v. Transamerica Title Ins. Co.*, 1998 WL 283052 (Wash.App.Div. 1) (unpublished), the deed and policy both included an extra parcel by mistake. The insurer denied coverage based on mutual mistake. It withdrew that defense when the insured and seller settled shortly before trial, and admitted liability under the policy. The issue of mutual mistake and the exclusion was not litigated on appeal. In *First American Title Ins. Co. v. MacLaren, L.L.C*., 2012 WL 769601 (D.Del.) (unpublished), the court ruled that the title insurer was required to defend an insured owner in a reformation action despite rather striking evidence that it did not intend to buy the land. The court acknowledged that Exclusion 3(a) would negate coverage if the deed were reformed. Other decisions, such as *Golf Links*, have held that there is no duty to defend such an action. In *Jurney v. Ticor Title Ins. Co.*, 2012 WL 1073160 (N.D.Ga.) (unpublished), a Georgia federal court said there is no definitive answer from Georgia state courts as to whether or not a seller's lawsuit to reform the insured's deed to remove parcels is a matter "created, suffered, assumed or agreed to" by the insured. The seller asserted the land was conveyed by accident but the insured asserted that he intended to buy the land.

[125] 707 A.2d 387 (Me. 1998).

[126] In *Polsfoot v. Transamerica Title Ins. Co.,* 47 Or.App. 261, 614 P.2d 1173 (1980), an insured sought to buy land

The insurer is also entitled to reform a policy that fails to make exception for a matter that attaches to the title to the property due to the act of the insured, including an encumbrance granted by the insured or a non-consensual lien against the insured that attaches to the property by operation of law.[127] The policy may also be reformed when the insurer and insured have made a mutual mistake regarding its other terms, including exceptions, exclusions or endorsements.[128]

When a title matter is excepted in the commitment but the exception is not carried forward into the policy due to an error, the insurer may be entitled to reform the policy on the grounds of mutual mistake. Under those facts, the insured cannot prove that both parties intended that the exception not appear in the policy. An insurer should prove not only its own policy-issuing mistake, but also that the insured contracted to assume the liability for the defect in question. However, if the error is deemed to be unilateral rather than mutual, the court may refuse to reform the policy.[129] Even

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which had been divided in a divorce decree. When he sued the sellers, he was permitted only a portion of the land, on a finding of mutual mistake. The insurer raised the finding of mutual mistake as collateral estoppel. The court rejected the argument, however, after finding that the mistake was unilateral by the seller. Similarly, in *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962), the policy insured "all of Lot 9 ... fronting on U.S. 183 Expressway," and the court held that the policy insured all of Lot 9, despite the fact that 7/8ths of that parcel had previously been taken for the highway, because the insured professed not to know that, and the insurer did not establish the intent of seller and buyer.

[127] See *Edwards v. First American Title Ins. Co.*, 2014 WL 575953 (Ariz.App. 1 Div. 2014) (unpublished), in which the insured owner sued the insurer for having failed to make exceptions in his policy for two judgments against him that attached to the property as liens when he became the owner. The insurer did not seek reformation, but the court found that the owner's claim was barred.

[128] In *Fidelity Nat'l Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848 (5th Cir. (Tex.) 2014), the court reformed the policy, which was accidentally issued without a number of exceptions that had been contained in the commitment. In Texas, a "unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake." *Givens v. Ward,* 272 S.W.3d 63, 67 (Tex.App.-Waco 2008, no pet.). The court found that the agreement between the insured and insurer was represented by the title commitment. In *Regions Bank v. Commonwealth Land Title Ins. Co*., 977 F.Supp.2d 1237, 24 Fla. L. Weekly Fed. D 192 (S.D.Fla. 2013), the court refused to reform endorsements that gave specific coverage against the subject matter of the claim, the priority of a lien evidenced by a memorandum. The court said that "Regions did not execute a single document acknowledging or agreeing to subordinate its mortgage to the Memorandum. Instead, exactly the opposite occurred." Thus, there was no mutual mistake. The court also there was "no evidence whatever" that the lender's counsel "attempted to 'snooker' [the title agent] or trick him into issuing" the endorsement. In *BAPCO LLC v. Fidelity Nat'l Title Ins. Co.,* 2019 WL 5576863 (Ariz.App. 1 Div.) (unpublished), the court reformed a policy to add exceptions for the two senior deeds of trust that the lender knew to exist. The insurer was not barred from enforcing the policy as reformed against the successor holder of the loan, BAPCO, because reformation alters the policy as originally written. The court said: "…Fidelity only sought reformation of the Policy to reflect the existence of the two liens. BAPCO's lack of actual knowledge has no bearing on whether a mutual mistake occurred in the drafting of the Policy—a process in which BAPCO had no role. BAPCO, as assignee, stands in the shoes of Diversified." The court also rejected the argument that reformation was prohibited by the policy's own terms, because the policy said that it could be amended only by an endorsement. The court said this argument failed "because amendment and endorsement are not the same thing as reformation." In *Queens Organization, LLC v. First American Title Ins. Co*., 172 A.D.3d 932, 99 N.Y.S.3d 411 (N.Y.A.D. 2 Dept. 2019), the court held that the title insurer was not required to defend its insured in a lawsuit claiming that the insured altered the deed to add itself as the grantee of a half interest in the property.

[129] In *Hilliard Properties, Inc. v. Commonwealth Land Title Ins. Co.*, 1997 WL 781727 (Ohio App. 8 Dist.) (unpublished), app. not allowed, 81 Ohio St.3d 1503, 691 N.E.2d 1062 (Table), an insurer was denied the right to reform

if the court refuses to reform the policy, however, Exclusion 3(a) or the "no loss" exclusion may apply. See §§11.2 and 11.4.

11.2.4 Matters Discoverable By Inspection Of Property

FORM 53, Appendix A
Matters discoverable by inspection

Most matters that would be plainly visible on an inspection of the property are excluded from coverage by Exclusion 3(a). For example, a public road built partially on the insured property was excluded even though no exception was made for it in the policy. The court emphasized that the insured was a lawyer and CPA, was represented by an attorney at closing, had inspected the property, and had examined a survey showing the roadway as being within the boundary of the insured lot.[130] The cases under Exclusion 3(a) overlap with cases at §12.3 construing the inspection clause of the survey exception.

However, in some cases, the exclusion may be held not to bar coverage for an adverse claim of title or encumbrance in the public records despite evidence that would be obvious on inspection that a person claims a right of some kind in the property.[131] For example, in *McDaniel v. Lawyers' Title Guaranty Fund*,[132] the policy did not except a power line easement running along one boundary line. The insureds testified that they saw the utility line, but did not know it was on their property until they tried to sell the property. In *Laabs v. Chicago Title Ins. Co.*,[133] the insured had owned the property for a number of years before getting a title policy. The title defect was a record overlap. One week before getting the policy, the insured allegedly told her neighbor that his deed included land she owned. The prior neighbor had torn down a fence built by the insured before the policy was ordered, because of a dispute as to who owned the land. The court rejected the 3(a) defense primarily on the insured's own testimony that she thought she owned the land. In addition, the court noted that

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a policy that was accidentally issued without an exception for special assessments that had appeared in the commitment. See also *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*, 956 F.Supp. 989 (S.D.Ala. 1997), in which the insurer was denied a request to reform a policy which failed to except tax liens, and *Rivera v. TRW Title Ins. of New York, Inc.*, 309 A.D.2d 740, 765 N.Y.S.2d 257 (N.Y.A.D. 2 Dept. 2003), in which the insurer produced no evidence as to why it should be permitted to reform a policy to except a mortgage and tax lien, and was therefore denied that request. In *Geo Finance, LLC v. University Square 2751, LLC*, 2014 WL 7369940 (E.D.Mich. 2014) (unpublished), the court said that there was insufficient evidence of a mutual mistake to support reformation, although it applied policy exclusions to bar coverage.

[130] *Malkin v. Realty Title Ins. Co., Inc.*, 244 Md. 112, 223 A.2d 155 (1966).

[131] In *C 1031 Properties, Inc. v. First American Title Ins. Co*., 175 Wash.App. 27, 301 P.3d 500 (Wash.App. Div. 3 2013), the court held that Exclusion 3(b) did not apply when power poles were visible, but the insured did not actually know there was a recorded easement allowing their placement on the property.

[132] 327 So.2d 852 (Fla.App. 1976).

[133] 72 Wis.2d 503, 241 N.W.2d 434 (1976).

the insurer could have protected itself from loss because it was "at least arguable" that the overlap was discoverable in the public records. Similarly, in *Fohn v. Title Ins. Corp. of St. Louis*,[134] the insured got a policy long after purchasing the property, and was already aware of signs on the property suggesting that a neighbor claimed to own some of the land, but the court found that knowledge of signs was not the equivalent of knowledge that the neighbor had a better claim of record ownership to the disputed area.

11.2.5 Prior Liens Created By Lender Or Of Which It Had Knowledge

A lender insured is precluded from recovering under a title insurance policy as to a paramount lien that was created by the insured, or of which it had knowledge or had agreed to be subordinate.[135] Thus, the insured was not entitled to recover due to a determination that its lien was junior to another mortgage when the insured had sign an agreement subordinating its lien to the other mortgage.[136] Likewise, a bank "created" the defect when the prior trust deed omitted from its policy

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[134] 529 S.W.2d 1 (Mo. 1975). In *Fohn*, the insurer asserted Exclusion 3(c) rather than Exclusion 3(a).

[135] In *First American Title Ins. Co. v. Lane Powell PC,* 764 F.3d 114 (1st Cir. (Mass.) 2014), the court held that a law firm that fully understood that its mortgages on two properties would be junior to existing liens had "assumed" those liens or "agreed to" take subject to them. The court based its decision largely on *National Credit Union Administration v. Ticor Title Ins. Co.,* 873 F.Supp. 718 (D.Mass. 1995), which applied the exclusion when the insured lender's officers were fully aware of the competing lien and agreed that the new lien would be subordinate. The *Lane Powell* court also emphasized the important point that Exclusion 3(a) exists to bar an inequitable windfall. If the court raises the proof burden too high, the insured will be able to collect insurance even "where the lender assumes or agrees to liens, or where the lender stands to receive an inequitable windfall." For that proposition, it relied on *Chicago Title Ins. Co. v. Resolution Trust Corp*., 53 F.3d 899 (8th Cir.1995). Similarly, in *Beneficial Mutual Savings Bank v. Stewart Title Guar. Co*., 36 F.Supp.3d 537 (E.D.Pa. 2014), when a bank's loan documents all stated that it was taking a second lien and the commitment excepted a first mortgage, but the policy did not contain the same exception, Exclusion 3(a) was applied to negate coverage against the first lien. The New Jersey court distinguished between the standard of proof for a matter "agreed to" versus one "created" by the insured. The court described "the term 'agreed' as carrying connotations of contracted and requiring full knowledge by the insured of the extent and amount of the claim against the insured's title." The bank argued that the exclusion should not apply because there were a number of smaller facts that it did not know, such as the correct name of the senior lender. The court said the bank sought to interpret the exclusion too finely: "[a]ssuming arguendo that Lender actually was mistaken as to whether it was First Cornerstone Bank or Prior Lender that held the Prior Mortgage, this lack of knowledge would not change the outcome. For Exclusion 3(a) to apply, Lender did not need to know every detail of the Defect." Also, in *First American Title Ins. Co. v. DJ Mortgage, LLC*, 328 Ga.App. 249, 761 S.E.2d 811 (Ga.App. 2014), the lender reluctantly agreed to permit the seller to take back first-position liens of $10,000 on each of fourteen condominium units, ahead of the bank's lien. The bank instructed its closer to "withhold" $10,000 per unit from the bank's loan, and that all of the parties agreed that both lenders would be paid on all sales. The policies issued to the bank inexplicably did not except the seller carry-back liens. The court refused summary judgment to either side, although it said Exclusion 3(a) did not apply to a later loan and policy as to the same lender, which had no contemporaneous side agreement about priority. In *Metropolitan Nat'l Bank v. Commonwealth Land Title Ins. Co*., 456 S.W.3d 61 (Mo.App.S.D. 2015), the court held that a trial was needed to determine if the insured lender actually knew that a lender was not paid any consideration for the subordination of its superior deed of trust, in which case Exclusion 3(a) would void coverage for the lien priority assured by the policy based on the subordination. In *Bank of America, N.A. v. Chicago Title Ins. Co*., 2017 WL 2215012 (N.D.Ill.) (unpublished), the court held on a motion to dismiss that the insured may have "agreed to" having its mortgage be subordinate to a development agreement by acquiescing in recording instructions that told the insurer to record the development agreement before the mortgage.

[136] *Schuman v. Investors Title Ins. Co.*, 78 N.C.App. 783, 338 S.E.2d 611 (1986). In *Schuman*, the lender argued that

was also in favor of the insured bank, on a separate loan made several weeks earlier. The fact that the bank officers making the insured loan had no actual knowledge of the prior loan was "of no consequence," because the creation of the prior trust deed itself was a conscious and deliberate act by the lender.[137] A lender "suffered" a federal tax lien against its borrower that was disclosed on the credit report and automated loan underwriting report obtained by the lender, although it was not shown on the title commitment, when it elected to close the loan despite its knowledge of the lien.[138] Also, when the lender's own officers were secret partners in the borrower partnership, the lender and its successor were bound by the knowledge of its officers that the mortgage was a second lien rather than a first, as shown on the policy. The court held:

> Given the extensive involvement of the officers in arranging for the two mortgages, the undisputed evidence supports Ticor's position that [the lender's] officers intentionally "suffered, assumed, or agreed to" the first mortgage. Any other result would be inequitable here, because it would give [the lender] a windfall as a result of the fraudulent conduct of its agents, albeit unknown to it, at the expense here of an innocent insuring party.[139]

However, an adverse party's assertion that the insured lender had "knowledge" of its title interest or lien, by itself, does not establish that the exclusion applies, particularly when the insured denies the allegation.[140]

The exclusion has also been held not to have been invoked when the lender had more general

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there were intrinsic advantages in being the first lien of which it was deprived, including the right to challenge the subordination it had signed. The court rejected these claims as being unrealistic. This argument is somewhat analogous to the reasoning accepted in several cases as to why tender of a deed is not as good as the valid and enforceable debt for which the lender bargained. See §3.4.6 regarding those cases.

[137] *Valley Bank & Trust. Co. v. U.S. Life Title Ins. Co. of Dallas*, 776 P. 2d 933 (Utah App. 1989).

[138] *First Nat'l Bank of Jeanerette v. Lawyers Title Ins. Corp.*, 2010 WL 3734056 (W.D.La.) (unpublished), findings adopted in 2010 WL 3734020 (W.D.La.) (unpublished). The court said the insured did not detrimentally rely on the title commitment in the face of the credit report. Rather, the bank should have asked the insurer if the lien still attached, and noted that the insurer is permitted to amend the commitment to except a lien after it is disclosed.

[139] *National Credit Union Administration v. Ticor Title Ins. Co.*, 873 F.Supp. 718, 728 (D.Mass. 1995).

[140] In *Colonial Mortgage Service Co. v. Commonwealth Land Title Ins. Co*., 2014 WL 6237852 (E.D.Pa.) (unpublished), the insured lender, Colonial Mortgage, was sued by another lender that closed its loan after Colonial's loan but before the Colonial mortgage was recorded. The other lender, Customers Bank, made claims for constructive fraud, negligence and civil conspiracy, hinged on the allegation that Colonial "was aware of Customers' equitable lien" at the time Colonial recorded its mortgage. Commonwealth said that allegation invoked either Exclusion 3(a) or 3(b) or both. However, Customers also alleged that Commonwealth had knowledge of its claimed lien. The court mashed concepts by holding that neither exclusion applied because Customers had alleged that Commonwealth had knowledge of the purported lien, and was "negligent" in the closing conducted by its policy-issuing agent. In *Shamrock Bank of Florida v. First American Title Ins. Co*., 2014 WL 1304694 (S.D.Ill. 2014) (unpublished), the court found that evidence of what the insured lender knew about a reverter before making the loan was too equivocal to negate coverage, although witnesses testified that the bank officers had been informed of it and consented to it.

knowledge that the property may be subject to a prior lien, or the lender might have prevented the lien by greater diligence. For example, the general knowledge within the industry that a lender-assignor was under investigation for loan fraud was found not enough to prohibit the insured assignee from indemnity for the assignor's failure to pay off prior mortgages.[141] A lender did not "assume" a prior mortgage lien because it was aware that the mortgage existed at the time it took an assignment of the insured mortgage. Rather, the court said, the bank was "a bona fide assignee [that] acquired all of the rights … under the title policy" and the policy made the insurer "liable for matters affecting title unless the particular defect is specifically excepted from coverage, even if the matter affecting title consists of a hidden defect…"[142] Similarly, a lender's knowledge that loans had been closed in a highly unusual manner was not sufficient to conclude that the insured had assumed the risk that prior mortgages would not be paid off.[143]

When the lender closes the loan through its own employees or an appointed closing agent, and the employee or closing agent makes a mistake that affects title or the insured lien, Exclusion 3(a) may apply to bar the claim as a matter "created" or "assumed" by the insured.[144]

When the insured lender has negotiated for protection against a title risk, by that very fact it has not "agreed to" the risk. Thus, a lender that got a policy intentionally omitting a prior mortgage was found not to have "agreed to" second position, even though the insurer gave its assurance on the condition that the insured hold funds sufficient to pay off the first mortgage. The lender did hold the funds, but the loan agreement did not require that the lender use the money to pay off the mortgage. The court held that the insurer had assumed the risk of its own failure to determine the terms of the

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[141] *International Charter Mortgage Corp. v. Commonwealth Land Title Ins. Co.*, 538 F.Supp. 1154 (D.P.R. 1982). The insurer argued, in essence, that the exclusion created a duty to take assignments in a commercially reasonable manner, with ordinary diligent inquiry. The insurer argued that the insured was not a holder in due course of the mortgages and notes, and therefore was subject to the defenses that could be raised against the original lender. The court found the UCC analysis inapplicable as between insurer and insured. It chose not to interject any standard of reasonable or prudent business practice as an element of the 3(a) analysis.

[142] *U.S. Bank, N.A. v. Stewart Title Ins. Co.*, 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007).

[143] *American Title Ins. Co. v. East West Financial*, 16 F.3d 449 (1st Cir. 1994). See further discussion of the case at §11.3.5.

[144] In *Plaza Home Mortgage, Inc. v. Fidelity Nat'l Title Ins. Co*., 145 A.D.3d 1048, 42 N.Y.S.3d 854, 2016 N.Y. Slip Op. 08890 (N.Y.A.D. 2 Dept. 2016), when the lender appointed a closing agent who failed to use the loan money to pay off the existing mortgage loan, the insured lender's agent "created" the title problem, invoking Exclusion 3(a) and negating policy coverage. However, in *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406 (Colo.App. 1 Div. 2014), the title insurance commitment for a loan required the recording of a deed putting the borrower in title as well as the recording of the deed of trust by that borrower. The lender closed the loan itself and failed to obtain and record the deed. The court found that Exclusion 3(a) did not apply because the insurer accepted the risk of the defective lien by issuing the policy with knowledge of its own requirement. The insurer could have refused to issue the policy until the requirement was met. The court's analysis was heavily influenced by the fact that Colorado is one of the states that interprets the word "created" as requiring proof that the insured was guilty of a conscious, deliberate, and affirmative act "intended to bring about the conflicting claim," not merely an inadvertent or negligent act. The word "assumed," however, has never carried that heightened burden of proof.

loan agreement before giving the coverage.[145]

A lender was held not to have "agreed to" second position when it took a second mortgage, lost its policy, and obtained a new one a year later that incorrectly omitted the first mortgage. The court accepted the lender's assertion that nothing as of the date the replacement policy showed the lender's intent to remain in second position.[146] The court also refused to require that the lender show it relied on the policy as a predicate to asserting a loss.[147]

11.2.6 Bankruptcy Preference Or Recharacterization Of Interest

When a borrower files bankruptcy during the preference period after the insured mortgage loan is made, and the trustee seeks to set aside the mortgage as a result, such claims are excluded by a creditors' rights exclusion, on policies containing such a provision. On policies issued before the creditors' rights exclusion was added, the same type of claim was decided based on Exclusions 3(a) or the post-policy exclusion. All cases involving creditors' rights are discussed at §11.8.

11.2.7 Fraud Or Other Tort In Obtaining Title

FORM 38, Appendix A
Tortious conduct in obtaining title

Exclusion 3(a) applies when the insured is accused of having obtained title by fraud. Such

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[145] *First Nat'l Bank of Minneapolis v. Fidelity Nat'l Title Ins. Co.*, 572 F.2d 155 (8th Cir. 1978). The *First National* court sagely points out that, when the insured creates or assumes the defect, but the insurer insures against it, the insurer cannot deny its coverage unless it can prove that the insured intended to assume the risk without relying on the policy assurance. The question is which party assumed the risk. For cases in which the 3(a) exclusion was negated on an owner's policy because the insurer "insured over" the defect created by the insured, see *Hansen v. Western Title Ins. Co.*, 220 Cal.App.2d 531, 33 Cal.Rptr. 668 (Cal.App. 1 Dist. 1963) and *Bozeman v. Commonwealth Land Title Ins. Co.*, 470 So.2d 465 (La.App. 1 Cir. 1985), discussed at §11.2.9.

[146] This argument was echoed in *Ticor Title Ins. Co. v. American Resources, Ltd.*, 859 F.2d 772 (9th Cir. (Hawaii) 1988), in which the insured mortgaged the property, then later got the mortgage released. At date of policy, the mortgage was released of record. Then the lender sued, claiming that the release had been obtained by fraud. The court held that the giving of the mortgage and the obtaining of the release were not "created" by the insured, since both acts were prior to the policy date. Thus, as in *Tumwater State Bank v. Commonwealth Land Title Ins. Co.*, 51 Wash.App. 166, 752 P.2d 930 (1988), the court found that the insured's conscious intent to "create" or "suffer" had to have existed on the date of policy.

[147] *Tumwater State Bank v. Commonwealth Land Title Ins. Co.*, 51 Wash.App. 166, 752 P.2d 930 (1988). The *Tumwater* court also asserted that the lender did rely on the erroneous policy because it read the policy to mean that it had moved into first position. "In addition to using the policy to make the initial loan determination, a commercial lender also tailors its continuing relationship with the debtor according to the protection afforded by the policy. In this case, Tumwater took a hands off approach with the Burkharts on the assumption that it was protected by the Commonwealth policy. Such reliance on the policy meant that Tumwater lost its opportunity to intervene into the Burkharts' failing business and possibly minimize its losses. Therefore, there has been reliance on the part of Tumwater." The court, however, does not point to any facts in the record showing that the lender actually made the above analysis. In any similar case, a lender should have to give concrete evidence that it acted in reliance on the policy.

allegations are not based on defects in title, but rather the tortious manner in which the insured *obtained* title.[148] Such allegations are outside of the scope of the policy and do not invoke any covered risk. The lack of coverage is merely confirmed by the exclusion. Because it is beyond the ambit of the policy, the insurer is not obligated to defend the insured when it is accused of fraudulent procurement of the property, even when the fraud claim is groundless.[149] Thus, claims that an insured has obtained title by fraud, undue influence, coercion, deceit or other tortious conduct have been uniformly deemed excluded under Exclusion 3(a).[150] See the companion discussion of these

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[148] The leading cases on the subject are *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal.App. 3d 658, 172 Cal.Rptr. 248 (Cal.App. 2 Dist. 1981); and *Barczewski v. Commonwealth Land Title Ins. Co*., 210 Cal.App.3d 406, 258 Cal.Rptr. 386 (Cal.App. 4 Dist. 1989). See further discussion at §4.5.1. *Moskopoulos* was extended in *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co*., 217 Cal.App.4th 62, 157 Cal.Rptr.3d 664 (Cal.App. 2 Dist. 2013), in which the insured was accused of forcing out a former co-owner by legal but devious methods, which was the sole basis to attack the insured's title. The insured argued that the plaintiff did not make tort claims, but couched the complaint as an action to quiet title. The court analyzed the case based on substance over form. It said: "[a]s in *Moskopoulos,* the *Partielly* Action did not allege a defect in Liberty's title, but tortious conduct in the manner in which Liberty acquired title. … The Partiellys alleged that they had a 9.5 percent interest in title to the BTC property by virtue of the loan participation agreement, but they were deprived of that interest when the defendants excluded them from “downstream transactions” in violation of a purported partnership agreement, and fraudulently represented that the BTC property was “no good” and that the defendants “intended to walk away and take no additional or active part” in it. … This situation is no different than *Moskopoulos,* in which the insured held legal title to the subject property, but the sellers sought to regain title (through a constructive trust or rescission) because the insured's alleged tortious conduct deprived them of it."

[149] *Brick Realty Corp. v. Title Guarantee & Trust Co.*, 161 Misc. 296, 291 N.Y.S. 637 (N.Y.City Ct. 1936). In *Queens Organization, LLC v. First American Title Ins. Co*., 172 A.D.3d 932, 99 N.Y.S.3d 411 (N.Y.A.D. 2 Dept. 2019), the court held that the title insurer was not required to defend its insured in a lawsuit claiming that the insured altered the deed to add itself as the grantee of a half interest in the property.

[150] *Taussig v. Chicago Title & Trust Co*., 171 F.2d 553 (7th Cir. 1948); *Rosenblatt v. Louisville Title Co*., 218 Ky. 714, 292 S.W. 333 (Ky.App. 1927); *Ginger v. American Title Ins. Co*., 29 Mich.App. 279, 185 N.W.2d 54 (1970); *Mattson v. St. Paul Title Co. of the South*, 641 S.W.2d 16 (Ark. 1982); *Brick Realty Corp. v. Title Guarantee & Trust Co.*, 161 Misc. 296, 291 N.Y.S. 637 (City Ct. 1936); *Farrington v. Commonwealth Land Title Ins. Co.*, 86 Wash.App. 399, 936 P.2d 1157 (1997) (transfer into corporation in fraud of creditors); *Mattson v. St. Paul Title Co. of the South*, 641 S.W.2d 16 (Ark. 1982); *Conway v. Title Ins. Co*., 277 So.2d 890 (Ala. 1973); *Feldman v. Urban Commercial, Inc*., 78 N.J.Super. 520, 189 A.2d 467 (Ch. 1963), aff'd, 87 N.J.Super 391, 209 A.2d 640 (App. Div. 1965); *Kachel v. Chicago Title Ins. Co*., 1999 WL 123807 (S.D.N.Y.) (unpublished), aff'd 2001 WL 527480 (S.D.N.Y.) (unpublished) (no duty to defend suit based on off-record agreement between insured owners; no claim of fraud or tort); *Szelc v. Stanger*, 2009 WL 4573425 (D.N.J.) (unpublished) (fraudulent conspiracy to strip seller's equity in a foreclosure rescue scam excluded because of deliberate nature of conduct, citing *Feldman*, but insurer required to defend unconscionability claim, which was not premised on fraud). In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, the court found no duty to defend a lender against tort claims concerning the making of the loan, following the *Moskopoulos* and *Liberty National* reasoning. In *RNT Holdings, LLC v. United General Title Ins. Co.*, 230 Cal.App.4th 1289, 179 Cal.Rptr.3d 175 (Cal.App. 2 Dist. 2014), the court held that the insured lender had invoked Exclusion 3(a) by its attorney's conduct in recording a deed in the gap that took the borrower out of title and in failing to disclose the title problems that caused a serious dispute, which conduct it said was "intentional and deliberate and not inadvertent or mistaken." In *Howard v. Fidelity Nat'l Title Ins. Co*., 2015 WL 5021768 (E.D.Mo. 2015) (unpublished), Howard was accused by his lender of having committed loan fraud when he purchased some property, to which he asserted that someone else had impersonated him in the loan application and closing because he was doing time when the loan closed. Later, Howard sued under the owner's policy issued in his name, claiming he had "lost" title due to fraud. The court found that

subjects in relation to the duty to defend the insured, in §4.5.1.

Similarly, the policy does not protect the insured against a claim that the insured conveyance was a fraud on the seller's creditors, even if the deed is voided, causing a complete title failure.[151] Thus, a local church and its District Council each claimed title to the church building, and the local church took steps to induce the insurer to issue a policy naming the local church as owner of the property. The court found that the local church had "created" the defect on which the claim was based, and thus the matter was excluded.[152] It held further that the claims "do not flow from a defect in the title to the properties which existed on the date of the policy, but rather, from intentional actions of the insured ..., [which] will be considered as having been 'created' and therefore excluded under the policy."[153] Exclusion 3(a) also applies to claims that the insured has slandered or disparaged another person's title, because such claims require allegations of intentional conduct antithetical to valid rights in property.[154] The exclusion also applies to claims that the insured defrauded the seller to strip him of his equity in the property or by conducting a foreclosure rescue scam.[155]

Exclusion 3(a) negates coverage for a claim that the insured deed should be recharacterized as a mortgage.[156] The insurer is not obligated to defend one insured in a lawsuit brought by a co-owner to recharacterize their interests in the property based on an unrecorded agreement.[157] Such a dispute presents essentially the same coverage issue as a fraud perpetrated in procuring title, the court said:

Exclusion 3(a) barred Howard's policy claim because he "cannot now argue that Defendant owes him money on title insurance for real estate transactions which he repeatedly argued were fraudulent based on his claimed inability to transact them from prison." In *Queens Organization, LLC v. First American Title Ins. Co*., 172 A.D.3d 932, 99 N.Y.S.3d 411 (N.Y.A.D. 2 Dept. 2019), the court held that the title insurer was not required to defend its insured in a lawsuit claiming that the insured altered the deed to add itself as the grantee of a half interest in the property.

[151] *Ginger v. American Title Ins. Co.*, 29 Mich.App. 279, 185 N.W.2d 54 (1970).

[152] *First Assembly Church of West Plains v. Ticor Title Ins. Co*., 872 S.W.2d 577 (Mo.App. S.D. 1994).

[153] Id. at 583.

[154] *Royale Westminster Retirement, LLC v. Commonwealth Land Title Ins. Co.*, 2011 WL 2582101 (Cal.App. 4 Dist.) (unpublished) (no duty to defend slander of title claim; disparagement of title cause of action requires proof of intentional actions, not mere negligence, invoking Exclusion 3(a)).

[155] *Bankruptcy Estate of Ketterling v. Chicago Title Ins. Co.*, 2010 WL 3926254 (D.Minn.) (unpublished) (no coverage for lawsuit accusing insureds of having defrauded sellers in foreclosure rescue arrangement); *Szelc v. Stanger*, 2009 WL 4573425 (D.N.J.) (unpublished) (rescue scam claims excluded under the Residential policy equivalent of Exclusions 3(a) and 3(b), which the court termed the "created-or-known" exclusion); *266 Summit, LLC v. Lawyers Title Ins. Corp.*, 2011 WL 3020301 (D.Minn.) (unpublished) (lawsuit by seller to unwind complicated double sale with seller financing and lease-option excluded).

[156] *Spurgeon v. Coan & Elliott*, 180 S.W.3d 593 (Tex.App.-Eastland 2005). Also see *Marr v. Commonwealth Land Title Ins. Co*., 307 Fed.Appx. 952, 2009 WL 211809 (6th Cir. (Ky.)) (unpublished).

[157] *Kachel v. Chicago Title Ins. Co.*, 1999 WL 123807 (S.D.N.Y.) (unpublished) *aff'd* 2001 WL 527480 (S.D.N.Y.) (unpublished).

> No matter what the respective rights are among the insureds, none of the insureds obtained insurance against title claims by their co-owners. Rather, they, as do all title insurance purchasers, sought to insure that the property they bought had free and clear title.

The court found that the use of Exclusion 3(a) advanced the interest of the public, by thwarting collusive lawsuits between co-owners.

Similarly, the policy does not protect the insured against claims based on the breach of the insured's own contract for the purchase of the property. In *Stevens v. United General Title Ins. Co.*,[158] the insured, Stevens, contracted to buy property from 1438 E Street, S.E. L.L.C., which was not yet in title but had a contract to buy the property from a Mr. Moy. There was a substantial difference in the two sale prices. Stevens learned that Moy was not even the owner. He signed a second contract with the real owners. 1438 E Street sued Stevens for intentional interference with contract and fraudulent conveyance. Stevens tendered his defense to the insurer. The insurer argued that Exclusions 3(a) and 3(b) precluded a duty to defend or indemnify. The court found both exclusions applicable.

One decision stands somewhat at odds with this line of cases. In *Ticor Title Ins. Co. v. American Resources, Ltd.*,[159] the claimed insured[160] had obtained a release of its own mortgage on the property. The lender later sued, claiming the release was obtained by fraud. The court found a duty to defend, because the lender asserted a lien on the property. The court refused to apply the exclusion, because the lien claim invoked a covered risk. *Moskopoulos* was also distinguished in *Wheeler v. Reese*,[161] in which it was claimed that the seller to the insured, rather than the insured himself, obtained title by fraud. The insurer claimed that the insured knew of his grantor's fraud, or could have discovered it. The court found that such allegations did not establish the requisite conscious act by the insured to invoke the exclusion.[162]

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[158] 801 A.2d 61 (D.C. 2002).

[159] 859 F.2d 772 (9th Cir. (Hawaii) 1988).

[160] In fact, the claimant, American Resources, was not the named insured but a member of the insured joint venture. It had deeded the property to the joint venture at the same time the disputed mortgage release was obtained.

[161] 835 P.2d 572 (Colo.App. 1992).

[162] In addition, the policy apparently had Exclusion 3(a) deleted from it by unilateral mistake of the insurer, which the court refused to reverse. While this case did not find Exclusion 3(a) invoked by knowledge that a party would obtain by normal inquiry into a transaction, at least one case did deny recovery on the basis of such knowledge, relying instead on Exclusion 3(b). In *Applefield v. Commercial Standard Ins. Co.*, 176 So.2d 366 (Fla.App. 1965), the purchaser of mortgages knew or should have known that the mortgages were not first liens, and the title commitments showing them as such were false. The court found no liability.

11.2.8 Construction Loan Disbursement

Exclusion 3(a) has been invoked in a series of cases involving construction loans and liens. These cases are discussed beginning at §10.1.4.

11.2.9 Other Matters Involving Owner Insureds

Various other kinds of actions are deemed to have been created,[163] suffered,[164] assumed or agreed to[165] by the owner-insured, invoking Exclusion 3(a). Disputes about the contracts under which the insured purchased the property are matters "created," "suffered" or "agreed to" by the insured.[166] Also, it is commonly accepted that the exclusion applies to any claim that the insured entity has not been validly formed.[167] However, the exclusion may not apply if the insurer was equally aware of the possible infirmity in the insured entity.[168]

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[163] In *Edwards v. First American Title Ins. Co*., 2014 WL 575953 (Ariz.App. 1 Div. 2014) (unpublished), the court dismissed an action brought by an insured owner against the insurer for fraud, due to its failure to include exceptions in the commitment or policy for two judgments that had been entered against the insured and which automatically attached to the property when he took title. Also, the insurer was not liable when the insured corporation's charter was revoked because it was found to have been improperly reinstated before the policy date, in *Peachtree Management & Invest. Co. v. Pioneer Nat. Title Ins. Co*., 541 F.Supp. 51 (N.D.Ga. 1981).

[164] A judgment against the insured was found to have been "suffered" by the insured, in *Smith v. Lawyers Title Ins. Corp.*, 76 Pa. D. & C. 88 (1951); *Buffington v. Atlanta Title & Trust Co.*, 43 Ga.App. 444, 159 S.E. 297 (1931).

[165] In *Beck v. Old Republic Nat'l Title Ins. Co*., 2009 WL 189847 (Cal.App. 2 Dist.) (unpublished), when the title insurer defended its insured in a lawsuit by a neighbor over a disputed boundary and the insured signed a settlement agreement, a subsequent lawsuit by the neighbor to compel the insured to perform under the settlement agreement was a matter "agreed to" by the insured, and thus the insurer had no duty to defend.

[166] In *Kramer v. Chicago Title & Trust Co*., 69 Ill.App. 3d 1015, 387 N.E.2d 1105 (1979), the insured was in default on the purchase contract on the date of policy and was later ordered to reconvey the property to the sellers. The court found the matter to have been "created" or "suffered" by the insured. In *City of East Providence v. First American Title Ins. Co.*, 2011 WL 5527604 (D.R.I.) (unpublished), adopting findings of 2011 WL 5521246 (D.R.I.) (unpublished), the title insurer was not required to defend the city against the business's lawsuit for breach of a contract to develop the property, which the business owner claimed gave it beneficial ownership of the property. The court said the lawsuit was about a contract, not title; concerned post-policy breaches; and that the city created or agreed to the contracts. The court rejected the city's argument that it was not guilty of misconduct or fraud, and thus the exclusion should not apply, citing *American Title Ins. Co. v. East West Financial,* 16 F.3d 449 (1st Cir.1994). The court rejected that narrow view of the exclusion, because the *East West* decision goes on to say that the exclusion also applies when "the insured either expressly or impliedly assumed or agreed to the defects or encumbrances." In *Carrington v. Chicago Title Ins. Co*., 2015 WL 6758365 (N.J.A.D.) (unpublished), the court held that an insured "created" the title issue asserted in a lawsuit brought by the insured's four siblings, in which they said the sister broke an agreement to give them each one-fifth interests in the property after their credit scores had improved.

[167] See, for example, *Peachtree Management & Invest. Co. v. Pioneer Nat. Title Ins. Co.*, 541 F.Supp. 51 (N.D.Ga. 1981), in which the policy was found not to provide coverage as to a dispute over the insured corporation's charter revocation and later reinstatement by strangers to the company.

[168] In *Sisco v. Nations Title Ins. Co.*, 278 A.D.2d 479, 718 N.Y.S.2d 82, 2000 N.Y. Slip Op. 11841 (N.Y.A.D. 2 Dept. 2000), land was conveyed to a trustee. An heir of the settlor attacked the deed as being void because no trust agreement was executed. The insurer obtained summary judgment at trial court based on Exclusion 3(a), but the appellate court reversed and remanded for trial. The appeals court noted that the insurer was aware of the lack of a trust agreement at the

The exclusion can apply to actions taken by the insured after the date of policy.[169] A claim caused by the insured's use of the land after the policy date, in violation of the encumbrances excepted in the policy, is excluded as a matter "agreed to" by the insured.[170] However, the exclusion does not apply to all post-policy actions by the insured.[171]

Some acts of the insured create title defects, but do not show sufficient intent to fall under the exclusion.[172] In *McLaughlin v. Attorneys' Title Guaranty Fund, Inc.*,[173] a lien that attached to the property for inheritance tax payable by the insured was found not to be excluded, on the slender premise that the insured did not affirmatively act to have the lien imposed on the property. Similarly, a court found that the claim that the insured trustee lacked authority to purchase the land was found not to be an "affirmative" act that would invoke the exclusion.[174]

When the insured has a close relationship to the party responsible for the defect in title, the "bad" act may be imputed to the insured and the matter excluded. Thus, in *First American Title Ins. Co. v. Kessler*,[175] the insured was not entitled to summary judgment when the nature of the

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time it insured. The policy "contains no specific exception for the claims relating to the purported trust." The court recited *Herbil Holding Co. v. Commonwealth Land Title Ins. Co*., 183 A.D.2d 219, 226, for the proposition that "a defect arising from the rights of a person whose interest appears in the chain of title must be covered unless specifically excepted." The court stopped short of ruling as a matter of law that Exclusion 3(a) is not applicable to a title defect of which the insurer is aware as of the policy date.

[169] See *Nourachi v. First American Title Ins. Co.*, 44 So.3d 602 (Fla.App. 5 Dist. 2010), in which the insured discovered or confirmed after the date of the policy that his title was defective, and the court held that the exclusion barred coverage.

[170] For example, in *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996), the insured property was subject to a disclosed restrictive covenant limiting the use of the property to "agricultural and residential purposes." The insured was sued by his neighbors for having used the property for commercial purposes. The insurer was found to have no duty either to defend or indemnify, because the policy had excepted the instrument. The insured was also alleged to have overburdened the easements benefiting the land by his commercial use. The overburdening claim was found to be excluded by Exclusions 3(a) and/or 3(d), since it concerned use of the property by the insured after purchase.

[171] In *Plantation Bay, LLC v. Stewart Title Guar. Co.*, 2016 WL 4508228 (D.N.J. 2016) (unpublished), when an insurer agreed to remove an exception for a 1927 use restriction on the underwriting theory that it was too old to be enforced, but a court later held the restriction was enforceable, the insured's agreement to impose a lesser restriction on the property was found not to fall under Exclusion 3(a), as a matter "agreed to" by the insured. The court held that the modified restriction "would not have existed" but for the 1927 restriction, and the insured "may have" agreed to the modified restriction as a means of mitigating its loss.

[172] In *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017), the court ignored an owner's policy construction lien exception, Exclusion 3(a) and the post-policy exclusion to hold that the policy might cover construction liens filed after the policy date after the owner insured refused to pay the contractors. There is a strong dissenting opinion.

[173] 61 Ill.App.3d 911, 18 Ill.Dec. 891, 378 N.E.2d 355 (3d Dist. 1978).

[174] *Keown v. West Jersey Title & Guaranty Co.*, 161 N.J.Super. 19, 390 A.2d 715 (N.J.A.D. 1978).

[175] 452 So.2d 35 (Fla.App. 1984).

relationship was not yet known. The court stated that the exclusion would apply if the insured and the person creating the title defect were partners. However, in *Bourland v. Title Ins. Co. of Minn.*,[176] the fact that the insured and the adverse titleholder both took title from the insured's mother did not, by itself, mean that knowledge of the defect should be imputed to the insured. The adverse deed was of record, and the insured knew that litigation over the deeds had been completed. In fact, the lawsuit did not remove the adverse claim, a fact apparently unknown to the insured. The insured thus was not shown to have the requisite intent to take subject to the adverse claim of title.

The exclusionary effect of the insured's knowledge of the title issue may be cancelled by the insurer's conscious assumption of the risk. Thus, an insurer may be precluded from asserting the exclusion when it considered the title issue before closing and agreed to give the insured affirmative coverage against it.[177] As one court explained, the conscious assumption of risk can bar the use of the exclusion:

> [A]n exclusion may not be used to defeat coverage where the insurer was informed of the "defect" in the title and agreed to insure against loss occasioned by such defect. Here, the company's agent issued the policy with full knowledge of the servitude, accepted the risk, and agreed to insure "over" the servitude in future policies as well. As this term, "insured over," is used in the title insurance industry, it means insuring the title to property in spite of and without exception to a known defect. In such cases, it is presumed that the reason the *insured* accepted the defect was because of the insurance over.[178]

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[176] 4 Ark.App. 68, 627 S.W.2d 567 (1982).

[177] For example, in *Dare Investments, LLC v. Chicago Title Ins. Co.*, 2011 WL 2600594 (D.N.J.) (unpublished), the insured bought a loan as to which there was a serious concern about whether or not there was a valid debt still owed. It negotiated for a highly unusual statement in the form of an exception in the title commitment: that the insurer, "through its due diligence, can verify that the amount currently due and owing on the said mortgage being insured hereunder, at the date of this Commitment, is no less than $15,000,000.00." After the borrower denied that the mortgage was enforceable because there was no valid debt, the insurer denied the claim based on Exclusion 3(a). The court ruled that the insurer was not entitled to summary judgment, because the court would have to weigh whether or not the insured was entitled to rely on the statement, which might negate the exclusion.

[178] *Bozeman v. Commonwealth Land Title Ins. Co.*, 470 So.2d 465, 467 (La.App. 1985). See also *Hansen v. Western Title Ins. Co.*, 220 Cal.App.2d 531, 33 Cal.Rptr. 668 (Cal.App. 1 Dist. 1963) and *First National Bank of Minn. v. Fidelity Nat'l Title Ins. Co.*, 572 F.2d 155 (8th Cir. 1978), discussed further at §11.2.5.

11.2.10 Other Matters Involving Lender Insureds

FORM 87, Appendix A
Mortgage invalid for lack of debt

FORM 32, Appendix A
Loan policy does not insure debt,
repayment of debt or value of secured land

Courts have held that a wide variety of lender acts invoke Exclusion 3(a), as matter created, suffered, assumed or agreed to by the insured. This includes defects or infirmities in the insured mortgage that are the result of matters created, assumed or agreed to by the insured lender.[179] For example, the lender insured "created" the risk that it would not be able to foreclose its mortgage by becoming a partner in the owner partnership. The insurer was not responsible for defending or paying a loss when the partnership raised the claim in an attempted foreclosure.[180] The district court held that "the harm to JDC [the lender] is not defective title, but the difficulty in collecting the partnership's indebtedness. Lawyers Title did not have a duty to protect JDC from such a risk. A title insurance policy does not guarantee that the insured will be able to collect its debts."[181] The Eleventh Circuit affirmed, saying:

> In issuing the policy, Lawyers Title did not insure the validity or collectability of the debt underlying the mortgages; nor did Lawyers Title make itself responsible for discovering the existence of, much less predicting the ramifications of the collapse of, the partnership relationship between [the lender and borrower]. …A finding that

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[179] In *LJW Land, LLC v. Old Republic Nat'l Title Ins. Co*., 2016 WL 4370052 (W.D.N.C. 2016) (unpublished), the court held that the insured lender had "created" and "suffered" the attack on the insured deed of trust by a junior lien holder, which asserted that the lender was controlled by the borrower property owner, and that the lien was a strategic device intended to frustrate the junior lender's ability to foreclose on the property. The court refused to find that the term "created" required evidence of evil motive or tortious conduct. Similarly, in *NPH Realty, Ltd. v. Ticor Title Ins. Co*., 1997 U.S. Dist. LEXIS 23648 (D.Mass. 1997), NPH held a first mortgage on property owned by Daejan, Inc. The owner had also granted a second purchase money mortgage to Larken Realty Trust. Daejan defaulted on both loans. NPH was the high bidder at its own foreclosure sale, wiping out Larken's take-back purchase money lien. Larken sued NPH and Dajean, alleging that "NPH was an entity created and controlled by Daejan and that Daejan and NPH were colluding to squeeze out Larken's second mortgage." Ticor Title refused to defend its insured, NPH, in that suit. NPH settled and sued Ticor. The court held that Exclusion 3(a) negated any duty to defend or indemnify because Larken had alleged that NPH created the defect by its tortious deal with Daejan. In *Investors Warranty of America, Inc. v. Chicago Title Ins. Co.*, 2018 WL 3992147 (Cal.App. 4 Dist.) (unpublished), the insurer relied on a subordination agreement to insure that a deed of trust had priority over an existing deed of trust. When the existing lender asserted that the insured had violated the subordination agreement, the court said Exclusion 3(a) did not negate coverage or a duty to defend.

[180] *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 818 F.Supp. 1543 (S.D. Fla. 1993), aff'd 52 F.3d 1575 (11th Cir. 1995).

[181] Id. at 1546.

> Lawyers Title had a duty to wade into this partnership morass ... would force insurers to underwrite risks not bargained for by either party.[182]

The exclusion also applies to actions by the lender in the drafting of the insured mortgage or its intentional and unpermitted alteration of that instrument. When a lender was sued for having allegedly altered the interest rate and forged the borrowers' signatures on the loan documents, the documents' unenforceability was found to have been "created" by the insured, barring any duty of the insurer to defend or indemnify the insured.[183] A lender was found to have created the defect in its mortgage that caused it not to impart constructive notice, when it drafted the mortgage using an incorrect spelling of the borrower's name.[184]

The exclusion applies when the lender makes an error in taking a mortgage on the wrong parcel, or not all of the parcels that it says it anticipated as having as collateral.[185] In a common situation, the lender obtains a valid lien against one parcel owned by its borrower, but does not receive a lien against other parcels also owned by the borrower. The insurer typically denies such a claim, because the insured has a valid lien against a parcel owned by its borrower, the policy insures the only parcel recited in the insured mortgage, and no Covered Risk is invoked by the lender's failure to obtain a lien on additional land. A lender sometimes argues that the insurer or its agent selected the legal description to be included in the title insurance commitment and chose the wrong parcel or not all of the intended parcels. A careful comparison of the title application, title commitment, purchase contract (if applicable), loan application, appraisal, mortgage, policy and real estate tax records, and an interview of the loan officer and title examiner, may be required to determine if a mistake was made and by whom in the selection of the parcel(s). If the title examiner misunderstood the title application and selected the wrong parcel or not all of the parcels, in most cases a reasonably prudent lender would have discovered the error. The lender, like any other proposed insured, has the right and obligation to review the title commitment to verify that it accurately identifies the land to be insured, and to instruct the title examiner to include other parcels

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[182] 52 F.3d at 1584.

[183] *First Federal Savings Bank v. Stewart Title Guar. Co*., 451 S.E.2d 916, 922 (S.C.App. 1994).

[184] *First Merit Bank, NA v. Guarantee Title & Trust Co.*, 2006 WL 1791148, 2006-Ohio-3333 (Ohio App. 9 Dist. 2006) (unpublished). The title insurer had given the lender the borrower's name by which he took title. The lender moved his first initial to a middle initial on the mortgage. The lender was not paid off when the borrower sold the property, because a subsequent title searcher did not discover the mortgage. The borrower later filed bankruptcy, preventing the lender from recovering the debt from the borrower personally. The court found that the lender had a duty to draft the instrument to impart notice, and its failure to do so fell under the exclusion:

"Upon review, we find that [First Merit] failed to meet its burden of demonstrating entitlement to coverage under the Lender's Policy. … Further, [First Merit] had the duty to confirm the validity of his lien and failed to do so. Therefore, we find that [First Merit] "created, suffered, assumed or agreed to" a defect in the title when it failed to reconcile the names listed on the deed and mortgage."

[185] *Deutsche Bank Nat'l Trust Co. v. Fadili*, 2011 WL 4703707 (D.N.H.) (unpublished). The policy correctly recited the legal description for the vacant parcel to which the insured mortgage attached. It recited on Schedule A the street address assigned to the adjoining parcel with a home on it. The lender had the wrong parcel appraised and selected the legal description to be used on the mortgage, invoking the exclusion.

in the commitment if necessary.

In any event, the policy does not insure a lien on a parcel when no such lien exists, and the policy cannot be reformed unless the mortgage is first reformed. A title insurer sometimes informs the insured that, if the lender obtains a new mortgage from the borrower encumbering additional land or a judgment reforming the mortgage to encompass such land, the insurer will endorse the policy to include the additional land. It is not uncommon for a lender to assert, after the borrower has defaulted, that it believed that it would receive additional collateral for its loan, while the borrower steadfastly disagrees. There are several objective indicators concerning a possible mutual mistake that would support reformation. If the loan was a refinance, a review of the parcel(s) described in the mortgage paid off by the insured mortgage loan is a strong indicator as to whether or not the insured reasonably expected to hold a lien on additional parcels. The appraisal is also a good but not foolproof indication of what collateral the lender believed it was taking.

The exclusion also applies to other encumbrances or covered matters created, suffered, assumed or agreed to by the insured lender.[186]

The exclusion also applies to claims against the lender for tortious conduct in the making of the loan, including fraud, tortious interference with contract, negligence, undue influence and other variants on fraud and tortious conduct.[187]

When a mortgage is void because the loan proceeds were improperly disbursed by the lender, the matter is excluded as having been "created" by the insured. In *Mark Twain Kansas City Bank v. Lawyers Title Ins. Corp.*, the lender disbursed almost the entire loan to a party other than the owner, with the effect that the owner partnership received only $45,000 of the $3.1 million loan. The mortgage and note were held void for lack of consideration. The court found that the lender caused the defect, and did so after the policy date (less than an hour later).[188] *Mark Twain* was relied on, in

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[186] In *Harvey v. J & H Holdings, Inc.*, 310 So.2d 371 (Fla.App. 1975), a seller that took back a purchase-money mortgage was not permitted to block the insurer's recovery against it as subrogee by asserting that the seller's loan policy also omitted the easement in dispute. The seller had granted the easement while it was the property owner. The court found that the easement was a matter created by the insured. In *Cynergy, LLC v. First American Title Ins. Co*., 706 F.3d 1321 (11th Cir. (Ga.) 2013), a lender that made a loan with full knowledge that the property securing the debt had no right of access "assumed" that risk, despite the fact that the policy included a standard access coverage. In *Northwest Savings Bank v. Fidelity Nat'l Title Ins. Co*., 2017 WL 253080 (Pa.Super.) (unpublished), the court found that an insured lender suffered, assumed or agreed to two prior mortgages when those loans were not paid off by the bank's closing agent, because the lender knew about the liens and failed in its duty to pay off the loans. The closing agent was also the policy-issuing agent, but its malfeasance was within the scope of its agency for the lender, not as the title agent.

[187] In *Colonial Mortgage Service Co. v. Commonwealth Land Title Ins. Co.*, 2014 WL 6237852 (E.D.Pa.) (unpublished), the court held that claims against the lender by the holder of a competing lien for tortious interference with contract and fraud did not invoke policy coverage or a duty to defend, because they are tort claims that do not affect title. However, it found that the insurer had a duty to defend the insured lender against claims of constructive fraud, negligence and civil conspiracy, brought by the same competing lien holder, because the relief sought for those claims was to subordinate the insured lien. In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, the insured withdrew its demand for a defense of tort claims including fraud, avoidance of fraudulent or preferential transfers after bringing suit, after the insurer the recent decision of *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co*., 217 Cal.App.4th 62, 157 Cal.Rptr.3d 664 (Cal.App. 2 Dist. 2013) on the same issue.

[188] 807 F.Supp. 84 (E.D.Mo. 1992). The disbursement was made less than an hour after the time of coverage shown

part, in *Rosen v. Nations Title Ins. Co.*[189] In that case, the priority of the insured deeds of trust was challenged on the grounds that the lender had disbursed the loan funds contrary to the bankruptcy court order which gave the lender its priority, thus working a subordination of the lender's interest. The court found the claim excluded under 3(a) and the post-policy exclusion.

Mark Twain cites *National Mortgage Corp. v. American Title Ins. Co.*,[190] which did not invoke Exclusion 3(a), but used the same reasoning. In *National Mortgage*, the fee owner subordinated to the insured loan, which subordination was premised on the loan being used for construction of improvements. The lender allowed the funds to be diverted, and the subordination was voided as a result. The court pointed out that there was no defect in the mortgage instrument or the title as of policy date. The subordination was voided because of what the insured did with the loan proceeds after policy date, a matter entirely within the insured's control. Thus, the matter was excluded. The court declined to address 3(a) because it found Exclusion 3(c) dispositive. Neither decision was premised on a finding of fraud or intentional misconduct by the lender. The *Mark Twain* court was satisfied with finding merely that "the Bank knew or should have known that this transfer was not proper." It rejected the lender's argument that the exclusion could apply only on a showing of intentional misconduct.

The policy is also void when the lender's closing agent absconds with the funds, allowing the borrower to set aside the mortgage for lack of consideration.[191] One court addressing the issue stated that this defect was not within the ambit of policy coverage and, further, Exclusion 3(a) buttressed its finding of no coverage:

> Furthermore, coverage was properly denied pursuant to the exclusionary provision in the loan policy in which Fidelity expressly excluded coverage for any loss which Consumer "created, suffered, assumed or agreed to." Here, Consumer admittedly designated Ferrara as its settlement service provider by directing the funds earmarked for the mortgage loans to an escrow account maintained by Ferrara, and by authorizing Ferrara to perform certain duties on Consumer's behalf at the closings. Where a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed [citation omitted]. Thus, the actions of Ferrara were properly

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on the policy.

[189] 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714 (Cal.App. 2 Dist. 1997).

[190] 299 N.C. 369, 261 S.E.2d 844 (1980).

[191] *Fidelity Nat'l Title Ins. Co. of New York v. Consumer Home Mortgage, Inc.*, 272 A.D.2d 512, 708 N.Y.S.2d 445, 2000 N.Y. Slip.Op. 05066 (N.Y.A.D. 2 Dept. 2000); *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012). In *Plaza Home Mortgage, Inc. v. Fidelity Nat'l Title Ins. Co.*, 145 A.D.3d 1048, 42 N.Y.S.3d 854, 2016 N.Y. Slip Op. 08890 (N.Y.A.D. 2 Dept. 2016), the court held: "The plaintiff [lender] wired the funds for the mortgage loans to the escrow account of the attorney for the borrowers with closing instructions to perform certain duties on its behalf as the settlement agent, thereby designating that attorney as its agent. Therefore, the act of the settlement agent in misappropriating the funds he had been directed to use to pay off a prior mortgage was properly imputed to the plaintiff, and therefore, the plaintiff created the loss at issue... ."

imputed to Consumer. As such, Consumer created the loss which is excluded from coverage.

Several courts have held that a lender does not create or suffer a defective title because of its own lax loan underwriting.[192]

A mortgage assignee's knowledge of a defect in title or to the mortgage does not invoke Exclusion 3(a).[193] The exclusion applies to defects assumed by the named insured at the time the policy is issued. The loan policy preserves this defense as to successors to the loan who take with knowledge of the defect, by reserving:

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[192] In *Fidelity Nat'l Title Ins. Co. v. Matrix Financial Services Corp*., 255 Ga.App. 874, 567 S.E.2d 96 (Ga.App. 2002), the borrower obtained satisfactions of two prior mortgages by signing replacement liens to the lenders which were recorded in the gap, and thus were not detected by the insured lender. The court agreed that the borrower had committed nefarious acts, but refused to find that the lender had created or suffered the result by its sloppy loan underwriting:

"The parties agree that Jones made various misrepresentations in the loan transaction. According to Fidelity, if Matrix had properly investigated Jones' representations and performed an adequate property title search, Matrix would not have closed the loan. It thus contends that Matrix negligently created its own title problems and cannot legally or equitably seek coverage under the policy.

"Once again, we find no merit in Fidelity's argument. Fidelity has pointed to no policy provision excluding from coverage a mortgage transaction that, in its view, should not have closed. Regardless of the circumstances underlying the loan transaction, Fidelity agreed to insure the priority of Matrix's interest in the property. By issuing the title insurance, Fidelity gave its opinion "'concerning the validity of title, backed by an agreement to make that opinion good if it should prove to be mistaken and a loss should result in consequence.'" … It cannot avoid its policy obligations simply by second-guessing Matrix's decision to close the loan. Regardless of whether Jones was an appropriate loan risk, Fidelity insured the title."

An Ohio court relied heavily on *Matrix* in making nearly identical rulings, in *Fifth Third Mortgage Co. v. Chicago Title Ins. Co.*, 692 F.3d 507 (6th Cir. (Ohio) 2012). The *Fifth Third* court said that the lender's loan underwriting was "immaterial" to the title risk of several prior mortgages fraudulently concealed and not paid off at closing and that the title agent had arranged for a straw buyer to mortgage a house he did not own. The court said that "the insurance policy says nothing about Fifth Third's underwriting obligations. … Nothing in the policy makes that obligation conditional upon the quality of Fifth Third's underwriting with respect to the Buford loan. Chicago Title insured against a risk of title defects, not a risk of default." A second Ohio decision contains a similar ruling in a different context. In *Ticor Title Ins. Co. v. Title Assurance & Indemnity Corp., LLC*, 2009 WL 5096806 (N.D.Ohio) (unpublished), the insurer argued that a purchaser invoked Exclusion 3(a) by committing loan fraud. The court found no causal connection between any loan fraud by the borrower and the title defect, which was the failure to pay off the seller's mortgage. In *First Alliance Bank v. Mississippi Valley Title Ins. Co. (In re Evans)*, 2012 WL 2374237 (Bkcy.S.D.Miss.) (unpublished), the borrower obtained many fraudulent loans that were rife with problems, some of which the insurer later said would have been obvious if the lender had cared. The court rejected the argument that the shoddy loan underwriting could negate policy coverage for prior liens, saying "even if the Woodgreen Banks were negligent in their loan negotiations with Chris Evans, in their dealings with Charles Evans, or in their acceptance of the Evans Plat, none of these actions relieved the Title Companies of their duty to act in good faith in performing their obligations." Contrast the above decisions with *Ocwen Loan Servicing, LLC v. Radian Guaranty, Inc*., 2018 WL 684838 (E.D.Pa. 2018) (unpublished), which was a coverage lawsuit about mortgage insurance (not title insurance) covering 7,000 loans, the court said that the mortgage insurer, Radian, could rescind some but not all coverage based on the lender's failure to detect borrower loan fraud.

[193] *Stewart Title Guar. Co. v. National Enterprises, Inc*., 133 F.3d 929 (Table), 1997 WL 800294, p. 1 (9th Cir. Cal.) (unpublished); *Fidelity Nat'l Title Ins. Co. v. Matrix Financial Services Corp.*, 255 Ga.App. 874, 567 S.E.2d 96 (Ga.App. 2002).

> all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land ... .[194]

Also, in a pair of decisions, a New York court held that the acts and possible fraud of the originating lender may not be imputed to the successor insured, because there was no agency relationship between the two entities. In the first decision in *GreenPoint Mortgage Funding Inc. v. Stewart Title Ins. Co.*,[195] Exclusion 3(a) was found not to apply to the successor insured. The named insured was Royal Mortgage Bankers, which made a loan to Royal's owner, Louis Crispino. After Crispino died, his wife sued to set aside the mortgage because Crispino had forged her signature. Royal had sold the loan to GreenPoint Mortgage. The insurer accused Royal of sloppy lending practices and sought to impute Crispino's acts to Royal, then assert Royal's negligence as a defense to GreenPoint under the successor provision. The court refused to employ Exclusion 3(a) to negate coverage because, it found, there was no evidence that either Royal or GreenPoint actually knew about the forgery, despite the lax lending practices. In the second *GreenPoint* decision,[196] however, the court held that there were triable questions of fact as to whether or not the acts of the closing attorney should be imputed to GreenPoint. The *GreenPoint* decision was relied on by another court which held that a lender did not assume the risk of prior liens by taking an assignment of the loan.[197] See §7.4 for a further discussion of the successor insured provision.

11.2.11 Effect Of D'Oench, Duhme Doctrine

With the large number of bank failures in recent years, an increasing number of claims involve the Federal Deposit Insurance Corporation and its relatives, the Resolution Trust Corporation and National Credit Union Administration (NCUA). Because these entities are governmental bodies, they enjoy special protections against other parties.

One such governmental shield affects the application of Exclusion 3(a). This protection was first enunciated in the U.S. Supreme Court case of *D'Oench, Duhme & Co., Inc. v. FDIC*.[198] In that case, the Supreme Court held that the FDIC was not bound by "secret agreements" between a third party and a bank whose assets are being administered by the FDIC. The court stated:

> Plainly one who gives such a note to a bank with a secret agreement that it

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[194] Conditions & Stipulations 1(a)(i), 1992 ALTA loan policy; Condition 1(e)(ii), 2006 ALTA loan policy.

[195] 12 Misc.3d 1194(A), 2006 WL 2337967, 2006 N.Y. Slip Op. 51568 (N.Y.Sup. 2006) (unpublished).

[196] 49 A.D.3d 687, 854 N.Y.S.2d 185, 2008 N.Y. Slip Op. 02552 (N.Y.A.D. 2 Dept. 2008).

[197] *U.S. Bank, N.A. v. Stewart Title Ins. Co.,* 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007).

[198] 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).

will not be enforced must be presumed to know that it will conceal the truth from the vigilant eyes of the bank examiners... . The test is whether the note was designed to deceive the creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled.[199]

The purpose of the *D'Oench, Duhme* doctrine is to allow the FDIC to rely on the face value of instruments in the bank's possession, rather than having to "retain linguists and cryptologists to tease out the meaning of facially-unencumbered notes."[200] *D'Oench, Duhme* also applies to the NCUA[201] and the RTC.[202]

The *D'Oench, Duhme* doctrine is essentially codified in 12 U.S.C. 1823(e), which states:

(e) **Agreements against interests of Corporation.**

(1) In general. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [12 USC §1821], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

(2) Public deposits. An agreement to provide for the lawful collateralization of deposits of a Federal, State, or local governmental entity or of any depositor referred to in section 11(a)(2) [12 USC §1821(a)(2)] shall not be deemed to be invalid pursuant to paragraph (1)(B) solely because such agreement was not executed contemporaneously with the acquisition of the collateral or with any changes in the collateral made in accordance with such agreement.

The case and the statute are often treated as being interchangeable. However, as one court

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[199] 315 U.S. at 460, 62 S.Ct. at 681.

[200] *FDIC v. Hamilton*, 939 F.2d 1225, 1230 (5th Cir. 1991) (quoting *Bowen v. FDIC,* 915 F.2d 1013, 1016 (5th Cir. 1990).

[201] *Savoy v. White*, 788 F.Supp. 69, 72 (D.Mass. 1992).

[202] *Resolution Trust Co. v. Feldman*, 3 F.3d 5 (1st Cir. 1993).

noted, there are differences. Section 1823(e) is:

> broader in that it applies to any agreement, whether or not it was secret and regardless of the maker's participation in a scheme; it is narrower in that it applies only to agreements and not to other defenses the borrower might raise.[203]

Thus, using either *D'Oench* or the statute, the FDIC may avoid the consequences of almost any kind of secret agreement that would otherwise hinder enforcement of a debt instrument. The protection of this section is waived if not pled and asserted at trial.[204]

The clash between the *D'Oench, Duhme* doctrine and the policy exclusion is illustrated in *National Credit Union Administration v. Ticor Title Ins. Co.*[205] In that case, a credit union made a loan that was understood at that time to be secured by a second mortgage on the real estate collateral. A year later, the credit union agreed to refinance that debt. At the second closing, however, the insurer's agent issued a policy that incorrectly insured the mortgage as a first lien. Officers of the credit union knew that the mortgage was actually a second lien, as did the attorney-agent, who also represented the credit union. Further, several credit union officers were secret partners in the owner partnership, and the credit union's Treasurer approved the acceptance of a second lien rather than a first as approved by its board.

The first mortgage was foreclosed, wiping out the insured mortgage. The NCUA as liquidating successor to the credit union made demand for the policy limits, and the insurer defended based on Exclusion 3(a). The NCUA argued that the exclusion could not apply because, under *D'Oench, Duhme*, the NCUA was not bound by the credit union officers' secret knowledge and acts.

The court disagreed, relying on the *Howell* exception to the *D'Oench, Duhme* doctrine. *Howell v. Continental Credit Corp.*[206] carved out the following exception to *D'Oench, Duhme* and the statute:

> When ... the asset upon which the FDIC is attempting to recover is the very same agreement that the makers allege has been breached by the FDIC's [predecessor], § 1823(e) does not apply. None of the policies that favor the invocation of the statute are present in such cases because the terms of the agreement that tend to diminish the rights of the FDIC appear in writing on the face of the agreement that the FDIC seeks to enforce.[207]

The *National Credit Union* court found that the title insurance policy was "an asset for

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[203] *Tuxedo Beach Club Corp. v. City Federal Savings Bank*, 749 F.Supp. 635, 642 (D.N.J. 1990).

[204] *Stewart Title Guar. Co. v. Federal Deposit Ins. Corp.*, 936 S.W.2d 266 (Tenn.App. 1996).

[205] 873 F.Supp. 718 (D.Mass. 1995).

[206] 655 F.2d 743 (7th Cir. 1981).

[207] Id. at 747.

purposes of the statute," and the NCUA took the policy subject to all of its limitations, despite the statute.[208] The court then concluded that the exclusion barred recovery under the circumstances.[209] The *National Credit Union* case should be equally applicable as to any assertion of Exclusion 3(a).

The *D'Oench, Duhme* doctrine has been found applicable as to Exclusion 3(a). In *Title Ins. Co. of Minn. v. Smith, Debnan, Hibbert and Pahl*,[210] an insurer sued a law firm on a title certification which incorrectly stated that two prior mortgages had been discharged. The firm defended by arguing that its lender client had "agreed to" the liens, and thus the insurer was not liable on its policy. The lender had been taken over by the RTC. The court agreed with the insurer that Exclusion 3(a) could not be asserted against the RTC, because there was no evidence in the loan file that the lender had agreed to the prior liens. Without such a written agreement in the loan file, the *D'Oench, Duhme* doctrine and 12 U.S.C. 1823(e) would preclude the insurer from binding the RTC to the insolvent lender's agreement.

11.3 Known To Insured

Exclusion 3(b) of the policy excludes those matters which are (1) not recorded in the public records on date of policy but (2) known to the insured, (3) not known to the insurer and (4) not disclosed by the insured to the insurer in writing before the insured takes title or consummates its mortgage loan.[211] See §7.10 for a discussion of knowledge of a successor insured under a loan policy.

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[208] "Exclusion 3(a) appears in writing on the face of the title insurance policy. The FDIC cannot seek to enforce the policy while disclaiming its exceptions. *Cf. FDIC v. Panelfab Puerto Rico Inc.*, 739 F.2d 26, 30 ("[W]e will not consider the [policy] as a whole to be valid for the purpose of collecting ... only to invalidate under [§1787(p)(2)] a particular option contained in the agreement that, when exercised according to its terms, is a defense to that collection."). Ticor's defense falls within the exception to *D'Oench* and ' 1787(p)(2) for claims that are premised on a breach of an agreement or warranty that is itself contained in the bank's records." 873 F.Supp. at 725.

[209] Id. at 728.

[210] 459 S.E.2d 801 (N.C.App. 1995).

[211] Exclusion 3(b) of the 2006 ALTA policies reads: "Defects, liens, encumbrances, adverse claims or other matters: … not 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 Claimant prior to the date the Insured Claimant became an Insured under this policy... ."

11.3.1 Misrepresentation By Proposed Insured

FORM 39, Appendix A
Misrepresentation or concealment voiding coverage

Exclusion 3(b) excludes from coverage risks known to the insured and not known to the insurer, which are not evidenced by an instrument in the public records, and which the insured does not disclose in writing to the insurer in advance of the closing of the sale, loan or lease to be insured. In many lines of insurance, such as health and life insurance, a proposed insured submits an application for insurance and is asked to make representations about the risks for which coverage is given. In extending coverage, the insurer relies primarily or exclusively on the representations made by the proposed insured in the application. The application is ordinarily attached to and made a part of the policy. If an applicant misrepresents on the application, causing the insurer to accept an undisclosed material risk, the policy is void.[212]

A title insurer does its own risk investigation in each transaction when it examines the public records.[213] Also, title insurance policies do not incorporate by reference an insurance application in which the insurance applicant is asked to disclose his or her knowledge of title risks, with a provision stating that the policy is void if the application contains a misrepresentation of fact.[214] In some jurisdictions, title insurers do not require any formal statement from the proposed insured regarding its knowledge of the state of title.[215] This fact received comment in *Collins v. Pioneer Title Ins. Co.*:

> In the ordinary practice the duty of disclosure has been relaxed. Most insurers require an applicant for insurance to answer questions prepared by it; "information not asked for is presumably deemed immaterial." Stipcich, supra, at 316, 48 S.Ct. at 513. Most applications for insurance are prepared by or with the assistance of an agent for the insurer. As a result, an applicant for insurance wishing to conceal information from

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[212] See Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 3:6, Thomson Reuters (collecting cases and statutes from various states).

[213] "Instead of relying on the representations of the insured to evaluate the risk, title insurers undertake an independent professional search of the public records relating to the subject property in order to protect itself [sic]." *Lawyers Title Ins. Corp. v. First Federal Savings Bank & Trust*, 744 F. Supp. 778, 784 (E.D. Mich. 1990).

[214] Earlier forms of title insurance policies contained more traditional provisions rendering the policy void for any misrepresentation in the application for insurance. See *Glickman v. Home Title Guaranty Co.*, 8 Misc.2d 303, 167 N.Y.S.2d 793 (1957); 15 Misc.2d 167, 178 N.Y.S.2d 281 (Sup. 1958), aff'd 8 A.D.2d 629, 185 N.Y.S.2d 756 (Sup.Ct.App.Div. 1959); *First Nat'l Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 171 Misc. 854, 12 N.Y.S.2d 703 (Sup. Ct. 1939); and *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429, 52 N.W. 910 (1892).

[215] In many states, insurers routinely require affidavits from sellers of property, but not from the proposed insured. In some states, insurers also regularly require ALTA Statements from buyers. Unlike medical or life insurance, however, the ALTA Statement is not an application, does not ask questions directly, and is not incorporated physically or by reference in the policy.

> an insurer must in most cases give a false or misleading statement. In contrast, Collins was not required to answer questions prepared by Pioneer; Pioneer relied on the certificates of title prepared by Ables [Collins' attorney]. While Collins did not make a false statement on an insurance application, Collins through his agent, Ables, failed to disclose Chalupsky's claim to Pioneer.[216]

Despite this lack of formal application, however, the applicant for title insurance must disclose his or her knowledge of a material risk. The insured's failure to disclose a material risk voids coverage, even as to matters appearing in the real estate records.[217] This duty is tempered in California by law, as to certain matters.[218] This duty to disclose is a continuing duty through the date of policy.[219] See §11.3.4 below for cases upholding the continuing duty.

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[216] 629 F.2d 429, 433-4 (6th Cir. 1980).

[217] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980); *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp*., 361 F.2d 764 (8th Cir. 1966); *1200 Ashland, LLC v. Lawyers Title Ins. Corp*., 2010 WL 5481800 (N.D. Ill.) (unpublished) (when insured requested zoning endorsement two years after closing and several months after receiving survey revealing that part of property was not zoned as stated on zoning endorsement issued to lender previously, insured's failure to disclose correct zoning classification to insurer voided endorsement). In *Nourachi v. First American Title Ins. Co*., 44 So.3d 602 (Fla.App. 5 Dist. 2010), a person who got a tax deed and then learned that the United States was the true owner of the land, then asked for title insurance without disclosing the government's ownership, voided coverage by concealment. The court said that to permit a person to shop for coverage in this fashion "would promote unsavory gamesmanship." It rejected the insured's argument that concealment should not apply because the title insurer had equal access to the facts, since the deed to the United States was recorded.

[218] Under Cal.Ins. Code §§ 333, 335, the insured is not required to tell the insurer the following, except in response to specific inquiries: (1) facts the insurer knows or should know, (2) facts for which the insurer has waived communication, (3) facts proving that a risk is excluded, (4) facts equally available to the insurer, and (5) general trade usages. The insured also does not have to disclose his or her opinion about a matter, even if asked. § 339.

[219] Conditions 2 of the 2006 ALTA commitment states: "If the proposed Insured has or acquired actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions." When the insured seeks an endorsement after the date of policy, the application of the exclusion and the commitment's terms to the insured's knowledge is less obvious. One court found that the duty does not apply to information learned by the insured after the policy date but before the insured requested an endorsement to the policy, even though that information was material to the endorsement coverage, because the policy exclusion referred to knowledge obtained before the policy date and the endorsement stated that it did not alter the terms of the policy. *First American Title Ins. Co. v. Columbia Harbison LLC*, 2013 WL 1501702 (D.S.C.) (unpublished). In *1200 Ashland, LLC v. Lawyers Title Ins. Corp.*, 2010 WL 5481800 (N.D. Ill.) (unpublished), an insured sought and obtained a zoning endorsement two years after purchasing the property, but coverage was voided due to the insured's concealment of a new survey it obtained, after the policy was issued but shortly before the endorsement was requested, that showed that part of the property was not zoned as stated on the survey the lender and insurer saw at closing. Because the insured discovered the zoning issue after the policy date, the court did not rely on Exclusion 3(b), but rather based its ruling on 215 ILCS

This duty to speak is based partly on the language of the insurance contract and partly on the common law. As was stated in *Collins v. Pioneer Title Ins. Co.*:

> Under Tennessee law Collins had a duty "to make a fair disclosure of the facts (of the risk involved) to the insurer." [citations omitted] The common law duty of disclosure was recognized by the United States Supreme Court in Stipcich v. Metropolitan Life Insurance Co., 277 U.S. 311, at 316, 48 S.Ct. 512, at 513, 72 L.Ed. 895 (1927):
>
> Insurance policies are traditionally contracts *uberrimae fidei* ["Complete good faith, with no concealment"] and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option.

The proposed insured has a duty to make a fair disclosure of all material facts. The applicant may not lie, misrepresent or make selective disclosure.[220] Silence in the face of a duty to speak is a breach of this duty. It is not sufficient for the applicant merely to refrain from making an affirmative misrepresentation.[221] In some jurisdictions at least, the insurer does not have to prove that the applicant intended to deceive the insurer by his or her silence.[222] Rather, the insurer need only show that the facts withheld were material and that the insured was, or should have been, aware of their materiality.

5/154 of the Illinois Insurance Code and case law holding that "a misrepresentation in an application for insurance avoids a policy when it materially affects either the acceptance of the risk or the hazard assumed by a company."

[220] *Parker v. Title & Trust Co.*, 233 F.2d 505 (9th Cir. 1956); *Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 382 A.2d 933 (App.Div. 1978). As the court stated it in *Parker*: "[s]urely a person thus led into a trap owes no duty to the one who did the trapping." 382 A.2d at 938. In *Lee v. Farnell*, 1997 WL 711352 (Conn.Super.Ct.) (unpublished), the dispute concerned an option to purchase. Dicta in the case provides an illustration of a form of subtle misrepresentation intended to induce an insurer to grant coverage. The seller's attorney gave the title insurer a copy of a letter dated February 15th in which the attorney declared to the optionee that the option had not been timely exercised. The closing took place on February 22nd. The insurer agreed to protect against the optionee's rights, based largely on the optionee's failure to respond to the letter. In fact, however, there was no response as of closing because the letter was not mailed until after closing, 11 days after it was dated. The court rightly stated that the failure to mail the letter, coupled with the implication to the contrary, "would not seem consistent with good faith dealing. Not only does it mislead [the purchaser], but it also could have the effect of materially misleading the title insurance company. ... [T]he company, thinking that the letter had been sent a week before the closing, may have had some reason to believe that the absence of objection from [the optionee] prior to the closing showed, to some degree, acquiescence in the contents of the letter."

[221] *Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp.*, 361 F.2d 764 (8th Cir. 1966); *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980). In *Investors Title Ins. Co. v. Bair*, 296 Fed.Appx. 332, 2008 WL 4570478 (4th Cir.(S.C.) 2008) (unpublished), the insured had quieted title to property but did not join certain easement holders in the suit. She then asked to have her title insured but failed to disclose the facts about the suit until the easement holders she had not joined to the action stepped forward. The court found the exclusion negated coverage.

[222] "It is well-established that actual intent to deceive need not be shown. … Commonwealth was entitled to rescind the policies whether the Bank's concealment of a material fact was intentional or unintentional (Ins.Code, 330-331) provided, as was established here, the Bank appreciated the importance of the facts preceding its acceptance of the trust deeds." *Bank of San Diego v. Commonwealth Land Title Ins. Co.*, 283 Cal.Rptr. 1 (Cal.App. 4 Dist. 1991) (unpublished), previously published at 231 Cal.App.3d 1265 and withdrawn from publication.

In other states, the insurer must prove that the insured intentionally withheld or misrepresented information to the insurer in order for the misrepresentation defense to apply. In *L. Smirlock Realty Corp. v. Title Guar. Co.*,[223] the insurer argued that the title defect should have been disclosed by the proposed insured, and this misrepresentation voided coverage. The policy was an NYBTU form containing a specific misrepresentation provision.[224] The court reviewed the cases, and concluded that the policy is only voided by intentional misrepresentation, and then only as to matters which the insurer should not be expected to discover in the public records. It found that earlier New York cases had held that:

> … [T]he policy was voided by the insured's failure to disclose only in instances where there was evidence of intentional concealment on the part of the insured and the undisclosed information concerned a matter not of public record….
>
> One Federal court, addressing a provision identical to that found in the defendant's policy, stated that the clause "must be given a common sense application and, considering the nature of title insurance transactions, a duty to speak could be found only if the insurance applicant had actual knowledge of certain defects or encumbrances. Further, misrepresentation could be found only if one charged with such a duty to speak intentionally failed to disclose the information." (Lawyers Tit. Ins. Corp. v. Research Loan & Inv. Corp., 361 F.2d 764, 768.) … Moreover, these cases indicated, either expressly or by implication, that the title policy would only be voided in instances where the undisclosed information was not discoverable by the insurer by reference to publicly filed records. … We agree with the view expressed by these cases. Therefore, we hold that a policy of title insurance will not be rendered void pursuant to a misrepresentation clause absent some showing of intentional concealment on the part of the insured tantamount to fraud. Moreover, because record information of a title defect is available to the title insurer and because the title insurer is presumed to have made itself aware of such information, we hold that an insured under a policy of title insurance such as is involved herein is under no duty to disclose to the insurer a fact which is readily ascertainable by reference to the public records. Thus, even an intentional failure to disclose a matter of public record will not result in a loss of title insurance protection. … Of course, an intentional failure by the insured to disclose material information not readily discernible from the public records will render the policy void.[225]

[223] 418 N.E.2d 650, 52 N.Y.2d 179 (1981), later appeals 469 N.Y.S.2d 415 (1983) and 473 N.E.2d 984 (Ct.App. 1984).

[224] In New York, the New York Board of Title Underwriters Owner's Policy Form 100-D was issued from 1984 until 1991, when New York insurers began issuing ALTA policy forms.

[225] 418 N.E.2d at 654-5.

In accord with *Smirlock* is *Bourland v. Title Ins. Co. of Minnesota*,[226] which held that the exclusion applies only if the insurer proves that the insured intentionally withheld information.

The exclusion does not bar coverage when the applicant has made written disclosure to the insurer of the material facts concerning the matter for which coverage is asserted. Rather, the insurer, armed with the facts, is considered to have assumed the risk disclosed to it.[227] Disclosure of the material facts by the insured to the insurer's policy-issuing agent is binding on the insurer.[228]

11.3.2 Types Of Knowledge And Notice

Exclusion 3(b) applies to matters "known" to the insured. The definition of "known" in the policy is "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 matters affecting the land."[229]

Thus, there are several categories of knowledge encompassed in the exclusion, not including constructive notice from public records. The phrase "actual knowledge" is not further defined. One court found this lack of definition created an ambiguity in the policy precluding any imputation of knowledge to the insured.[230] As will be discussed below, case law has otherwise been quite uniform in establishing that "knowledge" includes the following:

1. Matters of which the insured was personally cognizant as of the date of policy. This includes information disclosed by people and documents to the insured. It also includes facts about the title to or physical condition of the property that would tell

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[226] 4 Ark.App. 68, 627 S.W.2d 567 (1982).

[227] Thus, when the insured and insurer together concocted a straw-man sale and mortgage to get around a trust prohibition on mortgaging, the insurer assumed the risk that the scheme could be attacked. *McLoughlin v. Bridgeport Land & Title Co.*, 99 Conn. 134, 121 A. 175 (Conn. 1923). Also, in *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D. Idaho) (unpublished), the court said that the insured disclosed enough information to "put Stewart on inquiry notice," and that a "diligent inquiry" would have revealed the risk of inchoate construction lien rights. Therefore, "Stewart must be held to knowledge of these facts, and thus cannot claim that Credit Suisse committed fraud by failing to reveal the same facts." In *In re Pazzo Pazzo, Inc*., ___ B.R. ___, 2019 WL 6699694 (Bkcy.N.J. 2019) (not yet released for publication), the insured signed a purchase contract that both disclosed and protected the insured against the risk that the holders of an option and lease could assert those rights, which had been terminated of record. The court found that Exclusion 3(a) barred coverage for those rights. The insurer also asserted Exclusion 3(b). The court said that, on summary judgment, it could not rule in the insurer's favor on that exclusion because "[t]he question was what knowledge, if any, Stewart Title had of the same risk, and whether it was disclosed to the insurer in writing." While Stewart Title denied that it saw the sale contracts before the policy was issued, the insured insisted that it did see the contracts, and that it had assumed the risk of the option and lease rights.

[228] *McDonald v. Title Ins. Co.*, 49 Or.App. 1055, 621 P.2d 654 (1980); *Mocco v. Licata*, 2018 WL 2923483 (N.J.A.D.) (unpublished).

[229] Conditions & Stipulations 1(c), 1992 ALTA policies; Conditions 1(h), 2006 ALTA policies.

[230] *First American Title Ins. Co. v. Kessler*, 452 So.2d 35 (Fla.App. 1984), further discussed in §11.3.2.

the average person of common sense that a title defect exists.[231]

2. As to an insured that is not a natural person, matters known by an officer, employee, member, partner or other person in a position of authority.[232]

3. Knowledge of the insured's agent, principal, representative, attorney, spouse or affiliate, and imputed to the insured under general agency law. A common limitation to imputation is that the agent must have obtained his or her knowledge during the course of his or her employment by the insured.[233]

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[231] See, for example, *Connecticut Attorneys Title Ins. Co. v. Casmat, LLC*, 2012 WL 366521 (D.R.I.) (unpublished), in which the court found the insured had actual knowledge, through its manager and counsel, of a lawsuit in which the insured had appeared.

[232] *Peachtree Management & Inv. Co., Inc. v. Pioneer Nat. Title Ins. Co.*, 541 F.Supp. 51 (N.D.Ga. 1981) (sole shareholder of corporation found to be an insured under policy naming corporation as insured, with all policy defenses which insurer could assert against corporation imputed against shareholder); *Carefree Living of America (Minnetonka), Inc. v. Chicago Title Ins. Co.*, 2000 WL 290411 (Minn.App.) (unpublished) (knowledge of past president imputed to corporation insured); *Connecticut Attorneys Title Ins. Co. v. Casmat, LLC*, 2012 WL 366521 (D.R.I.) (unpublished) (knowledge of limited liability company's manager imputed to the company).

[233] The knowledge of a lender's closing agent was held to be imputable to the insured lender in *Greenpoint Mortgage Funding, Inc. v. Stewart Title Guar. Co.*, 49 A.D.3d 687, 854 N.Y.S.2d 185, 2008 N.Y. Slip Op. 02552 (N.Y.A.D. 2 Dept. 2008) (construing Exclusion 3(a) rather than 3(b)). In *Fleishour v. Stewart Title Guar. Co.*, 743 F.Supp.2d 1060 (E.D.Mo. 2010), the court held that the insured's real estate broker's knowledge of adverse possession rights was imputed to the insured. In *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980), the court imputed the knowledge of the insured's attorney to the insured. In *Arizona Title Ins. & Trust Co. v. Smith*, 21 Ariz.App. 371, 519 P.2d 860 (1974), the court accepted the argument that a real estate broker's knowledge may be imputed to an insured owner, but did not impute knowledge under the facts of that case. In *Lower Town Project, LLC v. Lawyers Title Ins. Corp.*, 2011 WL 3319710 (E.D.Mich.) (unpublished), the court held that the property manager's knowledge may be imputed to the insured if the insurer establishes that the property manager was engaged by both the seller and the purchaser-insured. The court also held that a non-imputation endorsement was not applicable, because the endorsement negated the seller's knowledge but not that of the property manager, who served as agent of the seller in contracting for work and who signed the false lien affidavit on which the insurer gave construction lien coverage. In *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012), the court imputed the acts and knowledge of the bank's closing agent to the bank to find that the lender had "created" the risk that the closer and others would steal the loan money, leaving the bank with a mortgage that failed for want of consideration and no policy coverage. In *Sher v. Luxury Mortg. Corp.*, 2012 WL 5869303 (D.Md.) (unpublished), the insurer relied on *Cole Taylor* to make the same argument on very similar facts. The court did not address the merits of the issue. In *Connecticut Attorneys Title Ins. Co. v. Casmat, LLC*, 2012 WL 366521 (D.R.I.) (unpublished), the court imputed to a limited liability company the knowledge of its attorney in the lawsuit that was the subject of the claim to the company. In *JBGR LLC v. Chicago Title Ins. Co.*, 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished), the court said that the knowledge of a member of the insured company could be imputed to it based on what he had done as a partner in the partnership that formerly owned the property. In *First American Title Ins. Co. v. DJ Mortgage, LLC*, 328 Ga.App. 249, 761 S.E.2d 811 (Ga.App. 2014), attorney Jones served as both the lender's closing agent and the title agent. He knew as the lender's agent that the lender had agreed to subordinate its security deeds to seller take-back purchase money liens. As title agent, Jones issued policies to the lender that did not except the seller liens. The court agreed that Jones' knowledge, gained in the course of his duties as closing attorney, could be imputed to the insured for purposes of Exclusion 3(b). However, Jones was not a general agent of the lender, and thus whatever he did that did not serve his client's interest or follow its instructions was not done as its agent. Second, Jones was a dual agent. The knowledge of a

4. Matters which the insured may have forgotten as of the date of policy, but which were the insured's own act or with which the insured had been so intimately involved that the insured could not deny being bound by the act or the knowledge of it. This includes encumbrances executed by the insured, and matters disclosed as exceptions on a prior title insurance policy in favor of the insured.[234]

The following matters have been found to be outside the scope of "actual knowledge":

1. Physical evidence on the property that provides a clue that title is defective or encumbered, but that would admit more than one possible explanation. This includes equivocal evidence of other parties' possession.[235]

2. Information generally known in the community about a person's business reputation

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dual agent is imputable to both principals, the court said, quoting from *Herron v. Interstate Life & Acc. Co*., 55 Ga.App. 534, 190 S.E. 631 (1937). Thus, what Jones knew could also be imputed to the insurer, First American, to the extent that it was within the scope of that agency relationship. The court denied summary judgment. It concluded that the lender might prove that Jones acted without authority, and that the lender did not suffer or agreed to the loss of priority of its security deeds. In *Emigrant Bank v. Commonwealth Land Title Ins. Co*., 2017 WL 4286335 (S.D.N.Y.) (unpublished), the court said that "knowledge" as defined in the policy includes all types of knowledge except as carved out in the definition, which encompasses knowledge imputed to the insured from its attorney. In *Northwest Savings Bank v. Fidelity Nat'l Title Ins. Co*., 2017 WL 253080 (Pa.Super.) (unpublished), the court imputed the knowledge and acts of the insured lender's closing agent to the insured. The closing agent was also the policy-issuing agent, but the court said its acts and knowledge were within the scope of its agency for the lender, not as the title agent. In *Immobiliare, LLC v. Westcor Land Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6828304 (E.D.Cal. 2019) (not yet released for publication), the insurer's claim that the insured's agent committed fraud in the inducement by ordering a policy and two endorsements increasing the policy amount by concealing facts about the infirmities in title was dismissed as to the insured's agent, because the insurer did not plead specifically that the insured's agent knew about the title problems. The court did not dismiss the same claims brought directly against the insured.

[234] However, in *CDJ Builders, LLC v. Fidelity Nat'l Title Ins. Co*., 2012 WL 6150208 (E.D.Mich.) (unpublished), the knowledge and acts of two of the LLC insured's three members in incurring a debt to a construction lien claimant and in defending the lien foreclosure suit were not charged to the LLC because the members claimed not to "remember" the lien or the debt, and also that they thought the lien had been resolved. The court refused to impute knowledge as the court had done in *Lower Town Project*, discussed in this section. In *JBGR LLC v. Chicago Title Ins. Co.*, 38 Misc.3d 1213(A), 966 N.Y.S.2d 346 (Table), 2013 WL 221480 (N.Y.Sup.), 2013 N.Y. Slip Op. 50089(U) (unpublished), the court said that the knowledge of a member of the insured company could be imputed to it based on what he had done as a partner in the partnership that formerly owned the property.

[235] In *Eller Media Co. v. DGE, Ltd.*, 2004 WL 2002449, 2004-Ohio-4748 (Ohio App. 8 Dist. 2004) (unpublished), there was a large billboard attached to the insured building. The real estate sales agent told the insured that the billboard was being leased from month to month, and could be a real moneymaker, but did not disclose an off-record lease that stated that the billboard was owned by the lessee. The insured also received a survey which showed a billboard. The court ruled that these facts did not give sufficient knowledge to the insured for the exclusion to apply: "Whether Eller's name was on the billboard at the time Daniels toured the property, or [the sales agent's] statement that the billboard was on a month-to-month lease are each and both insufficient to charge DGE with actual knowledge of Eller's purported adverse interest."

or past business dealings that might suggest that the person would commit a forgery or otherwise create a title defect, but not coupled with the knowledge or reasonable suspicion that any such activity took place in the insured transaction.

3. Facts that might have been discovered if the insured had made a diligent inquiry.[236]

The knowledge of an entity insured is the actual knowledge is its officers, directors, members, partners and employees that is, under state law, deemed to be imputed to such an entity. In *Carefree Living of America (Minnetonka), Inc. v. Chicago Title Ins. Co.*,[237] the knowledge of a former president was imputed to the corporate insured, negating coverage for the title defects caused by that officer. The insured argued that the policy definition of "knowledge," which includes actual knowledge but not matters of which the insured has constructive notice, does not encompass imputed knowledge. The court rejected this reading of the definition.

> The definition excluding implied knowledge must be read as a whole; only that knowledge imputed by reason of a public or other record is excluded. The knowledge here, while imputed to Carefree because of Selbak's status as an officer, is not based on public or other record, but rather on Selbak's actual knowledge.
>
> When opposing the grant of summary judgment, a party must show something more than "some metaphysical doubt as to the material facts." [citation omitted] Carefree's claim that corporate knowledge can somehow be isolated from the actual knowledge of a corporate officer or director is such a metaphysical doubt.

Some courts, however, have refused to impute knowledge, particularly when the person with

[236] In *C 1031 Properties, Inc. v. First American Title Ins. Co*., 175 Wash.App. 27, 301 P.3d 500 (Wash.App. Div. 3 2013), the court held that Exclusion 3(b) did not apply when power poles were visible, but the insured did not actually know there was a recorded easement allowing their placement on the property. It said "the policy definition unambiguously defines knowledge as 'actual knowledge' of an easement, not 'constructive knowledge or notice that may be imputed [to C 1031]' constructively. … When C 1031 saw the power lines on the property, it acquired at best inquiry notice, not actual knowledge of a recorded easement. Thus, First American's argument fails." In *Johnsen and Allphin Properties v. First American Title Ins. Co*., 2013 WL 6230344 (D. Utah) (unpublished), the court found that a successor insured under a loan policy did not have a duty to inquire further as to the state of title so as to invoke Exclusion 3(b). In a later decision, the court made few new rulings other than that there was a question of fact about what the insured knew that would require a trial. *Johnsen and Allphin Properties, LLC v. First American Title Ins. Co*., 2016 WL 6459579 (D. Utah 2016) (unpublished). In *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D. Idaho) (unpublished), the court turned the issue around and held that Exclusion 3(b) did *not* apply if *the insurer* had "knowledge of those facts that 'an inquiry pursued with ordinary diligence and understanding would have disclosed.'" However, in *BAPCO LLC v. Fidelity Nat'l Title Ins. Co*., 2019 WL 5576863 (Ariz.App. 1 Div.) (unpublished), the court reformed a loan policy to add exceptions for two deeds of trust known to the named insured. In finding the reformed policy binding on the successor insured, the court said that the insured was bound by inquiry notice. The court thus impliedly found that inquiry notice is a subset of actual knowledge. Other courts have also found inquiry notice to be a subset of actual knowledge. See *Mann v. Old Republic Nat'l Title Ins. Co*., 975 S.W.2d 347 (Tex.App.-Hous. 14 Dist. 1998); *Applefield v. Commercial Standard Ins. Co*., 176 So.2d 366 (Fla.App. 1965).

[237] 2000 WL 290411 (Minn.App.) (unpublished).

knowledge claims not to remember the lien or encumbrance.[238] The insurer must first establish that the party whose knowledge it seeks to impute against the insured was in fact an officer, director, member, partner or employee whose knowledge is deemed by law to bind the entity.[239]

Actual knowledge is not limited to matters that the proposed insured was consciously considering on date of policy. For example, the insurer was not liable on a seller's purchase-money mortgage policy for having failed to show a recorded easement which the insured-seller had created some years before.[240] Also, when the insured's own policy had disclosed restrictions, but a later policy failed to report them, the insured-seller's knowledge of its own title records was characterized as actual, not constructive; that knowledge negated any defense to a subrogation suit on warranties.[241] However, when the insured lender lost its policy showing two prior trust deeds, and later ordered a new one which omitted the trust deeds, the exclusion was found inapplicable because the insured had lost its knowledge of the prior encumbrances.[242]

The knowledge of the insured's attorney is imputed to the insured when that knowledge was obtained in the course of the lawyer's representation of the insured.[243] When the insured's attorney

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[238] Both such decisions emanate from Michigan. In *CDJ Builders, LLC v. Fidelity Nat'l Title Ins. Co*., 2012 WL 6150208 (E.D.Mich.) (unpublished), the knowledge and acts of two of the LLC insured's three members in incurring a debt to a construction lien claimant and in defending the lien foreclosure suit were not charged to the LLC. The members claimed in the alternative that they thought the lien had been resolved, and that they did not "remember" the lien or the debt to the contractor. The court refused to impute their knowledge or prior actions to the new entity, which had a third member with no knowledge of the lien. Similarly, in *Archambo v. Lawyers Title Ins. Corp.*, 646 N.W.2d 170 (Mich. 2002), a federal tax lien was recorded against a corporation and its officers. One of the officers later took title to some property. The insurer failed to disclose the tax lien on the officer's policy. The court found that Exclusion 3(b) did not apply, because the lien was of record. The court did not base its ruling on the issue of the officer's actual versus imputed knowledge. However, in a later decision concerning the same policy and Exclusion 3(a), the court also ruled that that exclusion did not apply, because the officer was not responsible for the company's books and did not induce the company to fail to pay its taxes. The latter decision suggested (erroneously) that the acts of the corporation and its other officers should not be imputed to the insured.

[239] In *First American Title Ins. Co. v. Kessler*, 452 So.2d 35 (Fla.App. 1984), the court reversed a summary judgment ruling and remanded for trial on the question of whether or not the person with knowledge was in fact the partner of the insured in the transaction. If he was a partner, his knowledge would be imputed; if not, the court held that there was no basis on which to impute his knowledge to the insured.

[240] *Harvey v. J & H Holdings Inc.*, 310 So.2d 371 (Fla.App. 2 Dist. 1975).

[241] *Fairmont-Tillett, Ltd. v. First Memphis Realty*, 691 F.2d 991 (11th Cir. 1982). In *Fairmont-Tillett*, the insured seller was not making a claim, however. Rather, the insurer was pursuing the seller on its warranties of title by subrogation. The seller raised the failure to except the easement as a defense to the insurer's subrogation right. The court rejected the defense, stating: "The seller is a business entity. Perhaps the individuals involved on behalf of the seller did not remember the papers received at purchase, or did not bother to look at them. Nevertheless, the entity can be held to know what is or should be in its own files concerning the property sold. This is not constructive knowledge, as argued in the brief for the seller, but actual knowledge." 691 F.2d at 991. *Fairmont-Tillett* relied on *Harvey v. J & H Holdings Inc.*, 310 So.2d 371 (Fla.App. 2 Dist. 1975).

[242] *Tumwater State Bank v. Commonwealth Land Title Ins. Co*., 51 Wash.App. 166, 752 P.2d 930 (1988).

[243] In *Vernon v. Title Guarantee & Trust Co.*, 7 Cal.App. 2d 171, 46 P.2d 191 (Cal.App. 2 Dist. 1935), a foreclosure sale was voided due to the improprieties of the foreclosing attorney, whose acts were imputed to the insured purchaser at

had examined the real estate records and told the insured that liens existed, the insured had a duty to inform the insurer of the falsity of affidavits to the contrary on which the insurer relied in removing the liens as exceptions from the policy.[244] The attorney's knowledge was also ascribed to the insured when the insured was aware that the attorney had misrepresented the status of title to the insurer in a title report used to issue the policy.[245] However, an insured's attorney's knowledge of a misindexed judgment, obtained before he represented the insured, was not imputed to the insured.[246] When the title commitment did not except mineral rights held by another party, but the purchaser's attorney issued an opinion letter noting those rights, the letter was found not to give "such actual, express knowledge as would" overcome the omission in the policy.[247] Knowledge may be imputed from an attorney to the insured only when the lawyer represented the insured in the transaction.[248]

The actual knowledge of a title defect may also be imputed to the insured from a party with whom it has a contractual relationship in regard to the transaction on which the policy is issued.[249]

The ALTA loan policies state that policy defenses that would apply to the named insured may be asserted against a successor insured only if the successor had knowledge of the title defect at the time it purchased the loan. That provision is discussed at §7.10.

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the sheriff's sale, who was the lawyer's spouse.

[244] *Applefield v. Commercial Standard Ins. Co.*, 176 So.2d 366 (Fla.App. 1965).

[245] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980).

[246] "Our cases hold that for knowledge of the attorney to be imputed to the client, the knowledge must have come to the attorney while engaged in a service for his client after the attorney-client relationship began." *Ball v. Vogtner*, 362 So.2d 894, 898 (Ala. 1978).

[247] *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc.*, 544 So. 2d 1070 (Fla.App. 1989). In such a case, the exclusion is clearly not applicable because the matter was in the public records. The court clearly was bothered by permitting recovery, since "the courts have been loath to impose liability on a title insurer for a condition of which the insured had actual, express knowledge." Id. at 1073. In such a case, the insured's knowledge would be better employed as evidence that the insured assumed or agreed to the matter, or had not suffered loss, since it closed on the purchase with full knowledge. See §11.3.6.

[248] In *First Carolinas Joint Stock Land Bank v. New York Title & Mortgage Co*., 172 S.C. 435, 174 S.E. 402 (1934), the knowledge of an attorney who prepared an abstract reporting title defects not excepted in the policy was not imputed to the insured, because there was no proof that the attorney was the insured's counsel.

[249] In *Great American Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425 (Tex.App. 1980), when a title search prepared for the lead lender reported restrictions that were not excepted in the policy, the knowledge of the lead lender obtained from the title search was imputed to the other participating lenders also. In *Lower Town Project, LLC v. Lawyers Title Ins. Corp*., 2011 WL 3319710 (E.D.Mich.) (unpublished), the court held that the knowledge of a property manager would be imputed to the insured if the insurer established that the insured signed a contract appointing the property manager as its agent.

11.3.3 Policy Obtained By Fraud Or Concealment

FORM 39, Appendix A
Misrepresentation or concealment voiding coverage

When an owner or purchaser becomes aware of a defect in title before closing, but conceals the information from the insurer, the applicant is committing fraud in the inducement to insure. Exclusion 3(b) applies as to such concealed defects.

In some cases, a person purchases title insurance precisely because he or she has discovered a title defect, and seeks coverage by concealing the defect from the insurer. Such cases follow a predictable pattern. The applicant usually already owns the property. The insurance is not requested in connection with any transaction. The dispute involves a matter which is either not of record or which the applicant had reason to believe will not be discovered by the insurer in its title examination. Shortly after the policy is issued, the insured submits a claim for the concealed title defect. The first clue of the concealment is normally the fact that the owner bought title insurance for no apparent reason. It ordinarily takes considerable investigation, however, to verify that the insured fraudulently concealed his or her knowledge to induce the issuance of the policy.[250]

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[250] The exclusion was enforced in the following cases which fit the fraud-in-the-inducement pattern: *Commonwealth Land Title Ins. Co. v. IDC Properties, Inc.*, 547 F.3d 15 (1st Cir.(R.I.) 2008), aff'g 524 F.Supp.2d 155 (D.R.I. 2007) (insured concealed other insurer's refusal to insure, tolling agreement with parties who later sued, private legal opinion that amendment to condominium regime was invalid); *Lesamiz v. Lawyers Title Ins. Corp.*, 51 Wash.2d 835, 322 P.2d 351 (1958); *Parker v. Title & Trust Co.*, 233 F.2d 505 (9th Cir. 1956); *Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 382 A.2d 933 (App.Div. 1978); *Vaughn v. United States Title Guaranty & Indemnity Co.*, 137 App.Div. 623, 122 N.Y.S. 393 (1910); *Conway v. Title Ins. Co.*, 277 So.2d 890 (Ala. 1973); *Lawyers Title Ins. Corp. v. Research Loan and Investment Corp.*, 361 F.2d 764 (8th Cir.1966); *Stearns v. Title Ins. & Trust Co.*, 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (Cal.App. 4 Dist. 1971); *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc.*, 544 So. 2d 1070 (Fla.App. 1989); *Commonwealth Land Title Ins. Co. v. Ozark Global, L.C.*, 956 F.Supp. 989 (S.D.Ala. 1997); *Kirwan v. Chicago Title Ins. Co*., 261 Neb. 609, 624 N.W.2d 644 (2001) (policy void because proposed insured did not disclose letter saying seller's deed had been obtained by fraud); and *Guilford v. First American Title Ins. Co.*, 2012 WL 3030250 (N.J.Super.A.D.) (unpublished) (policy void under common law doctrine of equitable fraud because insured did not disclose falsehoods in mortgage and note and owner's dispute over validity of debt).

The exclusion was not found to apply in *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976). In that case, the insureds explained a request for insurance long after they had bought the house by claiming that they wanted insurance in anticipation of a later sale. In *Jesko v. American-First Title & Trust Co.*, 603 F.2d 815 (10th Cir. 1979), the insured trustee had been advised by an attorney that his title may be defective. Later, his title was challenged. However, at the time the policy was requested, the applicant said he assumed that the party had decided not to attack title. The court found this position reasonable. It held that, while the applicant "may have had some premonition" that title would be attacked, there was no fact in existence on date of application which the trustee had a duty to disclose. In *IDC Properties, Inc. v. Chicago Title Ins. Co*., 974 F.Supp.2d 87 (D.R.I. 2013), the court said the insurer had not proved on summary judgment that the insured knew very much more than what could be discerned by reading recorded documents about the possible invalidity of amendments to a condominium declaration, and therefore the insured's failure to disclose that additional information did not invoke the exclusion. See also, Kratovil, *Fraud and Misrepresentation in Real Estate Transactions*, The Guarantor, May/June 1986. In *Immobiliare, LLC v. Westcor Land Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6828304 (E.D.Cal. 2019) (not yet released for publication), the insurer's claim that the insured's agent committed fraud in the inducement by ordering a policy and two endorsements increasing the policy amount by concealing facts about the infirmities in title was dismissed as to the insured's agent, because the insurer did not plead specifically that the insured's agent knew about the title problems. The court did not dismiss the same claims

Fraudulent inducement to insure not only renders the specific defect excluded; the entire policy is void.[251] In rejecting such claims, the prudent insurer will normally notify the insured that the policy is canceled, give the basis therefor, and return the premium, if paid. Also, fraudulent inducement of an insurer is a crime in many states.

11.3.4 Matters Which Applicant Must Disclose

The applicant must disclose both its knowledge of a potential defect, lien or encumbrance and its own actions in regard to the matter.[252] The applicant has a continuing duty to disclose any matter and information of which it obtains knowledge before the policy risk is bound by the insurer.[253] In an applicant withholds information from the insurer about a title risk out of concern that the insurer will not protect against the risk, that concealment of the material risk is emphatic proof that the applicant obtained insurance by the concealment. As one commentator counsels:

> An applicant for title insurance should not withhold knowledge of a title problem out of fear that title insurance will be denied. Almost no title is uninsurable. ... If the applicant does withhold information about a title defect, the applicant will lose coverage as to that defect anyway because of this policy exclusion.[254]

The proposed insured voids policy coverage by failing to disclose to the insurer his or her own intentional or fraudulent acts in obtaining title. For example, in *Peachtree Management & Investment Co. v. Pioneer Nat'l Title Ins. Co.*,[255] the proposed insureds discovered land owned by a defunct corporation, had the corporate charter reinstated by falsely claiming to be shareholders, and then purchased title insurance on the land. Their title was later revoked. The court found that the proposed insureds' failure to disclose their own chicanery voided the policy. Similarly, in *Insured*

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brought directly against the insured.

[251] New Jersey states that equitable fraud in the inducement to insure "requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." *First American Title Ins. Co. v. Lawson*, 177 N.J. 125, 827 A.2d 230, 236 (N.J. 2003). See also *Guilford v. First American Title Ins. Co.*, 2012 WL 3030250 (N.J.Super.A.D.) (unpublished) (policy void under common law doctrine of equitable fraud).

[252] *Guilford v. First American Title Ins. Co.*, 2012 WL 3030250 (N.J.Super.A.D.) (unpublished) (insured lender voided policy by concealing from insurer fact that insured mortgage and underlying loan were questionable or fraudulent and that true owner of property had refused to leave the premises).

[253] See *Kirwan v. Chicago Title Ins. Co*., 261 Neb. 609, 624 N.W.2d 644 (2001), in which the proposed insured was found obligated to inform the insurer that he had received a letter just before closing from a former owner who said that his co-owners had obtained a deed from him under the false pretense that they needed it in order to obtain financing, when in fact they intended to sell it and not pay him any of the sale proceeds.

[254] Joyce D. Palomar, *Title Insurance Law*, 2013-2014 Edition, § 6.16, p. 412, West/Thomson Reuters.

[255] 541 F.Supp. 51 (N.D.Ga. 1981).

Titles, Inc. v. McDonald,[256] the insured prepared the quit claim deed used to confirm a tax title, and altered the legal description from the grantor's own deed. The alteration increased the land conveyed from two acres to more than 12. However, the insured knew that the grantor's deed contained only two acres. Further, the insured paid no consideration for the deed. The court ruled that the failure of title to the additional acreage fell under Exclusion 3(b) because the insured was not a bona fide purchaser for value. The exclusion also applied when a mortgage foreclosure was voided because of the insured lender's unconscionable failure to release the mortgage for a nominal sum.[257]

The exclusion also applies when the insured is accused of having committed a fraud on a third party that affects title as insured. For example, when the holder of a second trust deed sought to have the first trust deed subordinated, because it was part of an alleged scheme to defraud the second lender, the court found no duty to defend the insured. It said:

> [Policy coverage] cannot include matters involving personal dealings between individuals even though those dealings may involve the development of real property when those dealings are not part of the public record. If we were to accept [the insured's] blanket assertion of coverage in this case, we would dramatically change the function and purpose of title insurance with enormous social and financial repercussions. We refuse to do so.[258]

Likewise, an insurer was not required to defend a suit seeking to set aside the insured deed as a fraud on creditors.[259]

The proposed insured also has a duty to disclose its knowledge of defects in the title.[260] The exclusion barred recovery for a boundary dispute of which the insured was aware for seven years before obtaining insurance.[261] The exclusion also negates coverage when the insured is aware of and does not disclose the contract rights of parties whose interests do not appear in the public records.[262]

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[256] 275 Mont. 111, 911 P.2d 209 (1996).

[257] *Conway v. Title Ins. Co.*, 277 So.2d 890 (Ala. 1973).

[258] *Barczewski v. Commonwealth Land Title Ins. Co.*, 210 Cal.App.3d 406, 410, 258 Cal.Rptr. 386 (Cal.App. 4 Dist. 1989).

[259] *Ginger v. American Title Ins. Co.*, 29 Mich.App. 279, 185 N.W.2d 54 (1970).

[260] *Connecticut Attorneys Title Ins. Co. v. Casmat, LLC*, 2012 WL 366521 (D.R.I.) (unpublished) (insured's concealment of lawsuit about title to property in which it had been a defendant for years, for which there was no notice in public records, invoked Exclusion 3(b)).

[261] *Stearns v. Title Ins. & Trust Co.*, 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (Cal.App. 4 Dist. 1971).

[262] In *Stevens v. United General Title Ins. Co.*, 801 A.2d 61 (D.C. 2002), the insured, Stevens, contracted to buy property from 1438 E Street, S.E. L.L.C., which was not yet in title but had a contract to buy the property from a Mr. Moy. There was a substantial difference in the two sale prices. Stevens learned that Moy was not even the owner. He signed a second contract with the real owners. He was sued by 1438 for intentional interference with contract and fraudulent conveyance. Stevens tendered his defense to the insurer. The insurer argued that Exclusions 3(a) and 3(b) precluded a duty to defend or indemnify. The court found both exclusions applicable:

The applicant must also disclose claims of ownership or other rights in the property of which the proposed insured obtains knowledge prior to closing.[263] The exclusion applied to negate liability for the failure of title when the insured had no contact with the owner and knew that he had left the vicinity years earlier, the land was not being taxed, he paid nominal consideration, and the deed was delivered "no questions asked."[264]

Kirwan v. Chicago Title Ins. Co.[265] is illustrative of the proposed insured's duty to disclose information suggesting a material risk to the insurer in the issuance of the policy. The insureds, the Kirwans, were found to have a duty to disclose an attorney's letter delivered before closing that claimed that a prior deed to the seller was invalid. The Kirwans argued that the claims made in the letter were too vague to require disclosure, calling it "a vague, threatening letter from a South Dakota lawyer claiming his client had an interest in the land." The court found that, no matter how the insureds might downplay the significance of the letter, the insurer was entitled to determine if the risk was material, and the failure to reveal it invoked the exclusion:

> The letter to the Kirwans was from an attorney and clearly asserted that the Vanderwerfs had either a right to the sale proceeds or an interest in title to the land. That is all the Kirwans needed to know in order to alert Chicago Title to this "adverse claim." Whether they believed it to be meritorious and serious is completely beside the point. Once the Kirwans got notice, they were dutybound to give notice to

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"[T]he words 'created ... by the insured claimant' generally have been defined to reflect conscious and deliberate or intentional conduct. … The allegations of the 1438 E Street complaint clearly specify intentional, conscious and deliberate conduct by Mr. Stevens. … Only by going outside the four corners of the complaint, and considering extrinsic evidence, is it possible to interpret the complaint in a manner favorable to Mr. Stevens. However, since the ordinary meaning of the words of the complaint show intentional and deliberate conduct on Mr. Stevens' part, extrinsic evidence is not permitted.

"With respect to Paragraph 3(b) of the policy exclusions, relating to matters 'not known to [United General], nor recorded in the public records at Date of Policy…,'the details of Mr. Stevens' efforts to acquire the 538 3rd Street, N.E. property are not recorded in the public records. The fact that there was information in the public records (specifically the deed of trust which secured the promissory note held by Mr. Moy and his wife) which, with additional investigation, would have enabled United General to reconstruct details about Mr. Stevens' acquisition of the Third Street property is irrelevant to the application of an unmodified 'eight corners' rule."

However, in *Cocco v. Hamilton*, 2010 WL 2011003 (N.J.Super.A.D.) (unpublished), the court found that an insurer that asked no questions about the rights of a contract purchaser and a filed lawsuit that the insured was excused from any duty to disclose information.

[263] *Ditmore v. Lochner*, 2005 WL 678180 (Mich.App.) (unpublished) (insured not protected against rights of neighbors to use property confirmed in court judgment that was not recorded but of which insured was alleged to have had knowledge).

[264] *Vaughn v. United States Title Guaranty & Indemnity Co.*, 137 App.Div. 623, 122 N.Y.S. 393 (1910). These facts led the court to the "irresistible" inference "that, when the plaintiff applied for the insurance, he had knowledge of all the facts upon which it was adjudicated in the condemnation proceedings that he did not have title." The insured only applied for insurance after he heard rumor that his deed was no good, and the village president told him "I don't think much of your title."

[265] 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001).

> Chicago Title, and since they failed to do so, the policy, which was issued and superseded the binder, excluded the Vanderwerfs' claim from coverage.

An insured lender's failure to disclose the borrower's poor financial condition will cause the exclusion to negate coverage if the borrower files for bankruptcy and the transaction is rescinded as a preference. Thus, in two cases, when the insured mortgage was set aside as a preference, the lender breached a duty to disclose the borrower's poor financial condition, because it had a material effect on the risk that the loan would be challenged as a preference.[266] Preference claims have also been found excluded under Exclusions 3(a) (see §11.2.6) and 3(d) (see §11.5). When the insured deed was set aside by a bankruptcy trustee because it was given three days after the seller filed bankruptcy, the insured breached its duty to inform the insurer of the seller's known financial difficulties.[267]

The applicant has a duty to disclose another party's opinion that title is defective, when that opinion has substance or is based on an examination of title. Thus, the insured was found to have voided coverage by concealing the fact that another title insurer had refused to insure the title, as well as that the refusal had been based on off-record information indicating that there was a strong likelihood of litigation over the title.[268] Also, when one title commitment disclosed the possibility that a prior deed was a fraudulent conveyance, the proposed insured was not excused from inquiry into the issue because a second title commitment did not raise it, and his failure to inquire erased his claim of bona fide purchaser status.[269] However, an attorney's opinion that a party might challenge the applicant's title was found to be a mere "premonition" of trouble that the applicant had no duty to disclose, since no actual claim of title had been pressed at time of application.[270] The applicant also

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[266] *Bank of San Diego v. Commonwealth Land Title Ins. Co.*, 283 Cal.Rptr. 1 (Cal.App. 4 Dist. 1991) (unpublished), previously published at 231 Cal.App.3d 1265 and withdrawn from publication; *First Nat'l Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, 171 Misc. 854, 12 N.Y.S.2d 703 (Sup. Ct. 1939).

[267] *National Heat & Power Corp. v. City Title Ins. Co.*, 57 App.Div.2d 611, 394 N.Y.S.2d 29 (1977). The court found a duty to defend, however, since the trustee was plainly attacking title.

[268] In *Commonwealth Land Title Ins. Co. v. IDC Properties, Inc.*, 524 F.Supp.2d 155 (D.R.I. 2007), the court said: "Michael Mellion, who made the decision to issue the Policy, testified that Commonwealth would not have issued the Policy if those facts had been known. He explained that, because the Policy required Commonwealth to defend against any claims challenging IDC's insured interests; and, because the policy premium of approximately $5,000 would have covered only a fraction of the cost of defending against litigation brought by the individual unit owners, Commonwealth would have declined to issue the Policy since it was not interested in 'buying a lawsuit.' That appears to be the decision that Chicago Title made in declining to issue a policy after learning of the threatened litigation.

"The evidence also shows that Commonwealth was unaware of the unit owners' threat of suit; the Tolling Agreement or the fact that the threat of suit was one of the reasons cited by Chicago Title for refusing to issue a policy. None of these facts were matters of public record and IDC did not disclose them.

* * * *

"… [T]he threat of litigation was real and it directly related to a risk covered by the Policy. Furthermore, the threat of litigation, alone, was material to Commonwealth's decision because Commonwealth did not want to 'buy a lawsuit' even if it had a good chance of prevailing."

[269] *City of Arkansas City v. Anderson*, 15 Kan.App.2d 174, 804 P.2d 1026 (1991).

[270] *Jesko v. American-First Title & Trust Co.*, 603 F.2d 815 (10th Cir. 1979).

was found not to have a duty to warn the insurer that another insurer has refused to issue a policy, when that refusal was not based on a fact that materially affected the risk.[271]

As stated above, the exclusion also applies to defects or title interests which attach or of which the applicant becomes aware after the title insurance order is placed but before the policy is issued. For example, the insurer had no duty to defend a suit brought by another buyer on an outstanding purchase contract which the applicant knew had not been terminated.[272] Similarly, in *Weir v. City Title Ins. Co.*,[273] the insured learned not later than two days after a request for policy was made that a significant portion of the insured property was claimed by a neighbor. The court found that the failure to disclose the risk negated coverage for it:

> In such circumstances it was the obligation of plaintiff and his attorney to forthwith bring the matter to the attention of and make full disclosure to defendant. The defect was manifestly material to the risk that plaintiff sought to have defendant undertake and fair dealing demanded no less. Instead, plaintiff and his attorney procrastinated for one month--whether to avoid arousing suspicion on the part of defendant of prior awareness of the defect by plaintiff and his attorney, or for some other reason, is not clear from the record. What is plain is that the delay in notification resulted in the issuance and delivery of the policy by defendant, without the slightest suspicion that the risk being assumed by it had been materially increased.[274]

When the insured seeks a new coverage after the policy is issued, the insured has a duty to disclose material facts that it has learned after the date of policy but before the new coverage was sought or bound, although Exclusion 3(b) is limited to the insured's knowledge obtained "prior to the date the Insured Claimant became an Insured under this policy."[275]

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[271] *Bush v. Coult*, 594 P.2d 865 (Utah 1979); *First American Title Ins. Co. v. Kessler*, 452 So.2d 35 (Fla.App. 1984).

[272] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980).

[273] 125 N.J.Super. 23, 308 A.2d 357 (App.Div. 1973).

[274] 308 A.2d at 361-2. In both *Weir* and *Collins*, the insured's attorney was also the insurer's approved attorney. As such, they personally certified to the insurer that title was clear when policies were requested. In each case, the court found these certifications to have been misrepresentations made by the insured's agent. A similar case is *Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 382 A.2d 933 (App.Div. 1978), in which the insured's attorney was aware of a very old title defect, and avoided its detection by the insurer by requesting a limited title search. In *Lucas*, the court again ruled that the attorney misrepresented and concealed as agent of the insured.

[275] In *1200 Ashland, LLC v. Lawyers Title Ins. Corp.*, 2010 WL 5481800 (N.D. Ill.) (unpublished), an insured sought and obtained a zoning endorsement two years after purchasing the property, but coverage was voided due to the insured's concealment of a new survey it obtained, after the policy was issued but shortly before the endorsement was requested, that showed that part of the property was not zoned as stated on the survey the lender and insurer saw at closing. Because the insured discovered the zoning issue after the policy date, the court did not rely on Exclusion 3(b), but rather based its ruling on 215 ILCS 5/154 of the Illinois Insurance Code and case law holding that "a misrepresentation in an application for insurance avoids a policy when it materially affects either the acceptance of the risk or the hazard assumed by a company." Likewise, in *Nourachi v. First American Title Ins. Co.*, 44 So.3d 602 (Fla.App. 5 Dist. 2010), the court

Finally, the applicant's duty to disclose is not limited to facts regarding valid adverse title claims. An owner of property who becomes aware of a competing claim of title may not then purchase a policy for the obvious purpose of having the insurer pay for the defense against the spurious claim of title, without disclosing the fact of the claim of title.[276]

11.3.5 Loan Fraud And Forgery

Both Exclusions 3(a) and 3(b) may also apply as to loan policies when the borrower commits forgery or fraud that renders the insured mortgage void or causes prior liens not to be paid off. The exclusion typically applies when the lender knew or should have known that a fraud was being perpetrated. In such cases, the insured may be deemed to have "created" or "suffered" the risk, or have had a duty to disclose its knowledge of off-record matters to the insurer under Exclusion 3(b). When the lender's own officers or agents participated in the fraud, their acts and knowledge are usually imputed to the lender, negating coverage.[277] When the lender's officers were secret partners in the borrower partnership, the lender and its successor were bound by the officers' knowledge that the mortgage was a second lien rather than a first as shown on the policy. The court held:

> Given the extensive involvement of the officers in arranging for the two mortgages, the undisputed evidence supports Ticor's position that [the lender's] officers intentionally "suffered, assumed, or agreed to" the first mortgage. Any other result would be inequitable here, because it would give [the lender] a windfall as a result of the fraudulent conduct of its agents, albeit unknown to it, at the expense here of an innocent insuring party.[278]

The court also found that Exclusion 3(b) applied.

Courts have divided as to coverage, however, when the lender did not participate in the fraud

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voided a policy and endorsement based on the insured's knowledge that he obtained after he bought the property, some of which he learned after the policy was issued. However, in *First American Title Ins. Co. v. Columbia Harbison LLC*, 2013 WL 1501702 (D.S.C.) (unpublished), in which the insured also sought and received an endorsement after the date of policy, and concealed from the insurer important facts about the risk for which it sought protection, the court said the exclusion did not require the insured to disclose the facts that it learned after the date of policy. The court refused to acknowledge that this narrow reading of the exclusion gives an insured permission to conceal material facts when seeking endorsement coverage after the date of policy, which the common law of fraudulent inducement to insure precludes.

[276] *Lesamiz v. Lawyers Title Ins. Corp.*, 51 Wash.2d 835, 322 P.2d 351 (1958).

[277] In *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012), the bank's closing agent and others stole the loan money and did not pay off existing creditors. The mortgage was void for want of consideration. The court held that, although no policy had been issued and none was owed, if it had been issued, Exclusion 3(a) would bar the lender's claim. The acts of the closer were imputed to the lender, and the lender "created" the defect in the mortgage. In *Sher v. Luxury Mortg. Corp.*, 2012 WL 5869303 (D.Md.) (unpublished), under very similar facts, the insurer asserted *Cole Taylor*, but the court did not reach the merits on the motion to dismiss.

[278] *National Credit Union Administration v. Ticor Title Ins. Co.*, 873 F.Supp. 718, 728 (D.Mass. 1995) (further discussed at §11.2.11).

but had reason to suspect it. In *Enterprise Timber Inc. v. Washington Title Ins. Co.*,[279] the lender's knowledge of its borrower's past forgeries, fraud conviction, NSF checks and various civil suits, all concerning timber sales, was found to give the lender a duty to inquire about the terms of the purchase of the timber land on which the insured mortgage was recorded. Its failure to either inquire or divulge its knowledge to the insurer meant that the policy did not cover the borrower's forgery of the deed to the property.

Similarly, in *Applefield v. Commercial Standard Insurance Company*,[280] the insured and his lawyer had sufficient knowledge that a borrower was perpetrating a fraud regarding prior liens not paid off to put them on a duty to inquire about the liens, rather than encourage the insurer to rely on fraudulent affidavits that the liens had been removed. Further, the insured had a duty to inquire further about the title agent's authority to issue policies free of the mortgages without examining title to verify that the liens had been removed. The court held:

> The master's finding that appellant did not 'consciously' participate in the fraud perpetrated upon appellant by The Theo. Rosengarten Co., Inc., and Gibraltar Title, Inc., does not operate to excuse appellant from the responsibilities devolving upon him in consequence of the fact, as the master found, that 'he was in a position to have discovered the fraud and was in possession of information sufficient to put him on inquiry which would have disclosed the fraud.'[281]

Therefore, the court upheld the master's conclusion that the insured's failure to disclose its knowledge "rendered the binders null and void." A later Florida decision rather broadly paraphrased *Applefield* as holding that there is no coverage under a title insurance policy as to "a condition which results from the fraud of the insured."[282] A third Florida case refused to deny coverage based on *Applefield*, however, when it found the lender to be more of a "white knight" than a co-conspirator, despite a strong dissent.[283]

Other courts have narrowly construed "knowledge" to mean that the lender must actually have known that a forgery had been committed in order for it to have a duty to disclose to the title insurer, not merely that it knew enough that a prudent person would have inquired further.[284] Such

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[279] 76 Wash.2d 479, 457 P.2d 600 (Wash. 1969). Courts have also applied the duty-to-inquire standard concerning parties in possession of the property. In general real estate law, a purchaser has inquiry notice of all parties in actual possession of the property. The purchaser has a duty to inquire further as to the nature and tenure of the party's rights in the property. Knowledge of possession sufficient to trigger the duty to inquire has been found to except the matter, under the parties in possession exception. See *Jupe v. City of Schertz*, 604 S.W.2d 405 (Tex.App. 1980).

[280] 176 So.2d 366 (Fla.App. 1965).

[281] 176 So.2d at 378.

[282] *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc*., 544 So.2d 1070 (Fla.App. 1989).

[283] *Rondinelli v. Safeco Title Ins. Co*., 544 So.2d 326 (Fla.App. 1989).

[284] *People's Building & Loan Co. v. Safeco Title Ins. Co.*, No. 10569, 1988 Ohio App. LEXIS 2782 (Ohio App. July 5, 1988) (unpublished); *Lawyers Title Ins. Corp. v. First Federal Savings Bank & Trust*, 744 F. Supp. 778 (E.D. Mich.

reasoning, however, creates a public policy concern, in that it encourages the lender to maintain willfully ignorance in the face of suspicious circumstances rather than to conduct ordinary due diligence in the making of the loan. This is a particular risk to the insurer when the lender closes the loan and assumes the responsibility of obtaining genuine signatures on the loan documents and insured mortgage.

In *People's Building & Loan Co. v. Safeco Title Ins. Co.*, the lender had made a series of bad loans based on very questionable and unorthodox collateral. The lender wished to convert its collateral into a piece of real estate. The loan officer impliedly invited the borrower to forge documents which the insurer then relied on to clear title. When the forgeries were discovered, the insurer pointed to the rather sordid history between the borrower and lender as evidence that the lender knew or should have known that the forgeries would take place. The court disagreed, stating that the insured would only have a duty to report a forgery which it actually witnessed.

In *Lawyers Title Ins. Corp. v. First Federal Savings Bank & Trust*, similarly, the borrower, Henry Ewald, initially asked for a loan with which to purchase a large office complex. While the loan application was being considered, Ewald announced that he had already bought the property with his own funds, but still wanted a loan for $6.5 million. Ewald then recorded a forged deed to his corporation, and forged discharges of the two mortgages on the property. The lender closed the Ewald loan without receiving a title insurance commitment. It made its check payable to Ewald, although the borrower and "owner" were Ewald's corporation.

The insurer argued that the insured lender knew or should have known that the borrower had forged documents putting himself in title. The court disagreed. It focused on the difference in language between the Michigan-form commitment and the ALTA policy. The commitment required disclosure of any "personal knowledge or intimation" of a title defect, which the court said "may well impose" the duty-to-inquire standard. However, the court found that the commitment language was merged into and superseded by the policy language, and therefore the more stringent "actual knowledge" standard applied. The court found that the lender had no actual knowledge of the forgeries, and thus Exclusion 3(b) did not apply. The merger provision of the policy is fully discussed at §6.2.

The problem with the *People's*/*First Federal* "actual knowledge" rule is that it rewards a lender for not performing due diligence in loan-making. The *People's* court admitted that the lender had everything to gain and nothing to lose if the borrower committed the forgery, since the bank was merely trying to recast an existing bad loan. The *First Federal* court explained its ruling on the need for certainty of coverage, saying: "In this area, more than perhaps any other, bright line rules are required to protect both the title insurance industry and those who depend on it."[285] However, neither the title industry nor lenders are protected by absolving lenders of the responsibility to follow prudent lending practices on large loans.

The imputed notice/actual knowledge distinction made in the *People's* and *First Federal* decisions work from the premise that inquiry notice is an extension of constructive notice rather than of actual knowledge. Inquiry notice is in a sense the middle ground between constructive notice and

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1990).

[285] 744 F. Supp. 778, 786 (E.D. Mich. 1990).

actual knowledge. As *Corpus Juris Secundum* states it:

> One kind of constructive notice is notice which results from a record or which is imputed by the recording statutes; and the other is notice which is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact.[286]

Thus, inquiry notice springs from knowledge, and is more properly considered a subset of knowledge than of notice. In *Mann v. Old Republic Nat'l Title Ins. Co.*,[287] an unrecorded easement was found binding on the insured based on inquiry notice. The court found the easement excepted from coverage under both Exclusion 3(b) and the inspection clause of the survey exception, because the insured had knowledge of facts which required him to investigate further:

> To avoid collateral estoppel, Mann attempts to create a distinction between the knowledge imputed to him in the federal court judgment, and knowledge as defined in the Old Republic title insurance policy. That policy defined knowledge as "actual knowledge, not constructive knowledge or notice which may be imputed to the insured by reason of any public records." (emphasis added) The policy also defines "public records" as "records which impart constructive notice of matters relating to the land." Actual notice exists when a person actually knows the facts charged to him, or should have known them if he had inquired about them, after learning of facts which put him on inquiry. ... Because the federal court judgment was not based on Mann's constructive knowledge imputed from public records, but rather on actual knowledge imputed to Mann for failure to make even a minimal investigation after learning facts which put him on inquiry, Mann's asserted distinction is untenable.[288]

In *First American Title Ins. Co. v. J.B. Ranch, Inc.*,[289] the insured asserted that inquiry notice should be considered equivalent to, or a subset of, constructive notice. The court refused to be confused: "inquiry notice arises from knowledge of certain facts and circumstances, not from records."[290]

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[286] 66 C.J.S. Notice § 6 (1950) (footnotes omitted) [quoted in *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 343 Utah Adv.Rep. 6, 966 P.2d 834 (Utah 1998)].

[287] 975 S.W.2d 347 (Tex.App.-Houston 14 Dist. 1998).

[288] Id. at fn. 4.

[289] 343 Utah Adv.Rep. 6, 966 P.2d 834 (1998).

[290] In *J.B. Ranch*, at issue was whether or not public roads disclosed only on road maps in the county clerk's office were excepted from coverage by an exception for " [e]asements, claims of easements or encumbrances which are not shown by the public records." The court found that "'coverage depends only on whether the easement is disclosed by those records which impart constructive notice under Utah law.'" This is so because the policy defines 'public records' as 'those records which by law impart **constructive** notice.' (Emphasis added.) Thus constructive notice must arise from the record itself in order for it to be a 'public record' as defined in the policy. We conclude that inquiry notice does not arise

In *International Charter Mortgage Corp. v. Commonwealth Land Title Ins. Co.*,[291] a similarly rigorous definition of knowledge was applied against the insurer. In that case, a loan assignee did not disclose that the maker of the loans was the subject of a HUD loan fraud investigation. The court decided that the loan fraud investigation was not connected closely enough to the possibility of a title defect to obligate the insured to tell the insurer, even though the loan maker forged releases of prior mortgages.

American Title Ins. Co. v. East West Financial[292] was decided on Exclusion 3(a), but is sufficiently similar to be discussed here. In *East West*, a condominium developer's attorney, Marderosian, was also the insurer's agent on a block of condominium unit loans. The project had existing financing and the developer was unable to obtain partial releases of units. It had to sell a number of the units to collect enough money to pay off the liens in full. Thus, Marderosian closed the sales of a large block of units, including new loans by East West Financial to the unit owners. Marderosian sent policies which omitted the existing mortgages. East West sold the loans to Bay Loan. When the policies and loan documents were received by Bay Loan, it funded the loans on the understanding that Marderosian would pay off the existing mortgages. However, Marderosian funneled the payoff money to the developer and the mortgages were not removed. The insurer argued that Bay Loan's claim was excluded because it knew of and permitted several highly unusual practices, including the facts given above. The court disagreed, finding simply that "[t]he continued existence of the prior mortgages was unintended by Bay Loan."[293] Thus, the exclusion did not apply.

GreenPoint Mortgage Funding Inc. v. Stewart Title Ins. Co.[294] was also decided under Exclusions 3(a), but concerned the insurer's claim that the lender's careless lending practices should preclude coverage for the title defect that resulted. In that case, Royal Mortgage Bankers, which made a loan to its owner, Louis Crispino. Royal sold the loan to GreenPoint Mortgage. After Crispino died, his wife sued to set aside the mortgage because Crispino had forged her signature. The insurer accused Royal of sloppy lending practices and sought to impute Crispino's acts to Royal, and asserted Royal's negligence as a defense to GreenPoint under the policy's successor-insured provision. Stewart argued that the lender's negligence "enabled the fraud to be committed." Stewart asserted that, in lieu of actual knowledge, GreenPoint "should have known that there was a problem at closing for various reasons." Stewart listed a number of facts in support of its argument, including that a GreenPoint loan underwriter had originally instructed that Mrs. Crispino sign the mortgage at closing. GreenPoint responded that there was no evidence that it had agreed to the forgery, took part in it, or knew about it. The court sided with the lender, citing *First Federal*:

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from records, and therefore, is not included in the policy's definition of public records." Based, in turn, on this conclusion, the court ruled that the road maps were not public records, and the exception applied.

[291] 538 F.Supp. 1154 (D.P.R. 1982).

[292] 16 F.3d 449 (1st Cir. 1994).

[293] Id. at 456.

[294] 12 Misc.3d 1194(A), 2006 WL 2337967, 2006 N.Y. Slip Op. 51568 (N.Y.Sup. 2006) (unpublished).

> On this record, there can be no doubt that it was the conduct of title closer, Barry Rosen, in failing to verify the authenticity of the signature of Linda Crispino at the closing, that enabled the fraud to be committed. … Overall, the Court finds that Stewart was paid to insure against any defect in title, not to second guess the wisdom of making the loan (see, Lawyers Title Ins. Corp. v. First Federal Sav. Bank & Trust, 744 F.Supp. 778 [E.D.Mich.1990]), as it has on this record. Stewart's title policy insured against the possibility of defects in the title held by Louis Crispino, and now it must make good on its promise.

Stewart also claimed that GreenPoint should be charged with the knowledge of Royal because it was GreenPoint's agent. The court found that no agency existed. It concluded:

> Accordingly, Stewart has failed to raise a triable issue of fact as to why GreenPoint is not a "purchaser for value and without knowledge" such as to fall within the definition of an insured in Stewart's title policy.

In a later decision, however, the *GreenPoint* court held that there were triable questions of fact as to whether or not the acts of the closing attorney should be imputed to GreenPoint.[295] The first *GreenPoint* decision was relied on by another court which held that a lender did not assume the risk of prior liens by taking an assignment of the loan.[296]

A Florida decision found on summary judgment, without further comment, that "there was no basis to sustain ... the defense[] ... that the plaintiff [lender] had 'assumed or agreed to' the defect" of a forged mortgage.[297]

11.3.6 Recorded Matters

Exclusion 3(b) states that it applies only to matters "not shown by the public records." Thus, a matter is not excluded under 3(b) based solely on evidence that the insured knew of a recorded matter not disclosed in the policy.[298] Nonetheless, an insured's deliberate decision not to disclose a

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[295] 49 A.D.3d 687, 854 N.Y.S.2d 185, 2008 N.Y. Slip Op. 02552 (N.Y.A.D. 2 Dept. 2008).

[296] *U.S. Bank, N.A. v. Stewart Title Ins. Co.*, 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007).

[297] *Personal Finance Co. v. Commonwealth Land Title Ins. Co.*, 678 So.2d 463 (Fla.App. 3 Dist. 1996).

[298] *Bourland v. Title Ins. Co. of Minn.*, 4 Ark.App. 68, 627 S.W.2d 567 (1982); *Cameron v. Benson*, 57 Or.App. 169, 643 P.2d 1360 (1982), rev'd on other grounds, 295 Or. 98, 664 P.2d 412 (1983); *Empire Development Co. v. Title Guarantee & Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918); *First Carolinas Joint Stock Land Bank v. New York Title & Mortgage Co.*, 172 S.C. 435, 174 S.E. 402 (1934); *Foremost Construction Co. v. Killam*, 399 S.W.2d 593 (Mo.App. 1966); *Glickman v. Home Title Guaranty Co.*, 8 Misc.2d 303, 167 N.Y.S.2d 793 (1957); 15 Misc.2d 167, 178 N.Y.S.2d 281 (Sup.Ct. 1958), aff'd 8 A.D.2d 629, 185 N.Y.S.2d 756 (Sup.Ct.App.Div. 1959); *Lipinski v. Title Ins. Co.*, 202 Mont. 1, 655 P.2d 970 (1982); *Maggio v. Abstract Title & Mortgage Corp.*, 277 App. Div. 940, 98 N.Y.S.2d 1011 (1950); *Marandino v. Lawyers Title Ins. Corp.*, 156 Va. 696, 159 S.E. 181 (1931); *McLoughlin v. Bridgeport Land & Title Co.*, 99 Conn. 134, 121 A. 175 (Conn. 1923); *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953); *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 52 N.Y.2d 179, 437 N.Y.S.2d 57, 418 N.E.2d 650, 17 A.L.R. 4th 1067 (1981); subsequent appeal, 97 App.Div.2d 208, 469 N.Y.S.2d 415 (2nd Dep't 1983);

matter in the public records, and which the insured knows has not been discovered by the insurer, borders on fraud in the inducement. See §11.3.3 for a complete discussion of concealment or silence that voids policy coverage. The insured may not obtain coverage by precluding the insurer from making an informed decision to accept a risk.[299]

Also, the exclusion applies to documents that are recorded, but which fail to impart constructive notice. This is because the exclusion uses the phrase "public records," and the policy limits public records to those that impart constructive notice under state law. In *Manchester Fund, Ltd. v. First American Title Ins. Co.*,[300] counsel for the proposed insured became aware of a lis pendens before closing giving notice of an action by the United States to enforce a forfeiture of the property. The attorney "chose not to advise the insurance company of this critical information" because he read the exclusion to mean that the policy would cover the insured even if it did not disclose. The lis pendens had not been discovered by the title insurer because it was misindexed. When coverage was contested, the insurer argued both that the insured had fraudulently concealed, and that the misindexed document was not in the public records.

The *Manchester* court decided that the insured's silence was not misrepresentation. It found that disclosure "was not required," and the withholding of the information was not done in bad faith. Other courts would disagree.[301] Nonetheless, the *Manchester* court concluded that the defect was excluded from coverage precisely because it was not discoverable in the public records:

> this court finds that the grantor-grantee indices are part of the public record. Furthermore, since the Notice of Lis Pendens was mis-indexed, the Court finds that the Notice of Lis Pendens was not part of the public records for purposes of providing constructive notice under the Recording Act. Nor does the mis-indexed Notice qualify as a "Public Record" as defined in the AGREEMENT TO ISSUE POLICY provided to Manchester Fund... .[302]

Nor does a physical feature of the land, or a man-made improvement, necessarily indicate to an insured that a record title interest exists.[303] For example, awareness of an irrigation ditch was

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J.H. Trisdale, Inc. v. Shasta County Title Co., 146 Cal.App.2d 831, 304 P.2d 832 (Cal.App. 3 Dist. 1956); *Archambo v. Lawyers Title Ins. Corp.*, 646 N.W.2d 170 (Mich. 2002) (insured was aware of IRS lien against him, but thought it had expired; because it was recorded, exclusion did not apply; court thus instructed insurer to pay insured's tax debt).

[299] *Kirwan v. Chicago Title Ins. Co.*, 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001).

[300] 332 N.J.Super. 336, 753 A.2d 740 (1999).

[301] See *Kirwan v. Chicago Title Ins. Co.*, 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000) and the case cited by the insurer in *Manchester*, *Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 N.J.Super. 332, 382 A.2d 933 (App.Div. 1978), aff'd o.b., 78 N.J. 320, 394 A.2d 360 (1978).

[302] 753 A.2d at 744.

[303] A related subject is matters disclosed by an inspection of the premises. Under that exception, there is also a series of cases holding that notice by inspection does not negate liability for recorded encumbrances. See §11.2.4. In *Jupe v.*

found not to be knowledge of a ditch easement.[304] The fact that the applicant saw two signs on the insured property was not knowledge that the land on which the signs were placed was not owned by the seller.[305] A fence dispute between the insureds and their neighbors before the insureds sought insurance was not knowledge of a record overlap.[306] Knowledge of a utility line along the boundary line of the property did not give notice that there was an easement inside the property.[307]

A proposed insured's knowledge of a record title defect may, however, be a factor in considering whether or not another exclusion or exception applies. For example, when the buyer had seen a paved road on the insured property, inspected a survey showing the road, and reviewed a title commitment excepting the roadway, the insurer was not liable to the insured.[308] The insured's knowledge was not a defense in itself, but evidence that the insured "agreed to" the encumbrance and suffered no loss because of its existence:

> We are satisfied [the insureds] understood that Sangamore Road occupies a part of the lot, that this made no difference to them since they were getting precisely what they saw when they inspected the property, that they freely elected to complete the transaction and that this step was taken with the knowledge and advice of counsel.[309]

The insured's knowledge of the matter may also bolster a reference in Schedule B that would otherwise be too oblique to properly except the defect.[310] Similarly, the insured's knowledge of tax assessments negated the insured's claim that it had been induced to purchase by the policy's lack of exception for same. The court found the assessments excluded based on Exclusion 3(d), for matters after the policy date.[311]

City of Schertz, 604 S.W.2d 405 (Tex.App. San Antonio 1980), writ ref n.r.e. Dec 17, 1980 (Tex.App. San Antonio 1980), the policy characterized the adjacent street as an easement. However, the insureds were aware before they purchased that the road was being used by the public. This knowledge was found to create a duty to inquire, which would have disclosed that the roadway was public. The matter was thus excepted by the parties in possession exception. See §12.2 for further cases regarding that exception.

[304] *Lipinski v. Title Ins. Co.*, 202 Mont. 1, 655 P.2d 970 (1982).

[305] *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975).

[306] *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976).

[307] *McDaniel v. Lawyers' Title Guar. Fund*, 327 So.2d 852 (Fla.App. 1976).

[308] *Malkin v. Realty Title Ins. Co., Inc*., 244 Md. 112, 223 A.2d 155 (1966).

[309] Id. at 158. To the same effect is *Luboff v. Security Title & Guaranty Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965).

[310] "It should be pointed out that the third-party action is resolved basically upon Tomgil's knowledge and awareness of the easement question. This scienter coupled with the title policy exception as to easements is sufficient." *Sullivan v. Tomgil Building Corp.*, 46 Misc.2d 613, 260 N.Y.S.2d 465, 467-8 (Sup. Ct. 1965).

[311] *Luboff v. Security Title & Guaranty Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965).

Exclusion 3(b) does not typically apply to knowledge of a title matter as imparted by an exception in the policy. Thus, a Schedule B exception for an ordinance may have informed the insured that some of the land described in Schedule A was not owned by him, but the insurer had equal knowledge of the excepted instrument, and the exclusion did not apply.[312] The adequacy of notice given by exceptions to title is discussed at §12.7.1.

11.3.7 Effect Of Alleged Knowledge On Duty To Defend

No general rules may be stated as to the effect of an insured's prior knowledge on the insurer's duty to defend, since that duty always turns on the particular facts pled. However, if all theories of recovery against the insured depend on an allegation that the insured had actual knowledge of the title defect, the exclusion may negate a duty to defend the insured. Courts have found that the insurer is not required to defend an insured against claims of fraud,[313] that the insured was not a bona fide purchaser for value, [314] or that the insured was aware of an off-record title encumbrance as of the policy date. [315] See Chapter 4 for a discussion of the duty to defend.

An allegation in a lawsuit that the insured knew or should have known of the adverse claim of title, as opposed to a categorical allegation that the insured had actual knowledge before the policy date, will ordinarily not invoke Exclusion 3(b).[316] The exclusion also does not negate a duty to defend when the insured is alleged to be bound by the effect of a matter that imparted constructive notice.[317]

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[312] See *Marandino v. Lawyers' Title Ins. Corp.*, 156 Va. 696, 159 S.E. 181 (1931).

[313] See *Ginger v. American Title Ins. Co.*, 29 Mich.App. 279, 185 N.W.2d 54 (1970).

[314] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980). In *Hauck Holdings Columbia SC, LLC v. Target Corp.*, 2010 WL 1258103 (S.D. Ohio) (unpublished), the court said there was no duty to defend or indemnify the insured as to a supplement to a declaration of restrictions, because it was unrecorded and thus not effective, by law and by the terms of the original declaration. The court said the supplement could only be enforced against the insured if the plaintiff alleged and proved actual knowledge of the document, which would invoke Exclusion 3(b). It thus rejected the insured's assertion that the insurer should have to defend the action, because the complaint did not invoke a covered risk and would have to invoke an exclusion to succeed. In *Fogg v. Fidelity Nat'l Title Ins. Co*., 89 A.3d 510 (D.C.App. 2014), the court found, based on Exclusion 3(b), that the insurer had no duty to defend an insured owner sued by a lender who alleged that the insured knew about the lender's unrecorded lien.

[315] *Ditmore v. Lochner*, 2005 WL 678180 (Mich.App.) (unpublished) (no duty to defend against claim by neighbor to use property based on old court judgment of which insured was alleged to have had knowledge but which was not in the public records).

[316] In *Sims v. Sperry*, 835 P.2d 565 (Colo.App. 1992), the court held that the insurer had a duty to defend the insured when the plaintiff alleged that the insured "knew or should have known" that his deed was defective or had been procured by fraud.

[317] In *National Heat & Power Corp. v. City Title Ins. Co*., 57 App.Div.2d 611, 394 N.Y.S.2d 29 (1977), the court held that Exclusion 3(b) did not negate the duty to defend the insured whose title was attacked by a bankruptcy trustee in an adversary alleging that the deed was void as a post-petition transfer. That claim was not based on an allegation that the insured had actual knowledge of the filing of the petition, but rather that the Bankruptcy Code imposes constructive notice of the filing of a petition on all persons who deal with the debtor.

11.4 No Loss Suffered

Exclusion 3(c) of the standard ALTA policies removes coverage as to matters for which the insured has not suffered a loss. This exclusion restates the basic premise that, with a policy of indemnity, the insured must prove both that a covered risk has been invoked and that he or she has suffered actual monetary loss or damage.[318] By asserting the "no loss" exclusion, the insurer does not assume the duty to prove that no loss has occurred, and thus relieve the insured of the burden to prove the loss. Rather,

> Exclusion 3(c) is ... nothing more than the flip side of [insurer's] primary obligation under the contract: to compensate [insured] for any "loss or damage by reason of loss of priority." Thus, [insured] bears the burden of proving its loss by establishing that the value of the project exceeded the obligations under the first two deeds of trust.[319]

The various contexts in which the exclusion has been applied are discussed below.

11.4.1 Liens And Encumbrances

FORM 40, Appendix A
No loss
FORM 89, Appendix A
Tortious interference with property rights

If the policy fails to except a lien or encumbrance, the insured must establish that he or she has suffered actual monetary loss or damage due to its existence in order to receive an indemnity payment from the insurer. In some situations, there is an identifiable and covered lien or encumbrance on title that does not cause a loss, most typically because it does not reduce the value of the property.[320]

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[318] Exclusion 3(c) of the 2006 ALTA policies states that the policy does not indemnify against "[d]efects, liens, encumbrances, adverse claims, or other matters … (c) resulting in no loss or damage to the Insured Claimant… ."

[319] *Marble Bank v. Commonwealth Land Title Ins. Co*., 914 F.Supp. 1252, 1254 (E.D.N.C. 1996).

[320] *Commonwealth Land Title Ins. Co. v. Nelson,* 889 S.W.2d 312 (Tex.App.-Houston 1994) (insured suffered no loss because it held valid first lien as insured): *Ky v. GOB Construction, Inc*., 136 So.3d 1020 (Table), 2014 WL 1717454 (La.App. 3 Cir.) (unpublished) (fact that insured's house encroached slightly into setback line imposed by private restrictions and zoning code had not caused him to suffer loss; lawsuit demanding that insurer indemnify was properly dismissed); *Stewart Title Guar. Co. v. McClain,* 2016 WL 1436613 (Penn.Super. 2016) (unpublished), reargument denied June 16, 2016, 145 A.3d 777 (Table) (insured owners did not suffer a loss due to lender's action to reform its mortgage to grant a lien on an additional parcel owned by the insureds and mistakenly omitted); *Osprey Landing, LLC v. First American Title Ins. Co*., 157 A.3d 247, 2017 ME 46 (Maine 2017) (affidavit claiming that members of public might have easement across property did not diminish value of property); *Chesapeake Land Development Company LLC v. Chicago Title Ins. Co*., 2017 WL 5930295 (W.D.Okla.) (unpublished) (insured had proven no loss caused by possible implied easement for jogging path, not a recorded grant and not formally asserted by city, so claim dismissed); First

Exclusions

When an insured purchases the property with knowledge of and subject to the encumbrance, he or she is deemed to have set the purchase price after factoring in the effect on value of the encumbrance; the insurer's failure to except the encumbrance in the policy does not cause the insured to suffer a loss.[321] However, when an insured purchaser knew of the encumbrance, but believed that it was unenforceable, the fact that he did not reduce the purchase price due to the encumbrance did not invoke the exclusion.[322] An insured owner suffers no loss due to the existence of a mortgage that the lender has failed to release, despite its obligation to do so after receiving payment in full.[323]

In most cases, an insured owner establishes actual monetary loss due to an unexcepted encumbrance by proving that it decreases the value of the property.[324] Encumbrances such as restrictive covenants frequently benefit the property as much as they burden it. As a result, the insured is often unable to establish that a restrictive covenant reduces the value of the land, and the no-loss exclusion is applicable.[325] Also, there may be no diminution in value due to a recorded restriction, if the use prohibited by the restriction would also be barred by a zoning or building ordinance.[326]

Bank Texas, SSB v. W.D. Welch, P.C., 2017 WL 2443132 (Tex.App.-Dallas) (unpublished) (lender insured whose deed of trust had priority over tax lien by equitable subrogation suffered no loss payable under policy; insurer not required to reimburse lender payment it made to buy subordination of lien).

[321] In *Cavil v. Trendmaker Homes, Inc.*, 2012 WL 32377 (S.D.Tex.) (unpublished), the insured's purchase contract stated that the mineral rights had been reserved, as did the title insurance commitment. The policy failed to except the mineral reservation. The court found that the insured had not suffered a loss due to the mineral reservation.

[322] *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (Fla.App. 1979).

[323] *Wells Fargo Bank, N.A. v. Bowman*, 2012 WL 474167, 2012 -Ohio- 576 (Ohio App. 5 Dist.) (unpublished).

[324] *Sala v. Security Title Ins. & Guarantee Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (Cal.App. 2 Dist. 1938); *Metropolitan Title Guarantee Co. v. Gildenhorn*, 102 App. D.C. 28, 249 F.2d 933 (D.C. Cir. 1957). In *Security Union Title Ins. Co. v. RC Acres, Inc*., 269 Ga.App. 359, 604 S.E.2d 547 (Ga.App. 2004), recon.den. (Aug 31, 2004), cert.den. (Nov 22, 2004), a flowage easement encumbered the property. The Rives Corporation had a survey recorded for its property, which it then conveyed to Helen Liggett, describing the property by reference to the survey. The survey was revised shortly before the sale to show the flowage easement. Liggett conveyed immediately to RC Acres, a company owned by Liggett's son, again using a description referencing the survey. Safeco Title insured RC Acres, and the policy description also referred to the survey. However, no exception for the easement appeared on Schedule B. RC Acres submitted a claim seventeen years later. The appeals court found that there was no loss, because the purchase price reflected the value of the property subject to the easement. In *Old Republic Nat'l Title Ins. Co. v. Minnesota Office Plaza, LLC*, 2010 WL 155175 (Minn.App.) (unpublished), the fact that an access easement had been terminated before the insured purchased caused the insured no loss when it already had superior access, the terminated easement path ran through the middle of a large Target store, and the insured paid nothing extra for the benefit of the easement.

[325] In *Nastasi v. County of Suffolk*, 106 A.D.3d 1064, 966 N.Y.S.2d 172 (N.Y.A.D. 2 Dept. 2013), the court held that the insurer had established a prima facie case that the insured did not suffer a loss due to an agreement about a beach area and, in fact, the agreement "resulted in a benefit to the plaintiffs and added significant value to their property due to the government's maintenance and nourishment of the beach." Because the insureds filed an opposing affidavit, the court said there was a question of fact that required a trial.

[326] In *Gibbs v. Williams*, 2015 WL 5440628 (W.D.Wis. 2015) (unpublished), the court held that an attorney for the insureds did not commit malpractice by failing to submit a claim notice to the insurer concerning a recorded use

An insured lender must also establish that the title defect, lien or encumbrance caused it to suffer a loss. An insured lender must prove both a diminution in the value of its security in the real estate due to the encumbrance, and that the encumbrance has caused it to recover less money from the borrower than it would have if the encumbrance had not existed.[327] This subject is fully discussed at §3.2.4.1.

Also, the insured suffers no loss as to certain types of defects unless the adverse party takes some action to enforce its rights. Thus, the fact that a wall "bulged out" onto the adjacent street did not result in loss, when the municipality had taken no action as a result.[328] When the asserted lien was a judgment in favor of the same party who claimed to be an assignee of the policy, the party sustained no compensable loss.[329]

When a defect is discovered as the property is being sold, a change in the sale price as a result of the title matter can establish the amount of a loss. Conversely, the lack of a reduction in sale price can invoke the exclusion. Thus, when a sale price was not reduced after a title defect was discovered, the insured did not suffer a loss.[330]

When the policy omits a senior lien, unlike an encumbrance, the measure of loss is typically the amount of that lien.[331] Two cases, *Blessing v. American Title & Ins. Co.*[332] and *Atlanta Title &*

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restriction prohibiting use of the property for a business, because a county zoning ordinance also prohibited the property's use as a resort. The court held that, because the policy included Exclusion 1, the insureds "could not recover under the title policy."

[327] The lender suffered no loss as a result of the fact that the property was not owned by the mortgagor, when the lender had not parted with any of the loan funds, in *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C.App. 444, 181 S.E.2d 799 (1971). The insured lender did not prove a loss due to a prior encumbrance when it received payment from the borrower of all the money the borrower had to give, and then voluntarily released its deed of trust, with no discount in payment attributable to the prior lien. *Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc*., 347 S.W.3d 582 (Mo.App. S.D. 2011). In *Associated Bank, N.A. v. Stewart Title Guar. Co*., 881 F.Supp.2d 1058 (D.Minn. 2012), a bank that received from the borrower as a settlement more than the value of the insured parcel on the date of the settlement did not suffer a loss due to the alleged defect in title. In *Twin Cities Metro-Certified Development Co. v. Stewart Title Guar. Co*., 868 N.W.2d 713 (Minn.App. 2015), the court held that, in order for an insured junior mortgagee to be entitled to be reimbursed by the insurer for mechanics' liens it had paid off, the lender was required to prove that the property had a value greater than the first mortgage excepted in the policy. If it did not, the mechanics' liens could not have caused a loss to the insured because the insured mortgage did not attach to any equity in the property.

[328] *Kenrich Properties, Inc. v. City Title Ins. Co.*, 25 App.Div.2d 520, 267 N.Y.S.2d 258 (1966).

[329] *Ruby Drilling Co. v. Title Guaranty Co. of Wyoming*, 750 P.2d 674 (Wyo. 1988). The court declined to rule on whether or not a policy may be assigned, since it found no loss payable.

[330] *Second Benton Harbor v. St. Paul Title Ins. Corp.*, 126 Mich.App. 580, 337 N.W.2d 585 (1983); *Youngblood v. Lawyers Title Ins. Corp*., 923 F.2d 161 (11th Cir. 1991).

[331] This subject is fully discussed in §3.2.3.1. One anomalous case is *Ferrell v. Inter-County Title Guaranty & Mortgage Co.*, 213 So.2d 518 (Fla.App. 1968). In that case, a court imposed an equitable lien superior to the insured mortgage. Separately, the insured mortgage had been defectively executed. All parties, including the court, agreed that the equitable lien was not covered by the policy, apparently because it was imposed post-policy. The insurer argued that the equitable lien was the source of the insured's loss, not the defective execution of the insured mortgage. The court disagreed, holding that "[h]ad the second mortgage not been defective, the appellants would still have had an interest in the property despite the fact that the first mortgagee possessed an equitable lien on the property."

Trust Co. v. Allied Mortgage Co.,[333] held that the insured was required to prove harm due to the existence of the lien. The *Blessing* case has since been criticized and overturned, at least in part.[334]

The "no loss" defense may be negated by a finding that the insurer had a special, extra-contractual duty to disclose all title matters.[335] The exclusion was specifically held not to apply to construction liens when such liens were otherwise protected against, even though the lender had failed to pay out available and committed loan funds to remove the liens.[336] In another case, the insurer argued that the insured did not suffer a loss because of an omitted judgment because it was insolvent and thus "uncollectible." The insurer made its argument not to the insured but the judgment creditor directly, which sought to collect from the insurer. The court rejected the argument, based on a statute which permitted attachment of insurance proceeds directly without proof that the insured has paid anything to the claimant.[337]

In California, when a lender makes a full credit bid for the property on foreclosure, the debt is considered satisfied.[338] Except in the rare circumstance in which the insurer-escrowee participates in a fraud against the insured,[339] if the lender obtains title free of defects, the full credit bid also operates to extinguish any policy claim. See §7.9 on the subject of a full credit bid as a payment that terminates a loan policy.

The holder of a mortgage does not suffer a loss if the debt is repaid, whether by the borrower, a guarantor or a third party. If the loan is not fully repaid, any loss is limited to the principal debt minus payments.[340] In this context, the no-loss exclusion is an extension of Conditions & Stipulations 9(c) of the 1992 ALTA Loan Policy, which states that full payment of the debt terminates all liability under the policy. Thus, a senior lien caused the insured mortgagee no loss when the insured received payments from the borrower, FSLIC and a loan assignee. Together, the payments totaled more than either the policy amount or the value of the property.[341]

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[332] 121 So.2d 455 (Fla.App. 1960).

[333] 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940).

[334] *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981).

[335] *Summonte v. First American Title Ins. Co.*, 180 N.J.Super. 605, 436 A.2d 110 (1981), aff'd 184 N.J.Super. 96, 445 A.2d 409 (1981); *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975); *Caravan Products Co. v. Ritchie*, 55 N.J. 71, 259 A.2d 223 (N.J. 1969); and *Burks v. Louisville Title Ins. Co.*, 95 Ohio App. 509, 121 N.E.2d 94 (1953).

[336] *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840 F.Supp. 522, 531 (W.D. Tenn. 1993).

[337] *Griffith v. Safeco Title Ins. Co.*, 812 P.2d 420 (Or.App. 1991).

[338] *Cornelison v. Kornbluth*, 15 Cal.3d 590, 125 Cal.Rptr. 557, 542 P.2d 981 (1975).

[339] See *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 44 Cal.Rptr. 352, 900 P.2d 601 (1995).

[340] See §3.2.4.4 for a discussion of the policy provisions regarding reduction in policy amount on repayment of debt as part of the formula for determining a loan policy loss.

[341] *The Cadle Co. v. Stewart Title Guar. Co.*, 1999 WL 623464 (6th Cir. Ohio) (unpublished); affirming D.C. decision

11.4.2 Land Insured By Mistake

FORM 21, Appendix A
Land erroneously included in policy and deed

The insured suffers no loss when the policy erroneously includes property that the insured did not contract to purchase.[342] For example, in *Cohen v. Security Title & Guar. Co.*,[343] the deed and policy description included land that the insured had never intended to purchase. The court held that the insured "had suffered no compensable loss." Similarly, when the insureds bought a townhome with garage but their parcel also included the land on which their neighbor's garage sat, the insureds would not suffer a loss by conveying the neighbors' garage to them, because the insureds would still own exactly what they thought they had bought.[344]

Reformation is the most common remedy when the policy includes a parcel in Schedule A that was conveyed to the insured by mutual mistake. See §8.4 concerning reformation of the policy to remove a parcel conveyed to the insured by mutual mistake, and §8.3 for a discussion of claims in which the insured later claims that it expected to obtain title to land not conveyed to it and that was not insured in the policy. Both the no-loss exclusion and Exclusion 3(a) support an insurer's request to reform the policy to exclude a parcel conveyed to the insured by mutual mistake, although such an action does not depend on the existence of an exclusion. Exclusion 3(a) and reformation are discussed at §11.2.3.

The no-loss exclusion does not apply if the policy includes land that the insured believed it was purchasing and for which it paid money, but the seller contends that it did not intend to sell that land.[345] The insured must establish that it believed it was buying the land, believed the seller owned it, and parted with consideration for the property. One court cited the following passage from C.J.S.:

> a present owner who insures his own title, which subsequently proves to be defective, although in fact he has lost nothing because he never did have the interest

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11/13/97 (unpublished).

[342] *Aja v. Appleton*, 86 Nev. 639, P.2d 524 (1970); *Booth v. New Jersey Highway Authority*, 60 N.J.Super. 534, 159 A.2d 460 (1960). In *Demetrio v. Stewart Title Ins. Co*., 124 A.D.3d 824, 3 N.Y.S.3d 75 (N.Y.A.D. 2 Dept. 2015), app.den. 25 N.Y.3d 906 (May 12, 2015), when the policy described the insured property as one lot, but incorporated by reference a metes and bounds description that encompassed seven lots, the policy insured only the one lot that the insured purchased, and the insured suffered no loss due to the "loss" of the land for which it paid nothing.

[343] 212 Conn. 436, 562 A.2d 510 (Conn. 1989).

[344] *Jordshaugen v. Port Ludlow Associates, LLC*, 149 Wash.App. 1066, 2009 WL 1133450 (Wash.App. Div. 2) (unpublished). The court concluded: "[s]imply stated, the Jordshaugens' suffered no loss or damage to the property they believed they were purchasing."

[345] *Kentucky Title Co. v. Hail*, 219 Ky. 256, 292 S.W. 817 (App. 1927); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975); *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976).

> he supposed he had, may recover for the loss of what he supposedly had ... .[346]

Another oft-cited case on this issue is *Empire Development Co. v. Title Guarantee & Trust Co.*:

> … the existence and lien of these assessments has been declared. Because under their contract the plaintiffs are compelled to pay them their loss is no less. … Failure to keep what a man has or thinks he has is a loss. What the word means is to be measured by the standard accepted between the parties. … To say that when a defect subsequently develops he has lost nothing and, therefore, can recover nothing, is to misinterpret the intention both of the insured and the insurer.[347]

Thus, in *Cohen* and similar cases, the insured was found not to have suffered a loss because he paid nothing for it. In the cases that found the exclusion did not apply, the insured paid for the land and would suffer a loss by not receiving uncontested title to the land.

11.4.3 Negligible Title Defect Causing No Loss Or Damage

The insured does not suffer a loss because of title "defects" which are purely technical only, or that do not represent valid or enforceable encumbrances or liens.[348] In *Sattler v. Philadelphia Title Ins. Co.*,[349] a judgment and lawsuit were omitted from the policy, but the insurer obtained a release of the judgment and settled the suit. The court held that the insured suffered no loss because the encumbrances were invalid and had been removed. In *Graham v. Lawyers Title Ins. Corp.*,[350] the insured's loan application was rejected because of a purported defect that did not actually exist. The court held that title was not unmarketable and there was no loss. Similarly, in *American Savings &*

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[346] 529 S.W.2d 1, 3. However, in *Knispel v. Transnation Title Ins. Co.*, 2012 WL 5334083 (Cal.App. 2 Dist.) (unpublished), the seller did not own one of the many parcels it contracted to sell. The court held that, because the insured did not obtain an insurable interest in the one parcel, the policy was void. The court said "if Golden Gate never had an actual right, contractual or otherwise, to the Knox parcel, then Golden Gate never held an insurable interest in that parcel, and the title insurance policy was void insofar as it purported to apply to that parcel."

[347] 225 N.Y. 53, 121 N.E. 468, 470 (1918). This passage from *Empire* was quoted with approval in *Glickman v. Home Title Guaranty Co.*, 8 Misc.2d 303, 167 N.Y.S.2d 793 (1957); 15 Misc.2d 167, 178 N.Y.S.2d 281 (Sup. 1958), aff'd 8 A.D.2d 629, 185 N.Y.S.2d 756 (Sup.Ct.App.Div. 1959).

[348] For example, when a member of an LLC sold its property by wrongly claiming to be the managing member, but the LLC ratified the sale after taking an assignment of the buyer's claim against its title insurance policy, title was not defective and there was no loss payable. *Reflection Townhomes, LLC v. First American Title Ins. Co.*, 2010 WL 445521 (Ariz.App. Div. 1) (unpublished). In *Ky v. GOB Construction, Inc.*, 136 So.3d 1020 (Table), 2014 WL 1717454 (La.App. 3 Cir.) (unpublished), the court found that the fact that the insured's house encroached slightly into a setback line imposed by private restrictions and the zoning code had not caused him to suffer a loss, and dismissed his lawsuit demanding that the insurer indemnify him. The court noted: "Ky testified in his deposition that he hasn't suffered any loss at this time, but his fear is that he will suffer a loss in the future. This fear is not evidence of an actual loss."

[349] 192 Pa. Super. 337, 162 A.2d 22 (1960).

[350] 20 App.Div. 440, 46 N.Y.S. 1055 (1897).

Loan Ass'n v. First American Title Ins. Co.,[351] a tax foreclosure brought in error, and later abandoned because the taxes had been paid, the insurer-escrowee was not negligent as escrowee and there was no defect in the mortgage lien.

When a court does not know if a particular defect would be raised by future title examiners, it sometimes characterizes the matter as a "cloud" on title that a buyer has a right to have cleared. Courts are often imprecise in identifying why something "clouds" title.[352] However, the policy does not give an assurance against "clouds" on title. The proper reading of the policy is that a cloud on title does not invoke a covered risk unless it is a defect, lien or encumbrance on title, or renders title unmarketable.

It is essential that the insured establish that title is being attacked by a third party, or that an identifiable right, lien or encumbrance on title is held by another. A covered risk is not invoked solely based on the insured's own opinion that his or her title is or may be defective.[353] In *Prestwood v. City of Andalusia*,[354] which did not involve title insurance, the sole basis on which the City of Andalusia as purchaser claimed that title was unmarketable was the offhand opinion of a person who had not examined the title. The court concluded that "the city itself, rather than a third party, has undertaken to attack its own title." The court found no evidence establishing that title was defective. Similarly, in *Schwartz v. Stewart Title Guar. Co.*,[355] the insured sued the developer-declarant and advised the insurer by letter that the condominium declaration was defective because it was signed by a different entity than the record owner of the property. The title insurer cured the identity issue by affidavit. No third party ever challenged the validity of the declaration. The insured obtained a large settlement from the developer, but sued the insurer for attorney fees in the prosecution of the action. The court found that there was no duty to prosecute, because no one was attacking title except the insured himself.[356]

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[351] 78 A.D. 624, 432 N.Y.S.2d 706 (1980).

[352] "A cloud on title, described in *Novogroder v. Di Paola* (1919), 11 Ohio App. 374, 378, 30 Ohio C.A. 421, 424, ... 'is but an apparent defect …; the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is … a cloud upon his title.'" *Meerhoff v. Huntington Mortgage Co.*, 103 Ohio App.3d 164, 658 N.E.2d 1109 (1995).

[353] In *Lennen v. Marriott Ownership Resorts, Inc.*, ___ F.Supp.3d ___, 2019 WL 1440092 (M.D.Fla. 2019) (permanent citation not yet available), appeal filed August 21, 2019, the owners of interests in Florida timeshare condominiums sued the developer, asserting a multitude of claimed defects in the ownership regime. The court dismissed most of those claims. Although the title insurer was also a party to the action, the court did not address, in the motion to dismiss, the issue that no other party had attacked the insureds' titles.

[354] 709 So.2d 1173 (Ala. 1997).

[355] 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999).

[356] "Although the plaintiff argues his title was made unmarketable because of the defect, this is not a loss suffered by the adverse action or claim asserted by a third party. Without an adverse claim contending the title is unmarketable, the defendant has no duty to provide the plaintiff's attorney fees and costs. The wording is important--the policy's coverage here is not of the marketability of title, but of an "unmarketable" one. The negative wording is consistent with the indemnity nature of the policy. To cover marketability of the title insured would be to guarantee the title; to cover its

The no loss exclusion also applies when the insured proves that title is defective or encumbered, but does not demonstrate that he or she has lost anything, or that the land has a diminished value as a result.[357] The exclusion would apply if the insured is restored to his or her original position, for example. In a very unusual case, a trial court found as a matter of law that the insured was put back in her original position even though she lost the lien of the insured mortgage, but the appeals court held that the insured deserved a trial.[358]

11.4.4 Matters Assumed Or Agreed To By Insured

When the insured has created a defect or deliberately agrees to take title subject to or assuming a title matter, the insured suffers no loss. For example, an insured lender suffered no loss when its loan was found void because it was usurious.[359] Similarly, in *Riffle v. United General Title*

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unmarketability is to provide an indemnity against adverse claims asserted against it. A marketable title is one that a vendor, through judicial action, can compel a purchaser to take; an unmarketable title is one that a purchaser, in the course of a transaction, is justified in rejecting at the closing table. Between these two poles, it is possible to find a good title for many purposes, but unmarketable." 134 Ohio App.3d. at 614, 731 N.E.2d at 1168.

[357] See, for example, *Clark v. Chicago Title Ins. Co.*, 2002 WL 15955 (Wash.App.Div. 3) (unpublished), in which the court found no coverage when the insured mistakenly believed that two recorded deeds conveyed part of the land it owned, when in fact the deeds merely granted an easement that was excepted in the policy. The court concluded: "The title policy indicated [the Clarks] purchased 40.1 acres of property subject to an easement. This is exactly what they now own. Therefore, the Clarks have not suffered any damages from the breach by Chicago Title." In *Zeiger v. Shons*, 2001 WL 470175 (Ohio App. 8 Dist.) (unpublished), the court said the insured had not suffered a loss due to the fact that the insured parcel was smaller than the insured had thought when his own appraiser put the value of the property actually owned by the insured at more than policy limits. In *First Nat'l Bank of Jeanerette v. Lawyers Title Ins. Corp.*, 2010 WL 3734056 (W.D.La.) (unpublished), findings adopted in 2010 WL 3734020 (W.D.La.) (unpublished), the court found that an insured lender had not suffered a loss just because it was unable to sell the loan. The bank said that it would have received a service fee of about $5,700 on the sale, and would not incur servicing expenses if the loan was sold. The judge said these items were not "actual monetary loss" for which the title policy provides indemnity, labeling the servicing a bookkeeping function and the fee at best a lost profit opportunity and not "an actual loss of money." He noted that the bank "has profited by over $60,000 to date," the amount of interest paid by the borrowers.

[358] In *Stevenson v. First American Title Ins. Co.*, 2000 WL 873492 (Ohio App. 5 Dist.) (unpublished), Mary Ann Stevenson's boyfriend (later husband) James gave her a $35,000 note secured by a mortgage. However, Mary Ann did not give James any money. James, a lawyer, represented a client in a divorce and did not get paid. James sued the client, got a $1,250 judgment against him, and levied on a $14,000 note and mortgage from the client's wife to the client. The sheriff sold the note and mortgage to James at auction for $50. James assigned the $14,000 note and mortgage to Mary Ann, who gave him a credit of $12,000 against his unfunded note to her. Mary Ann then got a $25,000 title insurance policy on the $14,000 mortgage that James had bought for $50. The client sued Mary Ann to get back his note and mortgage, and won. The trial court said that Mary Ann would not have lost anything if she simply took back the $12,000 credit she had given her husband on the nonexistent debt. The appeals court said that there may be no loss payable in the end, but that it could not find that there was no loss as a matter of law. It said: "We find there is a legitimate difference between having an asset which permits a credit on an outstanding debt, and merely reinstating or debiting the original debt. … [The client's] note and mortgage was worth more on its face, than a $12,000 debit, and may have been more collectable. … This is not to say [Mary Ann] might not fail under the express terms of the policy of the title insurance."

[359] *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993). The effect of usury is specifically excluded under Exclusion 5 of the loan policy. See §11.7 for a discussion of that exclusion.

Ins. Co.,[360] the "no loss" exclusion was found to apply when the insured bought the property with knowledge of the title defect, the purchase price was adjusted accordingly, and the insured did not establish diminution in value beyond the reduction in sale price. In *Riffle*, the insured knew that the property had a questionable right of access. It obtained a discount in the purchase price and got a title policy, but dropped its efforts to get access resolved before closing. After the purchase, the insured access easement was ruled invalid. The insured sued the insurer for policy limits. The insurer raised Exclusions 3(a), 3(b) and 3(c). The court never got to the first two exclusions, because it found that the insured had not proven a loss. The appeals court noted that the partners proceeded with closing without having actually resolved the issue that had hung them up. The only valuation testimony at trial was from Mr. Riffle, who opined simply that, without a right of access, the property was "useless" and had a zero value. The trial court found, however, that "the access problem was taken into account when negotiating the sale price." The appeals court found that the property was not valueless, since the partners could get there by boat, and their intended use was recreational and not commercial. It noted that damage evidence must "allow findings from established facts and not by conjecture." Thus, the court was unwilling to award policy limits as a default measure of loss without proof of actual damage suffered. Further, the court impliedly invoked Exclusion 3(a) by hold that "[a]ppellants received what they bargained for and cannot now claim that they have suffered damages." See the discussion of *Riffle* and similar decisions in relation to Exclusion 3(a) at §11.2.1.

11.5 Post-Policy Matters

FORM 42, Appendix A
Defect arising after Date of Policy--1992 Policy

FORM 41, Appendix A
Defect arising after Date of Policy--Residential Policy

FORM 74, Appendix A
Easement abandonment--post-policy matter

The coverages in the title insurance policy are limited to matters that already exist on the date of policy. Title defects arising after that date are not covered by the policy.[361] This limitation is stated in the preamble to the Covered Risks in the 2006 ALTA policies:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, **after Date of Policy**, against loss or damage, not exceeding the Amount of

[360] 64 Ark.App. 185, 984 S.W.2d 47 (1998).

[361] The ALTA Homeowner's Policy provides certain assurances as to post-policy matters, as discussed in §9.14.2.

> Insurance, sustained or incurred by the Insured by reason of… .

(emphasis added) This coverage limitation is confirmed by an exclusion in the 2006 and prior ALTA policies:

> The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> * * * *
>
> (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10)... .[362]

In addition, the 1992 ALTA Loan policy states that the insurer has no liability for advances made after the date of policy, including non-obligatory construction loan advances.[363] There is no corresponding provision in the 2006 ALTA Loan policy, but that policy does retain the post-policy exclusion.

The post-policy exclusion is at the heart of the nature of title insurance coverage. The policy remains in effect as long as the insured owns the property. The insured pays no renewal premium. However, anything that happens that affects title after the insured obtains his or her interest in the property is not covered by the policy, as confirmed by Exclusion 3(d).[364] Almost all such matters

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[362] The referenced Covered Risks 9 and 10 are the limited creditors' rights and gap coverages. The Residential policy exclusion reads as follows: "In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from: … 3. Title Risks: … that first affect your title after the Policy Date -- this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks... ." The Residential policy exclusion is thus identical in substance to the 1992 policy, except that it does not limit the construction lien coverage of Covered Title Risk 8.

[363] Conditions & Stipulations 8(d) of the 1992 ALTA loan policy states that the policy does not include any liability for advances made under the insured mortgage after date of policy, except those made to protect the mortgage lien:

"The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy."

On construction loans, "pending disbursement" endorsements are issued with each draw in certain areas of the country. Such endorsements extend the Date of Policy as to construction lien coverage through the date of each draw. See §10.2.1 regarding the pending disbursement endorsement. Other endorsements are also sometimes used to effectively eliminate this exclusion as to construction disbursements made after the date of policy.

[364] In *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996), the insured property was subject to a disclosed restrictive covenant limiting the use of the property to "agricultural and residential purposes." The insured was sued by neighbors for making commercial use of the property. The insurer was found to have no duty either to defend or indemnify, because the policy had excepted the instrument. Further, the insured was sued for overburdening the

easements benefitting the land, as a result of the commercial use. The overburdening claim was found excluded by Exclusions 3(a) and/or 3(d), since it concerned use of the property by the insured after purchase. In *Sabatino v. First American Title Ins. Co.*, 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999), the title insurer was found not to be obligated to defend insureds' alleged "deliberate, wrongful and intentional" disruption of an easement by necessity over the insured's land. The court held that the lawsuit concerned the insured's interference with the claimed easement, not the title to the land, and that all of the tortious conduct occurred after the date of policy. Also, in *Bourne v. Stewart Title Guar. Co.*, 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished), a municipality's actions to condemn and lay out a public road on the insured's property were all found to have occurred after the date of policy, and thus were excluded. *Herr v. Forghani*, 2011 WL 1833829 (Wash.App. Div. 1) (unpublished) held that the insurer had no duty to prosecute a lawsuit or pay a loss due to the insured's claim that his neighbors overburdened the access easement that ran across the insured's land, because the use was post-policy and the easement was excepted. In *City of East Providence v. First American Title Ins. Co.*, 2011 WL 5527604 (D.R.I.) (unpublished), adopting findings of 2011 WL 5521246 (D.R.I.) (unpublished), the title insurer was not required to defend the city against the business's lawsuit for breach of a contract the city signed to develop the property, which the business owner claimed gave it beneficial ownership of the property. The court said the lawsuit was about a contract, not title; concerned post-policy breaches; and that the city created or agreed to the contracts. In *Ruisi v. Connecticut Attorneys Title Ins. Co*., 2012 WL 3854407 (Conn.Super.) (unpublished), the court found that the policy did not protect against the fact that a mortgage on the insured parcel was not paid off because the lawyers entrusted with the money stole it and recorded a forged mortgage release, since the lender delivered the money after the policy date, invoking the post-policy exclusion. In *Witkowski v. Richard W. Endlar Ins. Agency, Inc*., 81 Mass.App.Ct. 785, 968 N.E.2d 922 (Mass.App.Ct. 2012), when the insured condominium unit was destroyed by a flood after the policy date, and the building code prevented the insured from rebuilding the unit, neither the flood nor the insured's inability to rebuild triggered policy coverage. In *Property Hackers, LLC v. Stewart Title Ins. Co.*, 96 A.D.3d 818, 949 N.Y.S.2d 70, 2012 N.Y. Slip Op. 04728 (N.Y.A.D. 2 Dept. 2012), app.den. 20 N.Y.3d 853, 982 N.E.2d 92, 2012 N.Y. Slip Op. 93255 (Table) (N.Y. Dec 11, 2012) (unpublished), the court held that the policy did not protect against the post-policy condemnation of the insured parcel. In *Murphy v. Ticor Title Ins. Co*., 729 S.E.2d 21, 12 FCDR 1657 (Ga.App. 2012), the court ruled that a neighbor's erection of a locked gate and other obstructions 20 years after the policy date, which blocked the use of the insured access easement, was a post-policy event and thus excluded from coverage. In *Cavender Enterprise Leasing Family, LLC v. First States Investors 4200, LLC*, 2013 WL 495650 (W.D.La.) (unpublished), a right of first refusal granted before the policy date was excluded because the instrument evidencing the right was recorded after the policy date, and the policy contained an exception for "[r]ights or claims of parties in possession not shown by the public records." The court said the combination of the exclusion and the exception barred coverage. Conversely, in *Nastasi v. County of Suffolk*, 106 A.D.3d 1064, 966 N.Y.S.2d 172 (N.Y.A.D. 2 Dept. 2013), which concerned a conveyance of some of the insured parcel signed years before the policy date but not recorded until a few months afterward, the court held that the conveyance was not excluded as a matter "attaching or created" after the date of the policy. The distinction between *Cavender* and *Nastasi* lay in the fact that, in the former case, the policy also contained the parties in possession exception. In *Back Creek Partners, LLC v. First American Title Ins. Co*., 213 Md.App. 703, 75 A.3d 394 (Md.App. 2013), the insurer was found not to be obligated to defend a lawsuit brought against insureds after they sold the property, about matters that occurred after the policy date. In *Moreno v. Wells Fargo Bank, N.A.*, 2013 WL 1395629 (Minn.App.) (unpublished), the borrowers' claim that their lender was not supposed to get a lien on all of their four parcels, in a 2004 refinance, could not invoke any coverage under their 2003 owner's policy, and any statement by the title agent about policy coverage did not alter the plain language of the post-policy exclusion. In *Casero v. Chicago Title Ins. Co.*, 2018 WL 830225 (D.Md.) (unpublished), the policy provided no coverage for the insureds' claim to own land that was not insured in the policy, as to which the insureds first asserted a right in a deed recorded five years after the policy date. In *Buroker v. Phillips*, 169 A.D.3d 992, 93 N.Y.S.3d 397, 2019 N.Y. Slip Op. 01386 (N.Y.A.D. 2 Dept. 2019), the insured's access over an easement drive was blocked years after the policy date, by people who took title to the burdened property through a post-policy tax foreclosure. The court said the title insurer was not entitled to summary judgment based on the post-policy exclusion, because it had not proven conclusively that the neighbors' legal theory for barricading the driveway was that the tax sale had extinguished the easement. The court conceded that, if that was the neighbors' theory, the exclusion would be invoked. In *Mortazavi v. Federal Ins. Co.*, 2019 WL 2609779 (Cal.App. 4 Dist.) (unpublished), the court held that the would be caused by the insured or due to the fact that the insured is the owner, and would also thus invoke Exclusion 3(a):

> Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes his title. [citations omitted] "It is not prospective in its operation and has no relation to liens or requirements arising thereafter." Mayers v. Van Schaick, supra. "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it."[365]

The only sense in which the policy extends into the future is that the insured typically becomes aware of the title defect after the date of policy. The post-policy exclusion has been found to be unambiguous.[366]

The exclusion is frequently applicable in tax claims. Generally, the exclusion applies to negate liability for taxes that are levied or become due after the policy date.[367] However, when a tax is imposed after the policy date but with a retroactive lien date, the exclusion does not apply.[368] Tax

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insurer had no duty to defend the insured former owner in a lawsuit brought by the purchaser alleging the insured's failure to disclose the existence of encroaching structures that the insured had built after the policy date.

[365] *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980); quoted with approval in *Firstland Village Associates v. Lawyers Title Ins. Corp.*, 284 S.E.2d 582 (S.C. 1981). In *Firstland*, the claim involved an amendment to restrictions that was recorded months after the policy date. The court found no duty to indemnify, clear title or issue later policies free of a reference to the amendment, stating "Title insurance is unique in that it is retrospective, not prospective." Similarly, in *Ruisi v. Connecticut Attorneys Title Ins. Co*., 2012 WL 3854407 (Conn.Super.) (unpublished), the court said "[t]itle policy is unique in that it is retrospective, not prospective. It is designed to protect against past events, not possible future encumbrances."

[366] *Chicago Title Ins. Co. v. Citizens and Southern Nat'l Bank*, 821 F.Supp. 1492, 1495 (N.D.Ga. 1993).

[367] *Vurimindi v. LandAmerica Financial Group, Inc*., 2012 WL 8700440 (Pa.Cmwlth.) (unpublished) held that the policy did not protect against taxes that became liens after the policy date, especially because the tax liens were likely invalid due to their late filing. In *Lone Star Equities, Inc. v. Dimitrouleas*, 34 N.E.3d 936, 2015-Ohio-2294 (Ohio App. 2 Dist. 2015), the court found that the post-policy exclusion barred liability for real estate taxes that were reassessed after the policy date, even though the dispute had begun before the closing date. In *Princeton South Investors, LLC v. First American Title Ins. Co*., 437 N.J.Super. 283, 97 A.3d 1190 (N.J.Super.A.D. 2014), cert.den. 220 N.J. 268 (Jan. 23, 2015), the exclusion was found to apply to a tax reassessment that was pending on appeal on the policy date, but on which there was no present tax owed. In *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co*., 830 F.3d 1195 (10th Cir. (Utah) 2016), the exclusion was found to apply when the property was within a special taxing district that had made no assessment on the policy date. In *First Clover Leaf Bank v. National Land Title Ins. Co*., 2015 WL 392728, 2015 IL App (5th) 120442-U (Ill.App. 5 Dist.) (unpublished), app.den. 32 N.E.3d 673 (Table) (May 27, 2015), the exclusion negated any duty of the insurer to redeem the property from taxes that were levied after the policy date.

[368] In *Menconi v. Stewart Title of Illinois*, 2015 WL 4534148, 2015 IL App (1st) 143043-U (Ill.App. 1 Dist.) (unpublished), the court has refused to dismiss a policy suit based on a tax levy made after the date of policy for an

claims are fully analyzed in §9.4.

A forged release of the insured deed of trust is necessarily a post-policy event, and thus excluded.[369] A claim that the insured mortgage was given as a preference is excluded, when the borrower files bankruptcy after the date of policy.[370] The claimed preference was a condition which:

> arose only because [the borrower] chose to file bankruptcy and chose to file within the critical time period. Both of these events, which might give rise to an avoidance, transpired after the title policy issued, and, therefore, the loss of the secured position would be excluded from the coverage of the policy because it was occasioned by subsequent events.[371]

In finding the matter excluded, therefore, the court determined that the source of loss was the filing of the bankruptcy within the preference period. In a second decision, in which the facts were not well developed, an adversary proceeding apparently based on preference was found not to create a duty to defend or indemnify, because the foreclosure and adversary proceeding were both post-policy matters.[372] Preference claims have also been found excluded under Exclusions 3(a) (see §11.2.6) and 3(b) (see §11.3.4). See §11.5 for a complete discussion of Exclusion 3(d), concerning post-policy matters.

When the adverse title claim, lien or encumbrance existed before the policy date, the fact that the action to enforce that interest is brought or the lis pendens is recorded after the date of policy does not invoke the post-policy exclusion.[373]

"omitted" tax from several years prior to the policy date, because it had a retroactive lien date prior to the policy date. Following the ruling on the motion to dismiss, the insured would still be required to prove that the lien was both effective and that the statute would properly be construed to impose a lien prior to the policy date.

[369] *Upson v. Goodland State Bank & Tr. Co.*, 797 P. 2d 845 (Colo.App. 1990). The court ruled that the exclusion was not negated or limited by the fact that the insurer recorded the forged release.

[370] *Chicago Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 821 F.Supp. 1492 (N.D.Ga. 1993).

[371] Id. at 1495.

[372] *Capital Bank v. Commonwealth Land Title Ins. Co.*, 861 S.W.2d 84 (Tex.App.--Houston [1st Dist.] 1993).

[373] Thus, the policy was found to protect against a mortgage recorded before the policy date despite the fact that the lis pendens on foreclosure of that lien was post-policy, in *U.S. Bank, N.A. v. Stewart Title Ins. Co*., 37 A.D.3d 822, 832 N.Y.S.2d 223 (N.Y.A.D. 2 Dept. 2007). In *San Jancinto Z, L.L.C. v. Stewart Title Guar. Co*., 2014 WL 1317696 (Cal.App. 4 Dist.) (unpublished), modified on denial of rehearing (April 24, 2014), rev.den. June 18, 2014, a governmental body brought a condemnation lawsuit years after the policy was issued. However, at the time that action was filed, there were already several lawsuits in progress to determine who had the better claim of ownership and there were competing lien claims. The person claiming ownership adversely to the insured made the assertion in his answer to the condemnation complaint that he was the rightful owner. The court held that this assertion triggered a duty to defend, although the condemnation itself was an excluded post-policy event. In *Colonial Mortgage Service Co. v. Commonwealth Land Title Ins. Co*., 2014 WL 6237852 (E.D.Pa.) (unpublished), the court found that the fact that a lis pendens was recorded after the policy date did not invoke the exclusion, because the rights claimed by the plaintiff in the complaint existed before the policy date.

Exclusions

The policy does not protect against a title defect arising after the policy date, even if the effect of such a defect is to invalidate the insured's interest as of the date of the policy. For example, a policy assured the insured lender that it had a first deed of trust on a lessee's interest, to which the fee owner's interest was subordinate. This assurance was given based on a subordination agreement from the lessor. The lessor's subordination was conditioned on the use of the loan funds for construction of a building on the property. After the policy date, the lender gave the borrower the loan funds without requiring that a building be built, and the lessor had the subordination agreement declared null. The insured sued the insurer, which defended on the post-policy exclusion. The court agreed with the insurer that the claim was not covered:

> Here, the policy of title insurance issued by defendant insured the lien of plaintiff's deed of trust on the Abernathy property "all as of the 18th day of July, 1969, at 12:26 p.m. the effective date of this policy." This affirmative statement of coverage is also restated in the negative as an exclusion from coverage in subparagraph 3(d) of the policy, which specifically excludes from coverage defects, liens other than certain statutory liens for labors and materials, encumbrances, adverse claims against the title as insured or other matters "attaching or created subsequent to the date hereof.[374]

Similarly, sellers brought an action to reclaim the insured property for lack of consideration, and a consent judgment was entered after the policy date by which the insured would either give a mortgage to the sellers or lose the property. The insured did not grant the mortgage, and was thus divested of title. This divestiture was a post-policy matter and thus excluded.[375] Also, when an easement was recorded before the policy date, but the easement holder first sought to reform it to encumber the insured property after the date of policy, the post-policy exclusion was found to apply.[376] When a neighbor sought to subdivide land contrary to the terms of a recorded declaration of restrictions 12 years after the policy was issued to the insured, the matter was excluded as being a post-policy act, and the insurer had no obligation to prosecute the insured's lawsuit to enforce the restriction.[377]

Title insurance policies typically recite not only a date of policy, but the exact time of day as to which policy coverage extends. The post-policy exclusion applies to matters that occur on the policy date but after the time recited in the policy. In *Mark Twain Kansas City Bank v. Lawyers Title Ins. Corp.*,[378] the policy was timed, at the lender's request, as of the moment at which the insured mortgage was recorded. The insured lender disbursed the loan funds less than an hour later. The

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[374] *National Mortgage Corp. v. American Title Ins. Co.*, 299 N.C. 369, 261 S.E. 2d 844 (1980).

[375] *Kramer v. Chicago Title & Trust Co.*, 69 Ill.App. 3d 1015, 387 N.E.2d 1105 (1979).

[376] *Campbell v. Ticor Title Ins. Co*., 166 Wash.2d 466, 209 P.3d 859 (Wash. 2009).

[377] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. July 23, 2009).

[378] 807 F.Supp. 84 (E.D.Mo. 1992).

money was delivered to a party other than the mortgagor owner. A court later held that the mortgage was invalid because the owner received no consideration for the granting of the lien. The court granted the insurer's summary judgment motion based on the post-policy exclusion, stating:

> … the policy clearly excludes coverage for defects attached or created subsequent to "Date of Policy" and unambiguously defines "Date of Policy" as embracing a specific date and time, that is, July 11, 1986 at 11:30. Although the faulty disbursement took place only fifty-one minutes later, the defect was created after the "Date of Policy" and hence is excluded from coverage.[379]

National Mortgage and *Mark Twain* were relied on in *Rosen v. Nations Title Ins. Co.*,[380] in which the priority of the insured deeds of trust were challenged on the grounds that the lender had disbursed the loan funds, after the date of policy, contrary to the bankruptcy court order which gave the lender its priority, thus working a subordination of the lender's interest.

A Florida court also relied in part on *Mark Twain* in applying the post-policy exclusion in *Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.*[381] In that case, after the policy date, the insured lender rejected the loan because it detected that some of the borrower's paperwork was phony. The insured told the loan broker to sell the loan to someone else, which it did, cancelling the assignment of note and mortgage. However, the broker did not repay the insured. The lender was denied foreclosure, and the court also rejected its policy claim.[382]

The exclusion also applies to an adverse right that ripens after the policy date but that was inchoate or latent on the policy date, such as an equitable lien, easement by prescription, adverse possession or constructive trust.[383] Similarly, the exclusion negates coverage as to the insured's

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[379] Id. at 87. Similarly, in *Ruisi v. Connecticut Attorneys Title Ins. Co*., 2012 WL 3854407 (Conn.Super.) (unpublished), the court found that the policy did not protect against the fact that a mortgage on the insured parcel was not paid off due to the fact that the lawyers entrusted with the money stole it and recorded a forged mortgage release, because the lender delivered the money after the policy date, and thus the post-policy exclusion applied.

[380] 56 Cal.App.4th 1489, 66 Cal.Rptr.2d 714 (Cal.App. 2 Dist. 1997).

[381] 862 So.2d 793, 28 Fla. L. Weekly D2746 (Fla.App. 4 Dist. 2003), reh.den. (Jan. 28, 2004).

[382] The court said: "Novastar's failure to take any action to enforce its rights on the note, whether at the time the closing package was received without the note, at Netwide's refusal to forward the note, at the time it learned that the loan had been resold, or at any time thereafter, made the machinations of Netwide possible. It is unreasonable for an insured to expect that a title insurance policy would insure against a wrongful act such as Netwide failing to repay Novastar when it resold the loan. All of the acts that prevented Novastar from enforcing its mortgage lien occurred subsequent to the issuance of the title insurance policy and arose as a direct result of Novastar's actions or inactions. As such, Novastar's loss was either not covered by, or was excluded by the policy provisions."

[383] See *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660 (Va. 1994), holding that an easement by necessity was excluded because it was not established until after the date of policy. In *Woodle v. Commonwealth Land Title Ins. Co*., 287 Neb. 917, 844 N.W.2d 806 (Neb. 2014), the court said that, although implied easements were created on a land division that occurred before the policy date, they did not "attach" for title insurance purposes until they were declared by court order. Because that order was entered after the date of the policy, the easements fell under the post-policy exclusion.

rights that were enforceable when the policy was issued but that are cut off or expire after the date of policy.[384] However, the exclusion typically does not apply to rights implied by law that existed on the date of policy, but which are not adjudicated until after the policy date.[385] Thus, it is important to identify whether or not, under state law, the rights at issue existed on the policy date without any requirement that they be adjudicated. For example, *Carstensen v. Chrisland Corp.*[386] involved a claim of an easement of necessity. The insureds contended that the exclusion did not apply, since an easement by necessity "arises at the time the dominant tract is severed from the subservient tract." The court disagreed:

> While an easement by necessity legally arises at the time the servient estate is severed from the dominant estate, the easement may remain inchoate until established through judicial order or otherwise. An easement often is not judicially established or sought to be established for many years following the initial severance. [citations omitted] If, as the Neighbors contend, this exception in the title policy is not applicable to easements by necessity established after the policy date, a title insurance company, before issuing a policy of insurance, would be required to research the title records for all contiguous properties to determine whether a latent easement by necessity existed in order to protect itself against exposure for a subsequently established easement by necessity. This is an unreasonable burden to place on the title insurance company.[387]

However, another Virginia court distinguished *Carstensen* and found that the exclusion did not apply to an easement by necessity, because the claim was made on an ALTA Residential policy, which excludes title risks "that first *affect* title after the Policy Date" rather than those "attaching or created subsequent to Date of Policy."[388]

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[384] In *Community Credit Union v. AmeriTitle & Abstract, Inc*., 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished), the court held that the expiration of an insured five-year access easement after the policy date did not invoke the access coverage, and the post-policy exclusion applied, because on the date of policy there was a right of access to the property.

[385] In *Blaser v. DeVries*, 2011 WL 5965762 (Mich.App.) (unpublished), the court held that a declaration of restrictions that was not recorded against the property but which other lot owners sought to impose under the doctrine of common plan of restriction attached to the property, if at all, on the date of the first deed that included the restrictions. The court relied on Michigan case law that has established that rule. The court found no coverage under this policy, not because of the post-policy exclusion bur rather due to a Schedule B exception for restrictions on "the use of the premises not appearing in the chain of title." The decision highlights the need to determine under local law when a particular right or interest is deemed to attach to property as of the policy date.

[386] 442 S.E.2d 660 (Va. 1994).

[387] Id. at 665.

[388] *Reams v. Southern Title Ins. Corp*., 43 Va. Cir. 494, 1997 WL 33619877 (Va.Cir.Ct. 1997) (unpublished). The court said: "[w]hereas the *Carstensen* outcome turned on the words 'attaching or created' in order to buttress the 'inchoate' versus 'judicially established' status of an easement by necessity, the language in the instant case leads to a contrary outcome. The easement by necessity burdening the Reams' property 'affected' the tract prior to the 1986 Policy

Adverse matters created before the policy date but not recorded until afterward create a tension between the Covered Risks and the post-policy exclusion. One example is the lien which takes priority over the insured mortgage lien, even though it is recorded after the policy date. In *Citibank v. Commonwealth Land Title Ins. Co.*,[389] the policy was dated as of the date on which the insured mortgage loan closed. The mortgage was recorded three weeks after the policy date. Another mortgage was signed two weeks before the policy date, and recorded a week after the policy date but two weeks before the insured mortgage was recorded. The intervening mortgage was found to have priority over the insured mortgage based on recording dates. The insurer argued that it was not recorded on the policy date, and therefore it was not protected against. The court held the post-policy exclusion inapplicable, however, because under state law the intervening lien arose when executed, which was prior to policy date.

The policy protects against covered matters discovered after the policy date but attaching before that date. Thus, the post-policy exclusion does not apply as to matters existing on the date of policy but discovered before the insured mortgage was assigned.[390]

Another form of inchoate right is the construction lien claim. In most states, construction lien claims relate back from the date of filing or recording of the lien to an earlier date tied to the first work on the project or the construction contract itself. See Chapter 10 regarding construction liens generally. The standard exception for construction liens removes coverage for lien claims based on work done prior to the Policy Date.[391]

Date, even though court recognition did not occur until 1994. Such an easement arose by operation of law at the time the Reams' parcel was severed from the dominant tract. In other words, this encumbrance existed prior to the plaintiffs' acquisition of the Powhatan tract and purchase of the title insurance policy from the defendant. At the time the policy was issued it affected title."

[389] 645 N.Y.S.2d 826 (A.D. 2 Dept. 1996).

[390] *Stewart Title Guar. Co. v. National Enterprises, Inc.*, 133 F.3d 929 (Table), 1997 WL 800294, *1 (9th Cir. (Cal.)) (unpublished).

[391] *Clements v. Mississippi Valley Title Ins. Co*., 612 So. 2d 1172 (Ala. 1992).

11.6 Lack Of Adequate Consideration

FORM 44, Appendix A
Lack of adequate consideration

The policy does not protect an insured against a claim that its title is defective because the insured failed to pay adequate consideration for the property.[392] One commentator has explained the purpose of the exclusion as follows:

> This exclusion fits in the category of those that prevent coverage of matters that the insurer cannot discover via a title search and for which the insured bears some responsibility. It prevents coverage where an insured owner or lender is deemed not to have been a purchaser for value. Such an insured will not be protected by state recording laws against claims of subsequent bona fide purchasers. The effect of the exclusion is that insureds who are not protected by state recording laws also will not be protected by their title insurance policies. Thus, under state recording statutes that give priority to subsequent bona fide purchasers for value, insured donees and devisees of real property may not only lose their priority, but also may not be indemnified for their losses because of this exclusion in their title insurance policies.[393]

For example, in *Insured Titles, Inc. v. McDonald*,[394] the insured prepared the quit claim deed used to confirm a tax title, and altered the legal description from the grantor's own deed. The alteration increased the land conveyed from two acres to more than 12. However, the insured knew that the grantor's deed contained only two acres. Further, the insured paid no consideration for the deed. The court ruled that the failure of title to the additional acreage was excluded because the insured was not a bona fide purchaser for value. While the court rested its conclusion on Exclusions 3(a) and 3(b), it might more properly have applied Exclusion 3(e).

When the insured's purchase at auction was set aside because its bid price of $3,500 was so low that it shocked the conscience, the Arizona Supreme court held nonetheless that the exclusion

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[392] Exclusion 3(e) of the 2006 ALTA Owner's policy negates coverage for defects "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title." Exclusion 3(e) of the 2006 ALTA Loan policy excludes loss "resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage." In *Northwest Savings Bank v. Fidelity Nat'l Title Ins. Co*., 2017 WL 253080 (Pa.Super.) (unpublished), the insured mortgage was unenforceable because the loan money that was to have been used to pay off prior liens was instead stolen by the bank's closing agent. The trial court found that this exclusion negated coverage. The appeals court affirmed based on Exclusion 3(a), but did not reach this holding.

[393] Joyce D. Palomar, *Title Insurance Law*, 2013-2014 Edition, § 6:25, p. 457, West/Thomson Reuters (footnotes omitted).

[394] 275 Mont. 111, 911 P.2d 209 (1996).

did not negate coverage.[395] The court said the exclusion is intended to apply when the insured's consideration is so low that the insured does not get the benefit of the race-notice recording laws. While the auction bid was low, it was more than merely nominal, and thus would protect the bidder under the recording laws. The court gave this helpful summary of the scholarly comment on the value exclusion:

> Title insurance exists against the backdrop of the recording statutes. Under those laws, unrecorded interests are invalid against creditors and against subsequent purchasers for "valuable consideration" who lack notice of the interest. …This background informs our interpretation of the "failure to pay value" exclusion. How can a purchaser's failure to pay value for the title result in a loss? This loss can obviously occur if an insured lacking recording act protection faces a title challenge from a prior unrecorded interest. The recording statutes generally protect bona fide purchasers from unrecorded interests in land, but such interests are valid and binding as to a purchaser who does not pay valuable consideration or who has notice. … The circumstances in which a purchaser will not be protected by the recording statutes have evident counterparts in the policy exclusions. Exclusion 5 excludes coverage for losses that result from the purchaser's "failure to pay value" for the title; Exclusion 4.b applies to unrecorded risks that are known to the purchaser but not the insurer. …Given the policy language and the nature of title insurance, the exclusion for "failure to pay value" is most reasonably understood as applying when an insured is not a bona fide purchaser protected by the recording statutes.[396]

The court found no coverage, but because the insured "created, allowed, or agreed to" the risk of set-aside by making the low bid.

The insurer should consider whether or not the exclusion applies, when the insured has been sued for fraud or unconscionable acts in the purchase of the property[397] or on the basis that the insured's deed is void as against a subsequent purchaser for value. The insurer should determine if the transaction has the indicia of a normal arm's length sale, through contact with others to the transaction, and by obtaining the closing statement, payoffs, checks and other proof of payment, notes and mortgages taken back by the seller, and other closing documents.

The insured need not pay value directly to the seller to avoid the exclusion. For example, in *Wheeler v. Reese*, the insured (Sperry) released the debt owed by Reese in exchange for the conveyance of property owned by another (Wheeler). Wheeler later challenged the conveyance for

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[395] *First American Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 187 P.3d 1107 (2008).

[396] 187 P.3d at 1111.

[397] Such cases are often also controlled by *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal.App. 3d 658, 172 Cal.Rptr. 248 (Cal.App. 2 Dist. 1981) and its progeny, in which the tortious conduct in the procurement of title is found not to be within the scope of the policy at all, and further excluded under Exclusion 3(a). See §11.2.7 for a discussion of these cases.

lack of consideration to him. The court stated:

> Here, the trial court found that Sperry received the title in exchange for forgiveness of Reese's $108,000 debt to him. Although this value was paid to Reese, not Wheeler, the exclusion does not require that value be paid to the grantor. Because we must interpret words of exclusion strictly against the insurer, … this exclusion does not preclude coverage.[398]

11.7 Usury, Consumer Credit, Truth In Lending

Exclusion 5 of the 2006 ALTA Loan policy negates coverage for:

> Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.

This exclusion is also found in the 1992 ALTA Loan policy. It appeared as an exception to Insuring Provision 5 in the 1970 ALTA Loan policy.

The policy thus states that the insurer is not required to indemnify the insured if the mortgage is found to be unenforceable because the underlying debt is usurious.[399] This exclusion was held to apply when the mortgage was rendered unenforceable by illegal loan charges.[400] The insurer's knowledge of the off-record agreement that created the illegal loan charges did not vitiate the exclusion or suggest that the policy should be reformed to remove it.[401]

Usury coverage is obtained either by removal of the exclusion or an affirmative assurance which cancels the exclusion. When an exclusion similar to the ALTA form was removed from the policy at the insured's request, the insurer was found liable for the insured's defense of a claim of usury.[402]

There are at least three bases for raising the exclusion. First, when the borrower asserts usury as a defense to the enforcement of the mortgage, the insurer may simply rely on the exclusion. Second, if usury is not alleged by the borrower, the insurer may raise it as a limitation on the loss payable. An insured should not be permitted to collect as a policy loss money that the lender would be barred by law from collecting from the borrower, as a matter of public policy. Generally, when

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[398] *Wheeler v. Reese*, 835 P.2d 572 (Colo.App. 1992), modified on den.reh. April 9, 1992, cert.den. August 31, 1992; *Sims v. Sperry,* 835 P.2d 565 (Colo.App. 1992).

[399] See Wisot, *Usury and Title Insurance*, in *Attorneys' Role in Title Insurance*, A.B.A. Real Property, Probate & Trust Law Section (1990).

[400] *Blaylock Inv. Corp. v. Standard Title Ins. Co.*, 335 F.Supp. 1284 (W.D.La. 1971), aff'd, 453 F.2d 395 (5th Cir. 1972).

[401] Id.

[402] *Freidus v. Title Guarantee & Trust Co.*, 159 Misc. 209, 287 N.Y.S. 639 (1936).

the insured knowingly and intentionally violates the law, any insurance coverage against such violation is void.[403] Using this rationale, one court permitted recovery from the insurer of the principal but not the criminally usurious interest.[404] The court stated:

> To summarize, we hold that it was not error for the trial court to consider the fact that the underlying loan transaction here involved criminal usurious activity as defined by Section 687.071(3), Florida Statutes (1981). Whether such considerations properly fit into the patchwork quilt of the law governing this particular kind of controversy is not by any means crystal clear. ... [T]he trial judge believed such considerations appropriate, and we are not prepared to say otherwise, inasmuch as we are unable to articulate convincing reasons to the contrary. Accordingly, we find that the trial judge properly disallowed that portion of the damages predicated on the usurious interest rate from the total coverage afforded by the commitment issued by Title & Trust. Where a contract contains both legal and illegal terms and enforcement of the illegal terms can be refused without nullifying the contract's essential purpose, courts will give effect to those valid portions and ignore the illegal terms.[405]

Finally, one court held that an insurer had the right to prove that the loan was usurious even absent an attack by the borrower. If the loan was proven to be usurious, coverage would be voided because the insured would hold no insurable interest in the property, and suffer no loss.[406]

> [O]ne has an insurable interest in property "by the existence of which he will gain advantage, or by the destruction of which he will suffer a loss." [citations omitted] Because, however, a usurious mortgage is void, and the mortgagee, therefore, has no right to collect principal or interest, no loss will occur if the property is destroyed.[407]

However, another court rejected the insurer's attempt to assert the usurious nature of the insured loan as a defense to loss, when the borrower had not raised usury directly.[408] However, that decision rested largely on the finding that the debt was not usurious because the insured had purchased the note at a discount.

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[403] See *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170 (D.C. Cir. 1975) below this section.

[404] *Title & Trust Co. of Fla. v. Parker*, 468 So.2d 520 (Fla.App. 1985).

[405] 468 So.2d at 524.

[406] *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993). The case is further discussed at §11.4.4, concerning the no loss exclusion. The penalty for usury varies from state to state. In *Focus*, the First Circuit found that Rhode Island law renders usury a complete bar to the debt. In other states, the penalty for usury is that the interest, or the usurious portion of it, is not collectible.

[407] *Focus Investment Associates, Inc. v. American Title Ins. Co*., 992 F.2d 1231, 1242 (1st Cir. 1993).

[408] *Moe v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 289, 98 Cal.Rptr. 547 (Cal.App. 1 Dist. 1971).

Recent versions of the ALTA loan policy also exclude defects or invalidity in the insured mortgage due to violations of consumer credit protection or truth in lending laws.[409] Thus, if the mortgage is void because the insured failed to comply with such laws, the policy does not indemnify the insured against loss.

11.8 Creditors' Rights

The policy excludes certain matters that arise by the assertion of rights in the insured property by creditors of the current or former owner. The creditors' rights exclusion has attracted great attention from scholars.[410] There are four main concerns covered by the exclusion. They are:

1. That the insured interest is voidable as a preference (Section 547 of the Bankruptcy Code);

2. That the deed or mortgage is voidable as a fraudulent conveyance (Code Section 548);

3. That the insured mortgage is subordinate to other lien claims because the insured lender engaged in inequitable conduct (Code Section 510); and

4. That the conveyance of the property was a fraud on creditors and should be set aside or recharacterized as a mortgage.

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[409] In *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170 (D.C. Cir. 1975), it appears that the policy did not contain this exclusion. The insurer argued that an insured should not receive insurance against violation of such consumer protection laws. The court held that the insurer was not entitled to void the policies, because the insured did not knowingly violate the law. The specific exclusion would presumably lead to the opposite result. In *Southern Title Ins. Co. v. Crow*, 278 So.2d 294 (Fla.App. 1973), cert den. 284 So.2d 221 (Fla. 1973), the court appeared to accept the premise that there would be no coverage when the mortgage was voided by the borrower due to a TILA violation, but held that the insurer had not established that the assignee insureds had knowledge of the violation when they bought the loan, and thus the insurer was barred from raising the defense. See §7.10 for a discussion of assertion of policy defenses against loan assignees.

[410] The numerous specific real estate transactions in which creditors' rights claims might surface, and the title insurer's underwriting of those transactions, are thoroughly analyzed in Bonita, *An Elizabethan Legacy: Creditors' Rights and Title Insurance*, Probate & Property, May/June 1998, p. 38. See Murray, *Creditors' Rights Issues in Loan Transactions* and *Recharacterization in Bankruptcy Proceedings: Equitable Subordination*, both in <u>Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders</u>, Practicing Law Institute N-448 1999, p. 739; Murray, *Guaranties and Fraudulent Transfers*, in <u>Title Insurance 2000: Critical Issues Facing the Buyer, Seller and Lender</u>, Practicing Law Institute N-462 2000, p. 1009. See, for example, Rifkin, *Title Insurance and Creditors' Rights*; Keller, *The Creditors' Rights Exclusion*; Hosack, *The Creditors' Rights Exclusion*; Levinson, *Creditors' Rights and Wrongs*; and Pedowitz, *The Creditors' Rights Exclusion: Belt and Suspenders?*, all in *Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992; Williams, *Creditors' Rights Exclusion in Title Policies*, 6 Probate & Property 8 (1992); Rifkin, *Title Insurance and Creditors' Rights*; Pedowitz, *Creditors' and Debtors' Rights and Title Insurance*, both in A.B.A. Real Property & Trust Law Section, *Attorney's Role in Title Insurance* (1990); and Palomar, *Title Insurance Law*, § 6.13, pp. 6-84 to 6-101.

A creditors' rights exclusion was added to the ALTA policies in 1990. It was amended in 1992 when ALTA adopted a form of exclusion promulgated by the New York State Land Title Association. The 1992 owner's policy version of the exclusion reads as follows:

> 4. 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 creditors' rights laws, that is based on:
>
> (a) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
>
> (b) 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:
>
> (i) to timely record the instrument of transfer; or
>
> (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

The 1992 ALTA Loan Policy included a modified (a) which read "the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer," and added a provision, inserted as (b), for "the subordination of the insured mortgagee as a result of the application of the doctrine of equitable subordination." Although earlier versions of the ALTA Homeowner's Policy had no creditors' rights exclusion, it appears as Exclusion 7 of the 2010 version of the policy. See a discussion of that policy's covered risks at §9.14.2, and its exclusions at §11.10.

The 2006 policies moved the exceptions to the exclusion to the Covered Risks. The coverage is found at Covered Risk 9 of the owner's policy and Covered Risk 13 on the loan policy. ALTA maintains that this coverage was implicit in the 1992 policy forms. The coverage protects against avoidance of the insured instrument caused by the overturning of a prior conveyance as a fraudulent transfer or preference.[411] It also protects against avoidance of the insured instrument as a preference, but only if due to untimely recording or its failure "to impart notice of its existence to a purchaser for value or to a judgment or lien creditor." Creditors' rights appear as Exclusion 4 in the 2006 owner's policy and Exclusion 6 in the loan policy. The exclusions now state that they do not limit the protections afforded by the covered risks. The primary change in the 2006 policy exclusions is that

[411] In *Concept Dorssers v. Pacific Northwest Title Ins. Co., Inc.*, 2010 WL 1141462 (W.D.Wash.) (unpublished), the court found that the prior-conveyance coverage was not invoked when the insured transfer also was attacked as a fraud on creditors, and thus the matter was excluded. Thus, the policy was found not to obligate the insurer to defend an insured deed of trust against a bankruptcy trustee's adversary proceeding claiming that prior transfers were in fraud of creditors, because the trustee also asserted that the insured deed of trust was a fraud on creditors and not for value. The court found that the trustee would be unable to attack the insured deed of trust unless it, too, was a fraud on creditors. The allegations against the insured's interest triggered Exclusion 6 of the loan policy, and negated any duty to defend or indemnify.

the loan policy creditors' rights exclusion is modified to drop subordination of the insured mortgage, which was a reference to Section 510 of the Bankruptcy Code. The official commentary says that ALTA believes this is not a narrowing of the exclusion, because coverage for such a subordination claim is already negated by Exclusion 3.

The creditors' rights exclusion applies to claims by a bankruptcy trustee seeking to avoid a transfer as a fraud on creditors or as a preferential transfer.[412] The creditors' rights exclusion also applies to non-bankruptcy disputes in which a transfer is attacked as being a fraud on creditors, including claims based on a state fraudulent transfer act.[413]

The creditors' rights exclusion exists because bankruptcy and state laws permit title to be divested, or a mortgage rendered void, because the transaction harmed creditors. The conveyance or mortgage is not defective; rather, the underlying transaction causes title to fail. The title insurer, however, is not in the business of analyzing borrowers' financial condition. It is not privy to all of the terms of the transaction. Thus, as one commentator put it,

> Most in the industry consider the 1992 amended ALTA creditors' rights exclusion to be a fair compromise among the concerns of title insurers, lenders, and purchasers. The amendment acknowledges that certain risks related to recording and notice may be within the title company's control and entitled to insurance coverage, but prevents the title insurer from being liable for financial risks in the transaction and rightful claims of the transferor's creditors that could not have been uncovered via a title examination. Title insurance was never intended to insure the solvency of the insured's transferor or the evenhandedness of the mortgagee's conduct. Neither was title insurance intended to guarantee that transferors will pay their creditors and not attempt to convey assets beyond their reach. Such risks are simply beyond title

[412] In *Rechtzigel Trust v. Fidelity Nat'l Title Ins. Co. of New York*, 748 N.W.2d 312 (Minn.App. 2008), a trustee for a bankrupt exchange intermediary brought a preference action to claim the proceeds of sale delivered by the intermediary to the seller. The commitment had said a 1987 Residential policy would be issued, but the insurer actually issued a 1992 form policy. The court reported that, because the parties "agree that the 1992 policy form does not afford coverage for Rechtzigel's claims beyond the 1987 policy, we further conclude there is no coverage under the 1992 policy." The court also dismissed the claim premised on the promised Residential policy, which does not contain a creditors' rights exclusion, on the alternate ground that the trustee did not attack title and no coverage of that policy was triggered by the preference action. In *Hanks v. First American Title Ins. Co.*, ___ S.E.3d ___, 2018 WL 2230674 (Tenn.App.) (not yet released for publication), the creditors' rights exclusion was found to bar coverage for a bankruptcy trustee's claims of fraudulent conveyance and preferential transfer, but not the claim that the property sale was a post-petition transfer that violated the automatic stay.

[413] In *Banner Bank v. First American Title Ins. Co*., 916 F.3d 1323 (10th Cir. (Utah) 2019), a lender was sued by a receiver appointed by the SEC, who attacked the insured mortgage as being part of a Ponzi scheme that defrauded investors. The receiver's claim was based on Utah's Uniform Fraudulent Transfer Act. The court held that the receiver's allegations fell under the creditors' rights exclusion. The court said: "The most natural reading of the Receiver's complaint is one to avoid Mr. Jacobson's transfer of the deeds of trust as a fraudulent conveyance. The action is clearly taken pursuant to the UVTA—a creditors' rights law—and the allegations in the complaint are that Mr. Jacobson was operating a wide-scale Ponzi scheme, and the transfer of the deeds was in furtherance of it and to defraud his creditors. The Receiver's action falls squarely within the policy’s exception for lawsuits alleging a fraudulent transfer or conveyance."

insurance companies' expertise.[414]

The addition of the exclusion in 1990 is not evidence that the earlier policy forms were either vague or broader in coverage. A case involving the post-policy exclusion is analogous. In that case, the court ruled:

> Defendant offers "expert" opinions as to whether this language contemplated a post-policy preference action. First of all, these experts were not involved in the formation of this contract… . Second, just because Chicago Title may have inserted even more specific language in other policies does not mean that the language in this contract actually contemplated coverage of the risk of a preference action voiding the bank's secured interest. After all, no court has ever actually construed this provision against Chicago Title.[415]

Most creditors' rights claims would also be removed from coverage under exclusions that existed before the creditors' rights exclusion was added to the policy. Preference and recharacterization claims have been found excluded under Exclusions 3(a) (see §11.2.7), 3(b) (see §11.3.4) and 3(d) (post-policy) (see §11.5).In addition, policies issued before 1990 often contained endorsements or exceptions in Schedule B removing coverage as to creditors' rights issues, when the specific transaction suggested a creditors' rights problem. In the 1939 case of *First Nat'l Bank & Trust Co. of Port Chester v. New York Title Ins. Co.*, an adversary proceeding to declare a mortgage a preference was held not to be a matter "created" or "suffered" by the insured.[416] The insured admitted that the mortgage secured antecedent debt, but denied that it had intended to take a preference.[417] The key fact was that the insurer was aware that the mortgage secured antecedent debt; from this, the court found that the insurer, not the lender, had assumed the risk of a preference claim. In a similar case involving antecedent debt, the insured did not disclose this fact to the insurer. The insurer argued that it would not have insured the mortgage if it had known that fact, which proposition the court accepted as reasonable.[418]

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[414] Joyce D. Palomar, *Title Insurance Law*, § 6.13, p. 6-90. In later editions of that book, the author has excised the last three sentences of the quoted passage.

[415] *Chicago Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 821 F.Supp. 1492, 1495 (N.D. Ga. 1993).

[416] 171 Misc. 854, 12 N.Y.S.2d 703 (Sup. Ct. 1939).

[417] The court stated: "The bank took the mortgage but it did not create the defect. That was created by operation of law. Such a clause does not protect the defendant from the very act insured against, which was the taking of the mortgage. ... The Federal Court did not adjudge that there was any actual intent on the part of the bank to obtain a preference. Nor does the evidence justify such a finding here. The mortgage could constitute a preference without such an actual intent on the part either of the mortgagors or the mortgagee." 12 N.Y.S.2d at 709.

[418] *Bank of San Diego v. Commonwealth Land Title Ins. Co.*, 283 Cal.Rptr. 1 (Cal.App. 4 Dist. 1991) (unpublished), previously published at 231 Cal.App.3d 1265 and withdrawn from publication. See discussion of this case and others at §11.3.4 concerning concealment of material risk as voiding coverage under Exclusion 3(b). See also §11.5, discussing *Chicago Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 821 F.Supp. 1492 (N.D.Ga. 1993), in which the settlement of a

In two cases, claims of preference were found to be excluded from coverage as post-policy matters.[419] One court found a duty to defend the insured, when the debtor filed bankruptcy three days before title passed. The post-policy exclusion was apparently not raised, although Exclusion 3(b) was argued and rejected. The trial court had:

> dismissed the complaint on the ground that the trustee's action did not attack plaintiff's title and that, even if it did, the defendant would not be liable under the policy because the plaintiff had failed to inform defendant of the bankrupt's serious financial difficulties, of which plaintiff had actual or constructive knowledge. Not being liable to pay damages, the defendant was held not obligated to defend the plaintiff against the trustee's action. This was error.
>
> By alleging that the transfer of the realty to plaintiff was fraudulent and null and void, the trustee's complaint attacked the plaintiff's title; the defendant was therefore under a duty to defend the plaintiff against the trustee's action.[420]

The court thus apparently relied on the axiom that the duty to defend is broader than the duty to pay, in that the duty to defend includes all matters that attack title, even those which are subject to valid policy defenses.

A different kind of creditors' rights issue is the person seeking to recharacterize a deed that is absolute on its face as a mortgage, on the premise that the deed was given to defeat claims of judgment or other creditors. The creditors' rights exclusion specifically negates coverage for such a claim. However, Exclusion 3(a) has also been found to apply to negate coverage as to an action to recharacterize a deed as a mortgage, when the action is brought outside of the context of bankruptcy.[421] The leading case involving recharacterization of an interest in bankruptcy is *Bidart v. American Title Ins. Co.*[422] That court found that an action to recharacterize the insured's title interest was premised on allegations about the insured's intent that triggered Exclusion 3(a). Because the grantee-mortgagor gave a secret repurchase option back to the seller when the property was conveyed to the insured, the court found no duty to defend the suit to rescind the conveyance or have the deed declared an equitable mortgage.[423] The court reasoned that "a claim that a deed absolute on its face is to operate as a mortgage is a claim that the parties intended to create the mortgage."[424]

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preference claim was found excluded as being post-policy, even though the transfer itself was before the policy date.

[419] *Chicago Title Ins. Co. v. Citizens & Southern Nat'l Bank*, 821 F.Supp. 1492 (N.D. Ga. 1993); *Capital Bank v. Commonwealth Land Title Ins. Co*., 861 S.W.2d 84 (Tex.App.--Houston [1st Dist.] 1993).

[420] *National Heat & Power Corp. v. City Title Ins. Co.*, 57 App.Div.2d 611, 394 N.Y.S.2d 29 (1977).

[421] *Spurgeon v. Coan & Elliott*, 180 S.W.3d 593 (Tex.App. -Eastland 2005); *Marr v. Commonwealth Land Title Ins. Co.*, 307 Fed.Appx. 952, 2009 WL 211809 (6th Cir. (Ky.)) (unpublished).

[422] 734 P.2d 732 (Nev. 1987).

[423] *Bidart v. American Title Ins. Co.*, 734 P.2d 732 (Nev. 1987).

[424] 734 P.2d 732, 734. See also *Transamerica Title Ins. Co. v. Alaska Fed. Savings and Loan Ass'n*, 833 F.2d 775 (9th

Bidart was followed in *Ticor Title Ins. Co. v. FFCA/IIP 1988 Property Co.*,[425] in which an insurer was found to have no duty to defend its insured when the bankruptcy adversary complaint alleged that the insured sale-leaseback was actually a mortgage. The *FFCA* court held:

> [T]he defendants correctly contend that Mr. Raghavan's attempt to recharacterize the transaction as creating a security interest was without merit and would not have succeeded. This does not resolve the issue, however, because "[i]t is the nature of the claim and not its merits that determines the duty to defend." [citation omitted] Thus, "[t]he insurance company can properly refuse to defend when the underlying factual basis of the complaint, even [if] proved true, would not result in liability under the insurance policy." [citations omitted]
>
> * * * *
>
> By its very nature, Mr. Raghavan's recharacterization claim alleged that the defendants intended to create a security interest when transacting with Mr. Raghavan. Were this allegation true, Exclusion 3(a) would exclude such a "defect" in title as one "created, suffered, assumed or agreed to" by the defendants. It is of absolutely no relevance that the defendants did not so intend, for Ticor's duty to defend was based upon the nature of Mr. Raghavan's claim, and not upon its merits. [citation omitted] Ticor has no duty to defend against a claim that, if successful, had no possibility of invoking coverage under the title insurance policy.[426]

However, *Bidart* was found not applicable in *Allison v. Ticor Title Ins. Co.*[427] In that case, a bankruptcy trustee threatened to have condominium unit owners' interests declared to be "merely either equity investors in the [condominium] and/or mortgage holders on said equity investment." The Seventh Circuit ruled that this claim did not render title defective. However, the adversary proceeding was never tried, and the allegations underlying the trustee's apparent recharacterization claim never clearly established. Therefore, the insurer could not convince the court that the trustee's suit was based on intentional conduct by the insureds permitting a recharacterization of their interests. The court found a duty to defend. The *Allison* result was primarily due to the lack of specificity in the trustee's pleadings.

Cir. 1987).

[425] 898 F.Supp. 633 (N.D.Ind. 1995).

[426] 898 F.Supp. at 640-641.

[427] 907 F.2d 645 (7th Cir. (Wis.) 1990); 979 F.2d 1187 (7th Cir. 1992). The *Allison* case is further discussed in Homburger, *Federal Securities Laws and Ownership of Nontraditional Real Property*, 27 Real Property, Probate and Trust Journal 523 (Fall 1992). That article dwells particularly on the court's rejection of the claim in *Allison* that title to the condominium units was defective because such units could be considered investment contracts rather than interests in real estate.

11.9 Violation Of Doing Business Laws

The loan policy excludes loss caused by the lender's inability to enforce the mortgage because the lender is not qualified to do business in the state.[428] "Doing business" laws have been characterized as those laws which "regulate corporations by prescribing the terms and conditions upon which corporations will be permitted to do business in the state.[429] If a lender is not qualified to do business in a state, one common penalty is that it is denied access to the state courts, which in turn prevents it from enforcing a mortgage through foreclosure. In some states, a loan transaction by an unqualified or unlicensed lender is completely prohibited. No matter what the penalty, the insured's legal status in the jurisdiction is a matter exclusively within the insured's control—hence the exclusion.

When the law in question did not state that a lender's failure to qualify made its mortgages unenforceable, the insured argued that the exclusion did not apply. The court rejected the theory, saying:

> This argument is ultimately self defeating because the premise relied on by American to avoid application of the exclusion, i.e., that Section 11-43-101 does not void liens, necessarily admits there is no injury or harm for which the policies provide coverage.[430]

Thus, whenever the borrower asserts as a defense to a foreclosure that the insured has not complied with the doing business laws, the claim is excluded by the ALTA loan policy.

11.10 Homeowner's Policy Exclusions

The Exclusions in the Homeowner's policy are very similar to those found in other ALTA policies. Certain coverages provide limited assurances about subjects otherwise excluded. For example, Exclusion 1, for governmental regulation, "does not limit the coverage described in Covered Risk 14, 15, 16, 17 or 24." Similarly, the post-policy exclusion, 4(d), does not limit Covered Risks 7, 8.d, 22, 23, 24 or 25. Exclusion 2 is very important and different from other policies. It excludes coverage for the failure of the existing structures or any part of them to be constructed in accordance with applicable building codes. Although this exclusion does not limit the coverage of Covered Risks 14 and 15, the exclusion makes clear that the policy does not protect the insured from building code violations. Also, the definition of Policy Date is modified so that it is the later of either the date shown on Schedule A or "the date and time the instrument [by which the owner took title] is recorded."[431] The statement that the policy does not insure title to land outside

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[428] Exclusion 4 of the 2006 ALTA Loan Policy states that the insurer will not indemnify the insured against "[u]nenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated." Earlier versions of the standard ALTA policy have nearly identical exclusions.

[429] *Title Ins. Co. of Minn. v. American Sav. & Loan Ass'n*, 866 F.2d 1284 (10th Cir. (Colo.) 1989).

[430] 866 F.2d at 1285.

[431] Mr. Gosdin says this definition "provides 'gap coverage.'" This statement deserves explanation. The "gap" is not

Schedule A, or any rights in adjacent streets or waterways, found in the definition of "Land" in previous policies, has quite logically been moved to Exclusion 6. That exclusion also "does not limit" the coverage of Covered Risks 11 or 18. Although earlier versions of the policy had no creditors' rights exclusion, it appears as Exclusion 7 of the 2010 version of the policy. The Homeowner's policy's covered risks are discussed at §9.14.2.

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the same one excepted in the title insurance commitment, but the one illustrated by the *Alford* decision, which is between delivery of the deed and its recording. *The New Homeowners Policy of Title Insurance*, Virginia Land Title Association Examiner, Spring, 1999, p. 15.

12 Exceptions

Some of the exclusions in a title insurance policy appear in Schedule B. The policy preamble states that the covered risks are granted subject to the exceptions in Schedule B of the policy. These exclusions are labeled in title insurance policies as exceptions from coverage, rather than as exclusions, but they are exclusions nonetheless. Policy exceptions almost invariably describe matters that are within the scope of the covered risks but that are removed from coverage.

There are two types of exceptions. The first are those termed "standard" or "general" exceptions (also occasionally known as "ALTA" exceptions, because the American Land Title Association promulgated wording for such standard exceptions some years ago). Such exceptions remove coverage for classes of risk that are not specific to any one recorded instrument or to the parcel. In this treatise, the term "standard" is used for this class of exceptions.

The subjects of the standard exceptions are: parties in possession (see §12.2), survey matters (see §12.3), rights and interests that are visible on inspection (see §12.3), easements that do not appear in the public records (see §12.4), construction or mechanic's liens (see §12.5 and Chapter 10) and real estate taxes (see §12.6).

The second type of exception is for a title matter that pertains specifically to the insured parcel. These are known in the industry as "special" exceptions. Most commonly, a special exception negates coverage for the effect on title of a recorded instrument. Special exceptions are discussed at §12.7.

12.1 Standard Exceptions--Nature And Purpose

FORM 75, Appendix A
Off record risks excepted by standard exceptions

The number and wording of the standard exceptions varies somewhat from state to state and company to company. Some consistency is lent by the fact that the American Land Title Association has promulgated "suggested" wording for the standard exceptions. This treatise will refer to the ALTA-promulgated language except as noted.

The primary purpose of the standard exceptions is to remove from coverage various matters that affect title but that cannot be discovered in a search of those public records that impart notice of rights in real estate. This rationale has been repeatedly endorsed by the courts as being fair and enforceable. One court said:

> The exceptions set forth in Schedule B refer generally to situations which may affect the title but which would not be reflected by an examination of the public records. A title insurance company has no other feasible method of protecting itself from these circumstances… .[1]

Another court said that, "[a]bsent a specific undertaking to that effect, [the policy] does not presume to insure against infirmities not of record."[2] Thus, a policy containing the standard exceptions is sometimes termed a record title policy. See §9.12.1 for a discussion of the extent to which the policy insures off-record matters.

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[1] *McDaniel v. Lawyers' Title Guaranty Fund*, 327 So.2d 852, 855 (Fla.App. 1976). Similarly, in *Quelimane Co., Inc. v. Stewart Title Guar. Co*., 19 Cal.4th 26, 77 Cal.Rptr.2d 709, 960 P.2d 513 (Cal. 1998), the court said: "[a] title insurer issues title insurance on the basis of, and in reliance on, the quality of its own investigation into instruments which, when recorded, impart constructive notice. Generally those records are public records concerning the status of the title. Potential risks not disclosed in public records are generally excluded from coverage." See also *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992); and *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W. 2d 893 (1984).

[2] *Krause v. Title & Trust Co. of Florida*, 390 So.2d 805, 806 (Fla.App. 1980).

12.2 Parties In Possession

FORM 46, Appendix A
Parties in possession generally

The ALTA-suggested wording of the parties in possession exception is as follows: "[r]ights or claims of parties in possession not shown by the public records." The parties in possession exception has been declared to be unambiguous.[3] The legitimate purpose of the parties in possession exception was well-explained in *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co.*:

> The rationale for including an actual possession exclusion in a title insurance policy stems from the fact that possession of the land is notice of an interest in it. Blackburn v. Venice Inlet Co., Fla.1948, 38 So.2d 43. When a person, who does not appear in the chain of title, is found in possession of property it may indicate, for example, that he is making claim to the property by adverse possession, or that he is claiming under an unrecorded deed. A title examiner, however, seldom visits the land the title to which he is concerned with. J. McBrayer, Examination of Florida Titles Section 275 (1958). Thus, both to protect themselves and to put their client on notice of this state of affairs, title examiners and title insurance companies generally exclude from their title opinions and policies claims of parties in actual possession of the land insured.[4]

The parties in possession exception applies to rights of tenants and holders of easements or servitudes. Adverse possession claims normally also fall under this exception, although some cases have found that other exceptions also negate coverage for adverse possession. Some courts have held that the parties in possession exception does not apply to rights of possession that are shown in the

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[3] In *Fischer v. First American Title Ins. Co*., 388 S.W.3d 181 (Mo.App. W.D. 2012), the court provided an erudite discussion of the exception. The court said that "[t]he plain and ordinary meaning of the parties in possession exception for coverage is: The title insurance policy does not insure against rights or claimed rights of parties asserting possession to property via means outside of any public record denominating such possessory interest in the property." Although "possession" is not defined in the policy, the *Fischer* court said that it had found no case holding the exception to be ambiguous. Rather, it said, "there are numerous cases across the country and treatises that conclude the opposite." It cited *Zimmerman v. Chicago Title Ins. Co.,* 28 S.W.3d 584, 586 (Tex.App.1999) (concluding that the parties in possession exception is "a standard exception from coverage specifically relating to claims such as adverse possession"); *Boyadjiev v. Transnation Title Ins. Co.,* 2005 WL 3556156 (Mich.App. 2005) (unpublished) (parties in possession exception was unambiguous and designed to except from coverage unrecorded property possessory claims such as adverse possession); *Cheverly Terrace Partnership v. Ticor Title Ins. Co.,* 100 Md.App. 606, 642 A.2d 285 (Md.App. 1994) (parties in possession exception unambiguously excepted unrecorded property possessory claims such as adverse possession, negating duty to defend insured); *Panciocco v. Lawyers Title Ins. Corp.,* 147 N.H. 610, 794 A.2d 810 (2002); and *Smith v. McCarthy,* 195 S.W.3d 301 (Tex.App.-Fort Worth 2006).

[4] 216 So.2d 255, 257 (Fla.App. 1968).

public records.[5] These three subjects will be discussed in turn.

12.2.1 Rights Under Leases And Unrecorded Instruments

FORM 48, Appendix A
Tenant in possession

The parties in possession exception removes coverage as to tenants in the property, whose rights of possession would be apparent on inspection but are not disclosed by recorded instruments.[6] As one court stated it:

> …coverage will not be extended for conditions that are physically observable by an inspection of the premises. An example would be a tenant in obvious possession of the real property.[7]

Most jurisdictions say that a purchaser of land is bound by the knowledge he or she would glean by an inspection of the property and an inquiry of parties in possession.[8] The possession exception thus merely confirms that a purchaser does not shift or delegate its inquiry notice or inspection duty to the title insurer, unless the policy contains an affirmative assurance to the

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[5] *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 216 So.2d 255 (Fla.App. 1968); *Pruett v. Mississippi Valley Title Ins. Co.*, 271 So.2d 920 (Miss. 1973); *Parker v. Title & Trust Co. of Fla.*, 429 So.2d 1267 (Fla.App. 1 Dist. 1983); and *Nautilus, Inc. v Transamerica Title Ins. Co.*, 13 Wash App 345, 534 P.2d 1388 (1975).

[6] In *Alabama Title & Trust Co. v. Millsap*, 71 F.2d 518 (5th Cir. 1934), a tenant, Mays, claimed to hold possession for the owner, who retained a right to redeem the property from foreclosure. The property was sold by the lender to Millsap. The redemption holder sued to redeem and Millsap, the insured, was found not to be a bona fide purchaser without notice because of the inquiry notice from the tenant. The possession exception was found to negate coverage as to the right of redemption. In *236 West 40th Street Corp. v. Chicago Title Ins. Co*., 54 A.D.3d 632, 864 N.Y.S.2d 416 (N.Y.A.D. 1 Dept. 2008), an exception for "rights of tenants or persons in possession" was held to remove coverage as to the rights of a tenant under an unrecorded lease with a right of first refusal. In *Carefree Villages, Inc. v Keating Properties, Inc.*, 489 So.2d 99, 11 FLW 1095 (Fla.App. 2 Dist. 1986), policy coverage was not in issue. Rather, the buyer and seller disagreed about whether or not the possession exception was a "permitted" title exception. The court stated: "[r]ights of parties in actual possession of land are properly excepted from the coverage of title insurance policies where the circumstances reflecting possession should be apparent to one who visits and inspects the property." In *Cavender Enterprise Leasing Family, LLC v. First States Investors 4200, LLC*, 2013 WL 495650 (W.D.La.) (unpublished), the exception plus the post-policy exclusion were found to negate coverage for a right of first refusal recorded after the policy date.

[7] *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc.*, 544 So.2d 1070, 1072 (Fla.App. 1989).

[8] See, for example, *Kroitzsch v. Steele*, 768 So.2d 514, 25 Fla.L. Weekly D2145 (Fla.App. 2 Dist. 2000), in which the purchasers drove by the property, confirmed that it was occupied, but failed to ask the occupant directly about his rights in the property. The occupant later claimed to be the owner. The purchasers' actual knowledge of the possession plus their failure to inquire precluded bona fide purchaser status. The title insurance policy contained a possession exception, and the seller signed a possession affidavit labeling the occupant a tenant. The court found that the buyers had no right to rely on the affidavit's characterization of the adverse party as a tenant only.

contrary. However, the exception may not negate coverage as to possessory rights that are not visible on inspection of the property, such as a buried pipe.[9] As one court explained:

> Did the parties intend to include buried pipe lines within the actual possession exclusion? We think not. It is well settled that in order for actual possession to place those acquiring title to the subject property on inquiry, such possession must be open, visible, and exclusive. [citations omitted] In the present case the water pipe line was buried beneath the ground and there were no surface indications of its existence. The possession was not, therefore, "visible." Consequently there was no "actual possession," within the legal meaning of that term as used in the appellant's contract insuring Mosely's title.[10]

The exception may or may not apply when the possessor also has rights that may be found in the public records. Thus, in *Herbil Holding Co. v. Commonwealth Land Title Ins. Co.*,[11] the parties in possession exception was held not to apply when the possessor was also the record titleholder. In *Herbil*, the titleholder was not named in a mortgage foreclosure. The insured purchased from the foreclosing lender. After closing, the purchaser started an action to evict the titleholder, and the titleholder overturned the foreclosure and the buyer's title because he did not receive notice of the action. The court held that the possession exception did not negate coverage, saying:

> We hold that a defect arising from the rights of a person whose interest appears in the chain of title must be covered unless specifically excepted, irrespective of whether notice of that interest to the insured may be implied through open possession at the time the policy was issued. Because there was no specific exception for Robert Barbieri's interest, the more general exception for a "person in possession" is no bar to recovery.[12]

The specific language of the possession exception in the policy at issue must be compared to the asserted right in order to determine if the exception negates coverage for the claimed interest in the property.[13] In *Fekishazy v. Thomson*,[14] there was an unrecorded five-year lease. The purchase

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[9] *Shaver v. National Title and Abstract Co.*, 361 S.W.2d 867 (Tex. 1962); *San Jacinto Title Guaranty Co. v. Lemmon*, 417 S.W.2d 429 (Tex.App. 1967); *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734 (Tex.App. 1977) (drainage channels not visible); *Happy Canyon Inv. Co. v. Title Ins. Co. of Minn.*, 38 Colo.App. 385, 560 P.2d 839 (1976) (utility easement); *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 216 So.2d 255 (Fla.App. 1968) (underground pipeline).

[10] *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 216 So.2d 255, 257 (Fla.App. 1968).

[11] 183 A.D.2d 219, 590 N.Y.S.2d 512 (N.Y.A.D. 2 Dept. 1992).

[12] 590 N.Y.S.2d at 517.

[13] See *Doyle v. Siddo*, 54 A.D.3d 988, 865 N.Y.S.2d 126, 2008 N.Y. Slip Op. (N.Y.A.D. 2 Dept. 2008), in which the court ruled that an action seeking to impose a constructive trust on the insured property was "clearly and unambiguously

contracted listed the possessory right as being a month-to-month tenancy, and the policy exception also recited a month-to-month tenancy right. The appellate court, relying on *Herbil*, found that the narrow possession exception in the policy did not adequately negate coverage for the tenant's actual rights under the five-year written lease. In *Morgan v. Chicago Title Ins. Co.*,[15] the adverse party was a tenant who also held a contract to purchase the condominium unit. The policy made exception for claims "which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof." The court construed this exception narrowly, so that it did not negate coverage for the possessor's claim of ownership.

12.2.2 Trespassers

FORM 49, Appendix A
Trespasser

The policy protects against ownership rights that affect the insured's title to the insured land. It does not insure against possession by a person who has no legal right, such as a trespasser, since such a person does not claim an ownership right or possessory interest in the property. The parties in possession exception merely restates the fact that "loss" caused by a party having no right to possess the property is outside the ambit of the policy. Even when the exception is removed from the policy, no duty to indemnify exists for trespass. The subject of the chain of title, public records, and their relation to policy coverage is discussed at §9.12.

For example, in *Southwest Title Ins. Co. v. Woods*,[16] a company cut timber on the insured land. The logger had a deed, but the grantor of that deed held no timber rights on the property, which made the logger a trespasser. The court said the policy did not protect the insured against the taking of the timber.[17] The court buttressed its conclusion by finding that the insured had not suffered a loss caused by the spurious timber deed, because that deed did not create a defect in the insured's title.[18]

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excepted from coverage" by the parties in possession exception.

[14] 612 N.Y.S.2d 276 (N.Y.A.D. 3 Dept. 1994).

[15] 65 Fed.Appx. 184, 2003 WL 21212656 (9th Cir. (Hawai'i) 2003) (unpublished).

[16] 449 S.W.2d 773 (Tex. 1970).

[17] "The policy does not, either expressly or by implication, purport to insure against damage done to the land by a trespasser under the circumstances of this case." 449 S.W.2d at 775.

[18] "A party is not charged with constructive notice of a recorded instrument which is not in his chain of title. The conveyance from Darnell Lumber Company to Gross & Janes is not connected in any way with the title under which plaintiff claims, because the deed from Massey to Darnell is not on record. Plaintiff is not charged with constructive knowledge of either instrument. [citations omitted] Having purchased and paid value for the land without actual or constructive knowledge of either conveyance, plaintiff took the property free and clear of any rights or claims that Gross & Janes might otherwise have been entitled to assert. The two timber deeds did not, therefore, prevent plaintiff's having "good and indefeasible title" as guaranteed by his title insurance policy." Id. at 774.

The lack of coverage concerning trespass depends on the legal status of the possessor. A person who claims to hold a right in the property may invoke coverage, unless and until a court determines that the person is in fact a trespasser.

12.2.3 Possession Exception And Claims Based On Recorded Instruments

The ALTA-promulgated possession exception is for rights of parties in possession "not shown by the public records." The public record qualifier in the exception establishes the tension between record notice, which the insurer is deemed responsible for discovering, and notice by inspection, which is the purchaser-insured's burden. Most courts have held that the possession exception does not negate coverage for rights based on an instrument or grant found in the public records, particularly a right that is not purely possessory in nature.[19] However, the exception is enforced when the claimed right is based primarily on possession and not a recorded instrument.[20]

12.2.4 Adverse Possession And Prescriptive Easements

FORM 47, Appendix A
Adverse possession or prescriptive easement claim

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[19] *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953) (exception did not apply to recorded easement); *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975) (exception did not apply to recorded deed for part of parcel); *Laabs v. Chicago Title Ins. Co.*, 72 Wis.2d 503, 241 N.W.2d 434 (1976) (recorded deed overlap); *Stewart Title Guar. Co. v. Sterling*, 772 S.W. 2d 242 (Tex.App. 1989); 822 S.W.2d 1 (Tex. 1991) (recorded deed to possessor for part of insured parcel); *Happy Canyon Inv. Co. v. Title Ins. Co. of Minn.*, 38 Colo.App. 385, 560 P.2d 839 (1976) (utility easement); *McDaniel v. Lawyers' Title Guaranty Fund*, 327 So.2d 852 (Fla.App. 1976) (utility easement); *Pruett v. Mississippi Valley Title Ins. Co.*, 271 So.2d 920 (Miss. 1973) (drainage ditch); *Guaranty Title & Trust Corp. v. Virginia-Carolina Tie & Wood Co.*, 152 Va. 698, 148 S.E. 815 (1929) (part of insured parcel patented to another); *Parker v. Title & Trust Co. of Fla.*, 429 So.2d 1267 (Fla.App. 1 Dist. 1983) (recorded but forged deed). Contra: *Halvorson v. National Title and Abstract Co.*, 391 S.W.2d 112 (Tex.App. 1965) (recorded easement excepted by possession exception). In *Stewart Title v. Sterling*, 772 S.W. 2d 242 (Tex.App. 1989), the court found that, although the parties in possession exception contained no exception for recorded rights, it nevertheless was so limited. That ruling was based on the Texas state-promulgated waiver of inspection form, which itself refers to unrecorded matters only. The court stated: "Sterling was required to sign a "Waiver of Inspection" at the closing which stated that Stewart Title's policy would except from coverage the rights of parties in possession, "the existence of which does not appear of record." … The Owner's Policy issued to Sterling by Stewart Title [excepted] 4. Rights of parties in possession. Significantly, the qualifying language, 'the existence of which does not appear of record,' which was included in the waiver signed by Sterling, was omitted from the policy issued to him." Also see *Chicago Title Ins. Co. v. Abstract Associates, Inc.*, d. 4/4/2000, No. 821 (Ct.Sp.App. Md.) (unpublished), in which the policy contained the simple exception "Fences." The insurer paid the claim when it turned out that the fence enclosed property owned in fee by another, but the agency that did the title search missed the deed. The insurer sued the agent, and the agent defended by claiming that the insurer could have denied the claim based on record ownership under the exception for "Fences." The appeals court did not directly decide the issue, but sent the case back for trial after noting several decisions that said that "a non-specific general exception would [not] exclude an undiscovered recorded ownership interest."

[20] In *Polito v. Chicago Title & Trust Co.*, 12 Ill.App. 2d 57, 138 N.E.2d 710 (1956), the possession exception negated coverage for the rights of an adverse possessor who had been in continuous possession, despite the fact that his possession was evidenced in the public records through a lawsuit that had been dismissed more than two decades before the policy was issued.

Most decisions have held that a claim involving adverse possession, prescriptive easement rights or a boundary by acquiescence or agreement falls under the parties in possession exception.[21] However, some claims of adverse possession are not removed from coverage, depending on the nature of the right claimed when compared to the language of the exception.[22] The possession exception negates coverage for even a claim of adverse possession in which the claimed possessor's use of the property is not open and obvious.[23]

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[21] *Cooper v. Commonwealth Land Title Ins. Co.*, 73 Or.App. 539, 699 P.2d 1128 (Or.App. 1985); *Koenig v. First American Title Ins. Co. of Texas,* 209 S.W.3d 870 (Tex.App.-Houston (14 Dist.) 2006); *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 642 A.2d 285, 100 Md.App. 606 (Mo.App. 1993); *Frydman v. Fidelity Nat'l Title Ins. Co.*, 68 A.D.3d 622, 891 N.Y.S.2d 381, 2009 N.Y. Slip Op. 09530 (N.Y.A.D. 1 Dept. 2009) (no duty to defend insured in adverse possession case when policy contained exceptions for "rights of tenants or persons in possession" and "fences ... [that] vary with the record lines" as shown on a 1972 survey report); *Fischer v. First American Title Ins. Co*., 388 S.W.3d 181 (Mo.App. W.D. 2012) (insurer not required to indemnify or defend insured when sued by neighbor for adverse possession or boundary by acquiescence based on fence line because policy contained parties in possession exception; contains informative discussion of difference between the two doctrines as to policy coverage). In *Hansen v. Fidelity Nat'l Title Ins. Co*., 2013 WL 424437 (D.Or.) (unpublished), the court found that an exception for "facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession" removed coverage for a claim of adverse possession. The court relied on *Cooper v. Commonwealth Land Title Ins. Co.*, 73 Or.App. 539, 699 P.2d 1128 (Or.App. 1985). The parties in possession exception was found to exclude an adverse possession claim in *Zimmerman v. Chicago Title Ins. Co.*, 1999 WL 394602 (Tex.App.-Austin) (unpublished). The court noted that "[t]he rationale for the exception, at least in part, is that possession of land should put the insured on notice of an adverse interest." *Zimmerman* was followed in another Texas case involving adverse possession, *Smith v. McCarthy*, 195 S.W.3d 301 (Tex.App.-Fort Worth 2006, pet. denied), which also relied on the *Cheverly* decision. In *Panciocco v. Lawyers Title Ins. Corp.*, 794 A.2d 810 (N.H. 2002), the court found an adverse possession claim removed from coverage by the possession exception, noting that the exception exists because the title examiner "seldom visits the land the title to which he is concerned with." Thus, "title examiners and title insurance companies generally exclude from their title opinions and policies claims of parties in actual possession of the land insured.'" One early case, *Bothin v. California Title Ins. & Trust Co.*, 153 Cal. 718, 96 P. 500 (1908), found adverse possession excepted by a possession exception for the "tenure of the present occupants." The court said "It was left to the appellant to determine, by an inspection and examination of the property, whether there was adverse occupancy or not, to determine for himself by actual measurement, survey, or examination of the premises whether he was getting what he contracted to purchase, or whether there was an adverse claim of title of any character by the occupants of the whole or any portion of the premises."

[22] In *Place v. St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N.W. 706 (1897), the court said an exception for "tenancy of the present occupants" did not negate coverage for a claim of adverse possession. It construed the phrase "present occupants" to refer to tenants only, not a party claiming fee title adversely to the insured owner.

[23] In *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 642 A.2d 285, 100 Md.App. 606 (Mo.App. 1993), the insured admitted that the possession exception would bar a duty to indemnify if the party could establish a claim of adverse possession. The insured claimed the insurer had a duty to defend the claim because the party could not prevail, and thus was not a "party in possession." The court disagreed, saying "We disagree with this result-oriented approach. The duty to defend under an insurance policy is not determined by the facts ultimately proven in the underlying suit. Rather, an insurer's duty to defend is based on whether the allegations in the complaint potentially bring the claim within the policy's coverage." The alleged claim was based on possession, not a recorded right, and therefore the exception negated a duty to indemnify or defend. Similarly, in *Boyadjiev v. Transnation Title Ins. Co.*, 2005 WL 3556156 (Mich.App.) (unpublished), the insured sought to avoid the effect of the exception by arguing that the neighbor was not really in possession. He submitted photographs to the insurer to support his argument. The court found that, "regardless

More than one standard exception may be found to apply to a claim involving adverse possession, prescriptive easement rights or a boundary by acquiescence or agreement. Adverse possession claims have also been found to be removed from coverage by the exceptions for unrecorded easements and survey matters. See §12.2.5 concerning the application of the latter two exceptions to such claims. For cases concerning the application of the survey exception to adverse possession claims, see § 12.3.17.2.

Some courts have held that a possession exception did not negate coverage, when the adverse party claimed both adverse possession and color of title based on a recorded instrument.[24] However, public record of a suit to remove the adverse possessor, which had been dismissed more than two decades before the policy date, did not take the possession claim outside the scope of the possession exception.[25]

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of whether the exclusion applies to claims of parties actually in possession or claims of parties merely claiming to be in possession, the exclusion applies to any possession that is not of record." However, in *Houston Title Guaranty Co. v. Fontenot*, 339 S.W. 2d 347 (Tex.App. 1960), the neighbor claimed title to a three-foot strip based on an oral property line agreement. The only physical evidence of the title claim was the encroachment of the neighbor's garage eave and downspout onto the insured property. The court held that the insured could not reasonably have divined the existence of the oral agreement from having seen the encroachment; thus, the matter was not excepted by the possession exception. Note, however, that *Fontenot* was not about adverse possession but an oral agreement granting an alleged easement or license.

[24] In *Hansen v. Fidelity Nat'l Title Ins. Co*., 2012 WL 1605618 (D.Or.) (unpublished), the court held that an exception for "facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession" would not apply if the adverse possessor also claimed to have color of title based on a recorded instrument. *Cooper v. Commonwealth Land Title Ins. Co.*, 73 Or.App. 539, 699 P.2d 1128 (Or.App. 1985), held that a possession exception negated coverage for an adverse possession claim, but would not apply if the claim was based on color of title from a recorded instrument. In *Nautilus, Inc. v. Transamerica Title Insurance Co.,* 534 P.2d 1388 (Wash.App. 1975), the adverse party based its claim on a platted description that overlapped the insured's description, not mere possession, and was thus not excepted. In *Horn v. Lawyers Title Ins. Corp*., 89 N.M. 709, 557 P.2d 206 (1976), the possession exception did not apply to the rights of a party in possession who also was the record titleholder.

[25] *Polito v. Chicago Title & Trust Co.*, 12 Ill.App. 2d 57, 138 N.E.2d 710 (1956).

12.2.5 Matters That Invoke Several Exceptions For Possession, Survey And Unrecorded Easements

Some claims of adverse possession, prescriptive easement, boundary line by agreement and similar rights or doctrines may fall under separate exceptions for parties in possession, survey matters, or easements not of record. When both exceptions are included in the policy, the court may elect to decide policy coverage under either exception.[26] When the policy contains one exception but not the other, the question is whether or not the remaining exception encompasses the issue presented by the claim, and the result can depend on the wording of the exception or the language of an affidavit used by the insurer to remove a different exception.[27]

For cases concerning the application of the survey exception to adverse possession claims, see §12.3.17.2. The exception for easements not of record is discussed at §12.4.

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[26] In *Dickins v. Stiles*, 81 Wash.App. 670, 916 P.2d 435 (1996), the policy contained both survey and possession exceptions, and was found not to create a duty to indemnify or defend against a claim of adverse possession. In *Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181 (Mo.App. W.D. 2012), a neighbor claimed some of the insured land either by adverse possession or under the doctrine of boundary line by acquiescence or agreement. The court said, in a scholarly opinion, that "[a]dverse possession is a 'title' claim; boundary by acquiescence is a 'boundary' claim. In the context of 'title' insurance, this is a distinction with a difference." The importance of that difference, the court said, was that a boundary line by agreement claim does not invoke a Covered Risk, while an adverse possession claim does. In any event, the court found no coverage for either claim based on the parties in possession exception. It did not reach the survey exception, which the insurer also asserted. In *Hansen v. Fidelity Nat'l Title Ins. Co.*, 2012 WL 1605618 (D.Or.) (unpublished), the policy contained exceptions for "facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession" and "[d]iscrepancies, conflicts in boundary lines, shortage in area, encroachments or any other facts which a correct survey would disclose." Therefore, it refused to dismiss a claim that the insurer had a duty to defend the adverse possession suit. The insured argued that the allegations in the neighbors' complaint were vague enough that they might have encompassed a claim based on color of title—that is, by a written instrument—and that instrument *could have been* recorded. The court so ruled despite the fact that the insured had already won the adverse possession lawsuit, and no such allegation had been made or proven.

[27] In *Alden v. Schuster*, 2008 WL 2039075 (Conn.Super. 2008) (unpublished), for example, insureds argued that the removal of the possession exception granted coverage against an encroachment, despite the fact that the survey exception remained in the policy. The premise for their argument was the language in the possession affidavit, in which the sellers had stated that they had no knowledge of any encroachments, and which said "[this affidavit] may be used under some circumstances to justify the deletion of the survey exception from certain mortgage policies." The court rejected the argument based on the fact that numerous cases have found encroachments to be excepted by the survey exception, and because the court determined that the possession exception is intended to deal with rights of tenants and others who reside in the premises. The court held: "It appears clear that 'rights of persons in possession other than the insured' refers to the rights of tenants. As there were no tenants of Lot 8, CATIC removed the exception. By its own terms, the affidavit relied upon by the plaintiffs does not relate to the "persons in possession" exception, it relates to exception B, the survey exception. … It is undisputed that CATIC did not delete the survey exception from the Policy. Under plaintiffs' interpretation of the Policy language, the removal of General Exception A, persons in possession other than owners, would always result in the de facto removal of General Exception B, the survey requirement. Whenever a survey would reveal that an insured's property encroached upon or was encroached upon by the property of a neighbor, that neighbor, like the Schusters, would be a 'person in possession other than the owner.' Such interpretation eradicates the survey exception, violating the basic rules of contract construction. … Contrary to the plaintiffs' argument, the language of the Policy is not ambiguous. General Exception A, "persons in possession other than the insured," refers to tenants of the insured property, not neighbors. The removal of that exception has no effect in the plaintiffs' present circumstances."

Exceptions

Several decisions have found claims of adverse possession or prescriptive easement excepted under the "unrecorded easements" or "accurate survey" exceptions.[28] In *Brenner v. Lawyers Title Ins. Corp.*, the Virginia Supreme Court disposed of an adverse possession claim based on the survey exception:

> ... any claim relating solely to the driveway portion was excluded from coverage under the survey exception [(c)] because it is undisputed that the driveway and its use "would have been disclosed by an accurate survey and inspection of the premises," in the language of the Exception. ... Thus, the insurer had no duty to defend because it appears clearly that it would not be liable under its contract for any judgment based upon the allegations of the Preshlock complaint.[29]

A Washington decision also held that a claim of adverse possession fell under the survey exception.[30] However, a Missouri court found that the issue of whether or not an accurate survey would disclose a prescriptive avigation easement was a question of fact:

> The issue of the disclosure of the matter of an unrecorded prescriptive easement by accurate and complete surveys is certainly one of fact as Hon contends. It cannot be determined from the pleading alone what a surveyor might take into account in surveying the boundaries of the property and what he might determine to be an easement by prescription by aircraft landing and taking off at a low altitude from the observable, adjacent Runway 31 to the north of Hon's property. The testimony of expert witness surveyors might determine that proposition, that testimony to be evaluated by the trier of the fact. Although no case has been cited or found concerning this issue which involves a prescriptive flight easement, see these cases holding that what an accurate survey would disclose is a fact question: ... [citations omitted][31]

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[28] See *Gebrayel v. Transamerica Title Ins. Co.*, 888 P.2d 83 (Or.App. 1995) (claim of prescriptive or implied easement excepted under either unrecorded easement exception or parties in possession exception). A prescriptive easement claim was not covered by the policy due to an exception for "any discrepancies, conflicts or shortages in area or boundary lines or any encroachments or protrusions, or any overlapping of improvements," in *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished). The insured protested that a claim of prescriptive easement was not one of the words recited in that exception. The court said that, "[a]lthough [the insured] asserts that [the plaintiff] did not specifically claim a boundary dispute or encroachment, the easement, by its very nature, disrupted the boundary lines between the two properties. Whether [the plaintiff] had pled encroachment, protrusion, or boundary discrepancy is irrelevant. The pleadings sufficiently alleged that the easement claimed surpassed his property line and lay within the bounds of [the insured's] property, thereby invoking the exclusion."

[29] 397 S.E.2d 100, 104 (1990).

[30] *Muench v. Oxley*, 90 Wash.2d 637, 584 P.2d 939 (1978).

[31] *Hon, Inc. v. Central Missouri State Univ. Board of Regents*, 678 S.W.2d 413, 415 (Mo.App. 1984).

Thus, not every type of possession interest is shown by an accurate survey. However, a purchaser of property, on inspecting the property and making due inquiry as to possession, has a duty to and will discover almost any form of possession. As an Illinois court observed, there is more cohesion in finding that the parties in possession exception applies to possessory rights, because that exception is clearly based on the purchaser's duty of inquiry and inspection:

> When Plaintiffs contracted for the purchase of the premises, and when they acquired title, it was their bounden duty to inquire of the person in possession by what tenure he holds and what interest or claims he had in the premises. The purchaser cannot excuse himself by merely obtaining information as to how possession was obtained ... . Open possession is sufficient to charge such purchaser with knowledge of all legal or equitable claims of the occupant which could have been ascertained by such inquiry.[32]

12.3 Accurate Survey And Inspection Exception

The second standard exception is commonly referred to as the "survey" exception. One of the more common phrasings of the survey exception is as follows:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

A different exception is used in Texas.[33] Also, there are numerous permutations of the survey exception, as is discussed at §12.3.3. When the ALTA 2006 form of policy is used, some insurers use a survey exception that is identical to Covered Risk 2(c), the so-called survey coverage of that policy, which reads as follows:

> Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

Covered Risk 2(c) is analyzed at §9.9.1, including those cases that have construed the coverage of a policy that contains both the survey coverage and a survey exception. That discussion is not repeated in this section.

The survey exception is frequently mated with an exception for unrecorded easements, because underwriting standards typically say that both exceptions must be inserted in a policy if the insured does not deliver an acceptable survey. See §12.4 for a complete discussion of the unrecorded

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[32] *Polito v. Chicago Title & Trust Co.*, 12 Ill.App. 2d 57, 138 N.E.2d 710, 713 (1956).

[33] The current Texas Exception 2 reads as follows: "Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements."

easement exception.

The removal of the standard exceptions is known in some states as "extended coverage." It is true that the removal of an exclusion always expands coverage. However, the term "extended coverage" should not be understood to suggest that the removal of the standard exceptions is the granting of any affirmative coverage.[34] The fact that a certain type of fact might or might not appear on a survey does not create or increase coverage.[35]

Most versions of the survey exception make exception for two separate but related classes of defects: those shown on an accurate survey, and those that would be disclosed by an inspection of the land. The inspection clause is discussed at §12.3.17. The following sections discuss some general issues about the survey exception, including the following:

1. The purpose and scope of the exception is discussed at §12.3.1.

2. The question of whether or not the exception is ambiguous is discussed at §12.3.2.

3. The effect of differences in the exception language is described in §12.3.3.

4. The assertion that the insurer had a duty to obtain a survey or highlight the effect of the exception is analyzed in §12.3.4.

5. The standards which establish what is shown on an accurate survey, and thus the scope of the survey exception, are discussed at§12.3.5.

Following these general topics, this section discusses survey issues by type: overlaps, encroachments, boundary line disputes, shortages in distance or area, adverse possession and prescriptive easements, and water boundaries. Finally, §§12.3.13 through 12.3.16 discuss the effect of removal of the survey exception and affirmative assurances about survey matters.

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[34] *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006) (survey exception is a policy exclusion; its removal does not create a coverage, even though some states call the removal of the exception "extended coverage").

[35] In *Chicago Title Ins. Co. v. Investguard, Ltd.*, 215 Ga.App. 121, 449 S.E.2d 681, 683 (Ga.App. 1994), the court said that it was irrelevant whether the property's location in a flood plain would be disclosed on an accurate survey, because that designation is not a defect in title and thus was not covered by the policy. In *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co*., 2007 WL 3334210 (W.D.N.C.) ((unpublished), the location of tree stump burial pits was shown on a survey, but the depicted area was allegedly not accurate. The insured, a homebuilder, built new homes on some of the pits and they sank. The pits did not invoke policy coverage, even though they were shown on a survey.

12.3.1 Purpose And Scope Of Survey Exception

FORM 76, Appendix A
No survey coverage unless exceptions removed

The commonly-stated purpose of the survey exception is that it removes from coverage various matters that cannot be found in the public records but that would be apparent on review of a survey. As one author points out, this is the same rationale that underlies most of the "standard" exceptions.[36] The necessity of the survey exception has been endorsed repeatedly by courts that have found it to be fair and enforceable. For example:

> The exceptions set forth in Schedule B refer generally to situations which may affect the title but which would not be reflected by an examination of the public records. A title insurance company has no other feasible method of protecting itself from these circumstances ... .[37]

Or, as a later Florida opinion said, "[a]bsent a specific undertaking to that effect, [the policy] does not presume to insure against infirmities not of record."[38]

Nested within most versions of the survey exception is a further exception for those matters that would be identified on an inspection of the property. The inspection clause is related to but not the same as the survey exception. The rationale for the inspection clause is slightly different than for the survey exception. The inspection clause excepts matters that are open and obvious to a purchaser of the property. The inspection clause thus makes it clear that the insurer is not the buyer's guarantor if the purchaser fails to make a diligent inspection of the property as is his or her ordinary duty in conveyancing law. As one court stated it:

> The purpose of an inspection, which is performed by merely visiting the property, is to disclose such matters as physical encroachments, evidence of adverse use, and monuments. By comparison, a survey, as this case demonstrates, can involve extensive research and field work. Unlike a mere inspection, a survey relates the property as described in recorded instruments to the land as it exists.[39]

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[36] Joyce D. Palomar, Title Insurance Law, 2013-2014 Edition, § 7:2, p. 515, West/Thomson Reuters.

[37] *McDaniel v. Lawyers' Title Guaranty Fund*, 327 So.2d 852, 855 (Fla.App. 1976). See also *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992); *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W. 2d 893 (1984).

[38] *Krause v. Title & Trust Co. of Florida*, 390 So.2d 805, 806 (Fla.App. 1980).

[39] *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992).

See §12.3.17 for a discussion of the inspection clause.

Thus, the most commonly-stated justification for the exception is that it excepts matters which the insurer cannot discover by even the most careful search of the land records, but that could be discovered by ordinary diligence of the purchaser-insured by either an inspection or by obtaining a survey.

Some property rights that would be identified on a survey or found in an inspection are also disclosed in the public records. In such cases, the question is whether or not the exception is negated by the fact that the insurer could have identified the issue from its records search.[40] The exception does not apply only to matters not shown in the public records.[41] Courts have reached surprising consistency in these cases.[42]

The survey exception covers a number of subjects, all of which relate in some way to matters that typically are disclosed on a survey. The exception has a significant drawback, in that the insurer or court must interpret the exception through the lens of what a survey would recite or disclose. Some courts have said this requires the expert testimony of a surveyor, or at least the preparation of an accurate survey, as is discussed at 12.3.5 and 12.3.5.3. In this regard, title insurers operating in other states should note that modern Texas policies contain a promulgated Exception 2 that encompasses all or most of the subjects of the usual survey exception without making any reference to a survey. The current Texas Exception 2 reads as follows: "Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements."

12.3.2 Survey Exception Enforceable, Not Ambiguous

As to non-recorded matters, the survey exception is not ambiguous, and is enforceable.[43] The

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[40] For example, in *Dallas Title & Guaranty Co. v. Valdes*, 445 S.W.2d 26 (Tex.App. 1969), the policy insured "All of Lot 9, Block G, Summit Oaks Subdivision fronting on U.S. 183 Expressway and being the same as lot 9 in Plat Book 7, Page 183, Travis County Plat records and same fronting about 140 feet on said expressway." In fact, about 90% of Lot 9 had been taken by public condemnation for highway. The court rejected the argument that the survey exception applied.

[41] This contrasts with the related exception for "easements, or claims of easements, **not shown in the public records**." See §12.4 regarding that exception.

[42] See §12.3.9 (record overlaps) and §12.3.17.2 (recorded easements).

[43] In *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 216 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992), the court gave this recitation of prior decisions that have found the survey exception enforceable: "[W]e find that the survey exception is neither vague nor unenforceable. The subject policy is in a form promulgated in 1970 by the American Land Title Association, which has been approved by the Commissioner of Insurance. Identical or similar language has been approved by other courts and scholars. See *Kuhlman v. Title Ins. Co.*, 177 F.Supp. 925 (W.D.Mo.1959) (excepting '[f]acts which would be disclosed by an accurate survey of the premises herein described'); *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W.2d 893 (1984) (excepting 'any matters which would be disclosed by an accurate survey and inspection of the premises'); *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 301, 354 N.W.2d 154, 157 (1984) (language excepting 'any other matters which would be disclosed by an accurate survey and inspection of the premises' construed 'as having plain and ordinary meaning'); *Swanson v. Mid-South Title Ins. Co.*, 692 S.W.2d 415 (Tenn.App.1984) (excepting 'other facts which a correct survey would show'); see also 7

terms "overlap" and "accurate survey" are also not ambiguous, and the lack of definition in the policy for the terms does not render the exception void.[44] The exception also unambiguously covers encroachments of improvements onto adjoining land.[45] The characterization of an encroachment as a "protrusion" did not make the exception ambiguous.[46] The exception also is not rendered ambiguous by the fact that it does not state the date as of which a survey would disclose the excepted matters.[47] One court found the survey exception rendered ambiguous when the insurer asserted it in a fashion that caused it to conflict with a covered risk.[48]

The survey exception is not a void adhesion contract term, since the insured can negotiate its removal in some cases. A buyer does not have a "reasonable expectation" of survey coverage that would bar the insurer from denying a claim based on the survey exception.[49]

Powell on Real Property Section 1046 at 92-38 (1987 ed.) (Powell) (an exception excluding 'any state of facts an accurate survey would disclose' described as a 'common exception in most owners' policies')." See also *Alden v. Schuster*, 2008 WL 2039075 (Conn.Super. 2008) (unpublished), which found the exception enforceable and not ambiguous.

[44] *Downing v. Eubanks*, 557 N.E.2d 1027 (Ind.App. 1990). The lack of definition of "overlap" was again raised in *RLB, Inc. v. US Life Title Ins. Co. of New York*, 774 S.W. 2d 607 (Tenn.App. 1989). In that case, the court stated: "We think ... that where RLB's deed covers a portion of the land described in a prior deed held by TVA, the facts show a classic case of an overlap. While we are not aware of any authority which defines the term 'overlap' as used in this policy, we think that the facts of this case come within the common, ordinary meaning of the term."See also §12.3.9, regarding overlaps.

[45] *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984): "[The] survey exception is expressed in language having plain and ordinary meaning. Therefore, correct location of any structure on the described premises is not a risk or loss covered by Chicago's policy of title insurance." See also *Alden v. Schuster*, 2008 WL 2039075 (Conn.Super. 2008) (unpublished).

[46] *Cook Consultants, Inc. v. Larson*, 677 S.W.2d 718 (Tex.App. 1984), aff'd in part and rev'd in part *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567 (Tex. 1986).

[47] In *Swanson v. Mid-South Title Ins. Corp.*, 692 S.W.2d 415 (Tenn.App. 1984), the insured made the argument that a survey performed on policy date would not have shown physical evidence of the neighbor's title claim. Thus, the insured would admittedly have gotten protection against the matter had he presented a survey at policy issuance. The insured wanted the insurer estopped from being required to grant the same coverage after the defect was discovered, on the pretense of the exception's "ambiguity."

[48] In *McDaniel v. Lawyers' Title Guaranty Fund*, 327 So.2d 852 (Fla.App. 1976), the insurer asserted that the survey exception negated coverage for a recorded, which the court found to be in conflict with the covered risk for easements, rendering the policy ambiguous and the survey exception unenforceable as to the recorded easement.

[49] "We reject plaintiff's contention that the exclusion should be deemed void as against public policy; we perceive no unconscionability in permitting, or public policy basis for prohibiting, title insurers from excluding from coverage, if clearly expressed, matters which would be revealed by an accurate survey. Such an exclusion is not so broad that it renders the insurance policy a meaningless sham, but rather merely places on the insured the burden of obtaining an accurate survey of the property the insured is purchasing and the responsibility for any defects which that survey discloses." *Muscat v. Lawyers Title Ins. Corp.* 135 Mich.App. 26, 351 N.W. 2d 893, 896 (1984).

12.3.3 Words And Phrases Used In Survey Exception

The breadth of the survey exception depends on the exact wording used. The use of the phrase "other matters" makes it clear that the survey exception is not limited to the subjects specifically identified in the exception, such as encroachments, overlaps and boundary line disputes.[50]

When the exception is for matters "which would be disclosed by an accurate survey and inspection of the premises," it does not except only those matters that would be disclosed by *both* a survey and an inspection of the property.[51] Rather, the survey exception and the inspection clause are independent limitations on coverage, based on different rationales, as is discussed at §12.3.1. However, one court construed an exception for "[u]nrecorded easements, discrepancies or conflicts in boundary lines, shortage in area and encroachments which an accurate and complete survey would disclose" as meaning that the phrase "which an accurate and complete survey would disclose" modified each of the prior clauses, including "unrecorded easements."[52] The court said that the exception would apply to an unrecorded easement only if that easement would have been shown on an accurate and complete survey. Another court held that a survey exception which used the phrase "and which are not shown by the public records" did not apply to any matter found in the public

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[50] In *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992), the court held that "other matters" included a claim based on the fact that the insured parcel contained fewer acres of land than was stated in the policy legal description. A prescriptive easement claim was not covered based on an exception for "any discrepancies, conflicts or shortages in area or boundary lines or any encroachments or protrusions, or any overlapping of improvements," in *Rockhold v. Fidelity Nat'l Title Ins. Co.*, 1999 WL 239053 (Tex.App. -San Antonio) (unpublished). The insured urged that the exception did not apply because prescriptive easement was not one of the words recited in that exception. The court said that, "[a]lthough [the insured] asserts that [the plaintiff] did not specifically claim a boundary dispute or encroachment, the easement, by its very nature, disrupted the boundary lines between the two properties. Whether [the plaintiff] had pled encroachment, protrusion, or boundary discrepancy is irrelevant. The pleadings sufficiently alleged that the easement claimed surpassed his property line and lay within the bounds of [the insured's] property, thereby invoking the exclusion."

[51] "Finally, we disagree with the conclusion of the Appellate Division that the exception does not apply because the shortage in acreage was not discoverable by both an accurate survey and an inspection of the premises. A survey and inspection serve related but different purposes. ... It would distort the title policy to the point of illogic to expose Chelsea to the risk of the results of an accurate survey merely because those results could not be revealed by an inspection of the premises." *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 217. In *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (Cal.App. 5 Dist. 1974) it was stated: "The insured is not protected from matters dependent upon a survey **or** a critical inspection of the property ... ."[emphasis added]

[52] "Hon argues that the matter of whether or not the easement by prescription claimed by CMSU over Hon's property would have been disclosed by an 'accurate and complete' survey is a question of fact which is properly made on the basis of proof, and not merely on the pleadings. Commonwealth argues that the clause in Schedule B, 2, supra, excepts coverage for unrecorded easements solely, and that the phrase, 'which an accurate and complete survey would disclose' modifies only the term 'encroachments,' not 'unrecorded easements.' That is too narrow a construction of the clause, which is contained in one single sentence wherein 'unrecorded easements, discrepancies or conflicts in boundary lines, shortage in area,' are connected by the conjunctive 'and' with 'encroachments;' thus a fair reading of the clause can only be that all of these items are subject to the disclosure of an accurate and complete survey." *Hon, Inc. v. Central Mo. State Univ. Board of Regents*, 678 S.W.2d 413 (Mo.App. 1984).

records.[53]

In *Houston Title Guaranty Co. v. Fontenot*,[54] the court construed a rather ancient version of the Texas survey exception, which used the phrase "discrepancies in area and boundaries which a correct survey would show." The court said the exception was not construed based on what a "complete" survey would show. The insurer argued that the insured's survey was not complete because it did not show encroachments, but the insurer did not say it was incorrect. The court held that the survey was an adequate representation of what would be shown on a correct survey. Because the survey did not show the encroachments that were the subject of the claim, the court found that the exception did not negate coverage for the encroachments.[55]

12.3.4 No Duty To Obtain Survey, Or Highlight Or Remove Exception

The insurer has no duty to obtain a survey for the insured in order to cause itself to remove the survey exception; nor does it have a duty to instruct the insured on the desirability of obtaining coverage against survey matters. Removal of the survey exception is a significant coverage for which, in most jurisdictions, an insured pays a substantial additional premium. When the exception may be removed by payment of an additional premium, the disclosure of the exception prompts the proposed insured to consider getting the coverage.[56] The policy issuer does well to inform the customer of the value of the additional coverage that is created by removal of the exception, which justifies the related premium.[57]

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[53] *Stearns v. Title Ins. & Trust Co.*, 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (1971). The full exception read: "Discrepancies, conflicts in boundary lines, shortages in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records."

[54] 339 S.W.2d 347 (Tex.App. 1960).

[55] *Houston Title Guaranty Co. v. Fontenot*, 339 S.W.2d 347 (Tex.App. 1960). The form of survey exception at issue in *Fontenot* has not been used in Texas for many years. Modern Texas policies use an Exception 2 that does not even refer to a survey, but instead lists the subjects generally associated with the survey exception. The Texas Exception 2 reads as follows: "Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements."

[56] In *Muench v. Oxley*, 90 Wash.2d 637, 584 P. 2d 939, 944 (Wash. 1978), the court said: "We do not agree that the provision should be denied effect because it was not set forth in the preliminary commitment. Certainly, it would seem desirable that general exceptions be specifically set forth in the preliminary commitment or that a copy of the standard form policy be delivered to the insured at the same time as the preliminary commitment. At the very least, this case demonstrates that an insured should receive a copy of the standard form policy in a closing conference conducted at the title company office. We cannot say, however, that Transamerica's failure to take either course renders the provision nugatory."

[57] In *Marshall v. King & Morgenstern*, 272 Ga.App. 515, 613 S.E.2d 7 (Ga.App. 2005), the insured asserted that the title agent orally committed to issuing a First American Eagle™ policy which would have included protection against survey matters, but instead the agent issued a 1992 ALTA policy without removing the survey exception. The court found a question of fact as to whether or not the agent (not the insurer) was liable to the insured for failing to adequately inform the insured or, alternately, to bind the intended coverage. In states where the Residential or Homeowner's policies are offered, giving affirmative coverage similar to those found in the Eagle™ policy, title agents should carefully consider advising customers on policies that afford greater coverage. Insurance broker liability is discussed at §17.7.

When the insured does not request or pay for the removal of the survey exception, that coverage may not be created by merely interpreting the exception as a nullity.[58] The exception also is not removed *de facto* by an allegation in negligence that the insurer has a duty to examine a survey and tell the insured what it contained.[59]

An insurer is not obligated to obtain an accurate survey for the insured so that the legal description insured can be verified by field measurements.[60] By not getting a survey, the insured assumes risk, including the possibility that it will pay for more land than is conveyed to it.[61]

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[58] "As Mr. Witkin puts it, '(f)or a premium of about double the usual sum, the company makes a survey and inspection, and the policy covers a great many of such off-record defects as would thereby be discovered.' (3 Witkin, Summary of Cal. Law, 8th ed., Real Property, § 168, p. 1906; see C.E.B., Cal. Real Estate Sales Transactions, § 17.17, p. 620.) What appellants are arguing is that the Western Title Insurance Company's policy of title insurance, although a standard policy of title insurance, protected appellants against the loss of acreage Edgardo Contini thought he was getting even though he admitted knowing the land he was buying had three government lots and the significance of the designation 'government lot.' What appellants are seeking from the Western Title Insurance Company policy is extended coverage without having requested that type of coverage and without having paid the additional premium. The court properly granted respondent Western Title Insurance Company's motion for judgment notwithstanding the verdict." *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257, 261 (Cal.App. 5 Dist. 1974). To the same effect are *Muench v. Oxley*, 90 Wash.2d 637, 584 P. 2d 939 (Wash. 1978) and *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W. 2d 893 (1984). In *Panciocco v. Lawyers Title Ins. Corp.*, 794 A.2d 810 (N.H. 2002), the court found that the survey and parties in possession exceptions should not be judicially eliminated from the policy based on the insured's "reasonable expectation" that the policy would not contain such exceptions from coverage. It ruled that the insurance contract's terms are not construed based on the insured's own subjective testimony about what coverage she expected to receive.

[59] *Ely v. Munshower*, 4 Pa.D. & C.3d 430 (1977).

[60] In *Kuhlman v. Title Ins. Co. of Minn.*, the court held: "Plaintiffs contend that when they sought title insurance from the defendant, it was the responsibility of the defendant to determine the correctness of the description in insuring the title to such property as the plaintiff actually purchased under their deed. Had the survey obtained by the plaintiffs prior to the erection of the building been a correct survey, it would have revealed the exact location of plaintiffs' east boundary and their present difficulty would not have arisen. It is very apparent that the defendant was under no obligation to cause a survey to be made prior to issuing the policy, and that it insured the title only to such property as plaintiffs actually acquired. There can be no other reason for the exclusionary clause in its contract, and such exclusionary clause is binding upon the plaintiffs, and they are not entitled to recover." 177 F.Supp. 925, 926 (W.D.Mo. 1959). In accord is *Ely v. Munshower*, 4 Pa.D. & C.3d 430 (1977).

[61] In *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992), the court said: "In effect, plaintiff seeks to obtain a better policy than it purchased by transferring to the insurer a risk that it assumed. … Had plaintiff obtained a survey from Duffy before the Kosa closing, instead of waiting until it wanted to subdivide the property, it could have eliminated the risk of paying for property it did not receive." This holding in *Walker Rogge* was quoted with approval in *American Title Ins. Co. v. Carter*, 670 So.2d 1115 (Fla.App. 1996), later appeal, 710 So.2d 1020, which denied recovery as to a boundary line dispute discovered by the insureds when they obtained a survey after closing. The policy contained the survey exception. See also: *Parahoo v. Mancini*, 1998 WL 180539 (Ohio App. 10 Dist.) (unpublished), dism., app.den. 83 Ohio St.3d 1416, 698 N.E.2d 1005 (1998) (insurer and closing agent has no "obligation to explain the meaning of metes and bounds descriptions in closing documents or ... provide purchasers with a survey map that accurately depicts the size of the subject property ... .").

12.3.5 How Survey Accuracy Is Measured

Proper survey method is important both when the coverage issue is whether or not the matter in dispute would have been shown by an accurate survey, and when an alleged boundary line dispute or overlap exists, as judged by a survey that uses the proper method. This section explains the most important rules regarding accurate and proper survey methods.

Cases construing the survey exception typically give little more than conclusory statements about what would be shown by an accurate, complete or correct survey. Most court decisions do not employ the substantial body of law on the subject of legal descriptions and survey methods. Careful evaluation of a surveyor's method can establish as a matter of law that the surveyor did or did not create an accurate (and complete) survey.

When the claimed overlap or encroachment results solely from a dispute between surveyors as to proper method for finding the property in the field, that dispute does not create a defect in title.[62] In the leading case of *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.,*[63] for example, the court determined that the case was "not a dispute about a boundary line or an overlap," but a (non-covered) "survey dispute."[64]

12.3.5.1 Survey Standards And Surveyor's Role

The standards for survey work are found in several different works. The benchmark is the 1973 government survey standards.[65] These standards, in book form, are the rules by which government surveys are to be performed and monumented. The book also provides a wealth of information useful in the preparation of surveys for private parties. A second authoritative source is *Clark on Surveying and Boundaries*.[66] This comprehensive work is relied on by surveyors and courts alike. The third source is the ALTA/NSPS (formerly the ALTA/ACSM) land title survey standards, which are discussed in full beginning at §12.3.5.2. There are also numerous other books and articles on the subject, some of which are state-specific.[67]

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[62] A common example would be a disagreement between surveyors as to how a shortage or excess of footage in a government section or smaller parcel should be apportioned. There is no one cure-all apportionment rule, but in each type of case there is a correct method. Disputes normally arise when one surveyor guesses wrongly as to the applicable rule. See Walter G. Robillard, *Clark on Surveying and Boundaries*, Eighth Edition, The Michie Company.

[63] 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992).

[64] *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992).

[65] United States Dep't of Interior, Bureau of Land Management, *Manual of Surveying Instruction* (1973) [Technical Bulletin No. 6].

[66] Written by Walter G. Robillard, now in its eighth edition, and published by The Michie Company (available through LexisNexis).

[67] Books include: Grimes, *Law of Surveying and Boundaries*, (Fourth Edition); and Brown, *Boundary Control and Legal Principles*, (Second Edition); Bales, *A Guide to Understanding A Survey*, an excellent source available from the author care of Chicago Title Insurance Company, Wheaton, Illinois; Lathrop, Ed., *Legal Topics in Boundary Surveying:*

> It is helpful first to recall the surveyor's proper role:
>
> The surveyor's responsibility is the location of the written title lines on the ground and the subsequent relation of all lines of possession that may conflict with them. This function does not permit him to pass upon the application of law to the identification of written or unwritten property rights.[68]

The limitations on the surveyor's authority are that he or she:

> … cannot establish a new boundary line without other authority, either legal or from the landowners. Except by express statutory authority, the surveyor cannot legally determine true existing boundary lines. Absent statutory authority, all a surveyor can do is testify as a witness as to where, in his best judgment, after relying upon the available evidence of earlier surveys, boundary lines are located.[69]

It can be very important to establish the surveyor's role for the sake of the court. To illustrate, in *Houston Title Guaranty Co. v. Fontenot*,[70] the court attempted to identify the difference between an

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A Compendium, American Congress on Surveying and Mapping, 5410 Grosvenor Lane, Bethesda, Maryland 20814-2122; and *Illinois Laws Relating to Surveys, Title and Real Property*, available from Compass Surveying, 1600 Shore Road, Suite E, Naperville, Illinois 60563. Articles include: Hoag, *Fundamentals of Land Measurement*, available from Chicago Title Insurance Company, Corporate Communications Department, 171 North Clark Street, Chicago, Illinois 60601-3294; Estopinal, *Understanding Land Surveys*, Professional Education Systems, Inc., Post Office Box 1208, 200 Spring Street, Eau Claire, Wisconsin 54702; *Land Surveys--A Guide for Lawyers* (1989), American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611; Williams and Onsrud, *What Every Lawyer Should Know About Surveys*, American Bar Association *Probate and Property*, March-April 1988); Bales, *The 1988 ALTA/ACSM Land Title Survey Standards*, in *P.O.B.*, June-July 1989, available from the publisher at 5820 Lilley Road, Suite 5, Canton, Michigan 48197-3623; Bales, *1988 ALTA/ACSM Land Title Survey Standards Reexamined*, in *P.O.B.* August-September 1991; Washburn, *The Riparian Developer's Dilemma: Locating the Boundary of Navigable Lakes and Rivers*, 18 Real Property, Probate and Trust Journal 538 (Fall 1983); Maloney, *Ordinary High Water Mark*, Land and Water L.Rev. 465 (1978); Nielsen, *Determining and Surveying Water Boundary Lines in Michigan*, Michigan Bar Journal, September, 1987, pp. 874-81; Nielsen, *Insuring Title to Riparian and Littoral Property*, Michigan Real Property Review, Summer, 1990.

Grimes and *Brown*, and numerous other aids, are available from Landmark Enterprises, 10324 Newton Way, Rancho Cordova, California 95670, a large mail-order supplier of survey book and teaching aids. The largest provider of survey drawing equipment is Pronto Land Measure, Inc., Post Office Box 3219, Flint, Michigan 48502. The Bureau of Land Management publishes a diskette containing hundreds of squibs on reported cases, organized by topic, which is a very useful research tool. See also, *Land Surveys, Second Edition*, edited by Mitchell G. Williams, published by the Real Property, Probate and Trust Law Section of the American Bar Association, which is a collection of articles. The ALTA/ACSM survey standards are discussed in an article by Richard F. Bales, Esq. and Michael Filipski, *Residential and Commercial Surveys in Illinois* (Illinois Institute for Continuing Legal Education).

[68] Walter G. Robillard, *Clark on Surveying and Boundaries*, Eighth Edition, The Michie Company, §2.02, p. 26.

[69] Id. at §2.04, p. 28.

[70] 339 S.W.2d 347 (Tex.App. 1960).

"accurate" survey and a "complete" survey. In that case, the survey did not show eaves and downspouts that encroached onto the neighbor's property. The court held that the survey was accurate but "incomplete." It therefore held that the undisclosed encroachments were covered by the policy.[71] This "accurate" versus "complete" distinction in *Houston Title*, however, is artificial and superficial. The court failed to understand that the failure to include detail such as encroachments renders a survey inaccurate, because the survey does not adequately reflect the location of improvements in the field. The insured should not obtain coverage against existing matters by tendering a survey that does not disclose the very matters against which coverage is sought.

The subject of surveyor negligence is beyond the scope of this treatise, but in general the surveyor is liable for failing to follow uniform standards, such as for the setting of boundary corner monuments.[72]

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[71] "Appellant asserts, however, that the survey made by Boyles was not a complete survey in that it failed to show that the eaves and downspout of the Collis garage encroached upon Lot 7. The policy in question does not call for a complete survey but a correct survey and refers only to discrepancies in area and boundaries which a correct survey would show. It makes no reference to encroachments such as overhanging eaves. It is our view, therefore, that the Boyles survey is a correct survey of the area and boundaries of the lot although it fails to show any protrusion of the Collis eaves across the line. Even if a complete or correct survey would have shown the protrusion of the eaves across the part of the boundary line adjacent to the garage, it still would not have shown a claim to the fee title to a 3 foot strip extending the whole length of the boundary line between Lots 6 and 7. Since a correct survey would not have shown such latter discrepancy, appellant was obligated to defend the suit, as it was obligated under the title policy to defend every suit or proceeding on any claim against or right to said land, or any part thereof." 339 S.W.2d at 349-50.

[72] For example, in *Commonwealth Land Title Ins. Co. v. Conklin Assoc.*, 152 N.J.Super. 1, 377 A.2d 740 (1977), we see the very rare case of the insurer seeking to recoup from the surveyor who caused the problem. The surveyor defended based on the statute of limitations. The surveyor had prepared the subdivision plat and, later, six surveys for individual lots. The statute had run on the subdivision plat. The court found compound negligence, and that the statute was not a bar: "Further, this court is satisfied that the evidence at trial adequately supports the charge of defendants' culpability. Expert testimony revealed that field markers, or monuments, delineate the state boundary at regular intervals. Rather than locate more than one such monument, as would have been the proper practice, defendants located one. As a result, the error was made. This spoke negligence. Prosser, Law of Torts (4 ed. 1971), s 33. In repeating the error by relying on the original mistake, defendants engaged in a new, independent course of conduct, albeit based upon an original wrongful act. While defendants suggest that this reliance was not negligent, offering expert testimony to the effect that it is the usual custom and practice of a surveyor in preparing individual lot surveys to rely upon the state line descriptions of a filed subdivision map, defendants are estopped to assert that the reliance placed on their own earlier negligent conduct was reasonable. Restatement of Torts s 894, Comment (b). Thus, in erroneously preparing the individual lot surveys, defendants exposed themselves anew to the charge of negligence. The failure to ascertain the true descriptions of these border lots was caused by an unreasonable failure to produce an accurate survey of the state line. Each time this was done negligence was involved. See Restatement of Torts, s 552." Title insurer recovery against a surveyor by subrogation is discussed at §5.7.

12.3.5.2 ALTA/NSPS And Statutory Survey Standards

The American Land Title Association and the National Society of Professional Surveyors have worked out joint standards for minimum survey detail.[73] These standards are the only uniform and national standards for land surveys, and are developed and periodically modified based on the joint effort of national organizations representing surveyors, the title industry and certain customer groups. The ALTA/NSPS Standards require that surveys show all encroachments, record overlaps, gaps and gores, boundary line disputes, recorded and unrecorded easements, boundaries of public or private roads, setback or building restriction lines, found and set monuments, evidence of adverse or prescriptive use, and water bodies and boundaries.

A survey that complies with the ALTA/NSPS survey standards is an accurate and complete survey, as that term is used in the survey exception and Covered Risk 2(c) of the 2006 ALTA policies.[74] A survey may also be considered to be accurate and complete if it is not prepared based on the ALTA/NSPS standards, but does comply with other recognized survey standards. Those other standards come from two general sources: trade associations and state law. A number of surveyor trade associations, both national and local, have developed standards that are used in various jurisdictions. At least some states also have survey standards imposed by law or regulation with which the surveyor must comply. A survey may also be judged as being accurate and complete based on a surveyor's expert testimony, as is discussed at §12.3.5.3.

Many drawings and plats are not properly termed surveys, and certainly are not accurate surveys as that term is used in the ALTA title insurance policy or a survey exception. Some surveyors and engineers issue drawings to residential mortgage lenders that depict only the principal structures. Typically, the preparer certifies only that these improvements are within the boundaries of

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[73] The NSPS was at one time an arm of the American Congress on Surveying & Mapping. The groups merged, with the NSPS as the surviving body. The current Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys (hereafter the "ALTA/NSPS Standards") may be viewed at alta.org. The standards have undergone numerous revisions over the years.

[74] In *Haley v. Hume*, 448 P.3d 803 (Wash.App. 1 Div. 2019), the seller to the insured, Hume, had abandoned a recorded access easement by allowing her neighbor to take out a culvert that had rerouted a stream to go on the far side of the easement path. After the culvert was removed, the stream went back to its natural bed, bisecting the path of the driveway and making it unusable. Hume's property abutted a public street, and was not rendered landlocked by her abandonment of the easement. Several years later, Hume conveyed her property to Haley, apparently together with the easement. Haley's title insurance policy contained a survey exception that read in part "...other matters which would be disclosed by an accurate survey or inspection of the premises." A court declared that Hume had abandoned the easement. Haley sued his title insurer based on his inability to use the easement. The court found no policy coverage, because of the survey exception. The court held that the best evidence as to what matters would be disclosed by an accurate survey was found in the ALTA/NSPS survey standards. The court relied on several ALTA/NSPS survey standards in order to reach this conclusion: "These minimum ALTA/NSPS requirements confirm that if Haley had conducted a survey in 2005, it would have disclosed that the easement area was exclusively possessed by someone other than Hume. The survey would have disclosed the recorded easement benefitting Haley's property. Following the ALTA/NSPS standard, the survey would have noted the evidence of Pugh's possession, noted that the easement was not observable at the time the survey was made, noted that there was evidence of use by someone other than Hume, and noted that there was a stream in the middle of the easement area. All of these would have indicated that the condition of the easement area in 2005 was inconsistent with the use of the easement that Haley believed he was acquiring. As such, a survey would have disclosed the loss that Haley now asserts."

the property. These drawings go by a variety of names, such as mortgage inspection reports and mortgage surveys. In most states with laws or regulations prescribing the detail and field work required for land surveys, such mortgage drawings do not qualify, and surveyors are thus careful to refrain from calling them surveys.

The mortgage drawing was created because lenders wanted something cheaper than a real survey that would give the basic assurance that the house is built on the land. In preparing a mortgage drawing, the surveyor typically sets no monuments, examines no title documents, and does only the most essential field work. In some locales, the surveyor or engineer relies entirely on lines of occupation rather than survey monuments in estimating the boundary lines and measuring the distance between the house and the lines. The product typically contains the caution that it is not to be used to establish the boundaries of the property or set fences. In some jurisdictions, title insurers remove the survey exception on loan policies based on these mortgage drawings. Because of the minimal field work done, however, insurers will seldom rely on such products to remove the exception from the owner's policy.[75]

A mortgage survey is not an accurate survey for purposes of determining the scope of the survey exception. In *State Farm Ins. Co's v. Peda*,[76] State Farm paid on its homeowners' insurance policy because the garage on the insured property encroached onto neighboring land. It sued the title insurer to recoup. The policy contained a survey exception, which Stewart Title argued removed coverage for the encroachment. The court agreed, finding that a boundary survey and a mortgage survey are two very different creatures.[77]

Some title insurers and surveyors also offer quasi-surveys that are aerial photographs reduced to scale, over which the preparer superimposes a number of layers of detail, such as boundary lines derived from a tax parcel or geographic information system (GIS) map or a prior survey, plotting of easements, setback lines established by private restrictions or zoning code and other information. The insurer may offer to remove the survey exception from the policy based on such a quasi-survey product.

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[75] See *Parahoo v. Mancini*, 1998 WL 180539 (Ohio App. 10 Dist.) (unpublished).

[76] 2003-Ohio-1092, 2003 WL 943884 (Ohio App. 11 Dist.) (unpublished).

[77] Citing *Parahoo v. Mancini*, 1998 WL 180539 (Ohio App. 10 Dist.) (unpublished), the regulations and other authorities, the court ruled: "It is clear from the preambles of the Administrative Code sections cited above, that a mortgage location survey is only for the intent and use of a mortgagee or title insurer, while a boundary survey is to be used to establish boundary lines. The policy exemption at issue in this case specifically excluded 'encroachments, overlaps, and boundary line disputes.' It is apparent from the context and language of the document that only a boundary line survey would be sufficient. Clearly a mortgage loan survey would not necessarily discover the specific exclusions relating to boundary lines in the policy. In this case, a mortgage loan survey was conducted, and it did not reveal the encroachment. Yet, boundary line surveys eventually revealed the existence of the encroachment. … The survey exception included in the policy was there to inform the insured that Stewart Title does not insure against boundary disputes or encroachments such as the one that has arisen. The exception excludes boundary line disputes, regardless of whether a survey was, in fact, conducted. When read in context with the language of the exclusion, the term survey was not ambiguous. It was intended to mean boundary line survey, because legally, only a boundary line survey would necessarily reveal the matters in the exclusion; i.e., encroachments and boundary line disputes. Since the term 'survey' as used in the exclusion was not ambiguous, State Farm was not entitled to judgment as a matter of law."

Subdivision plats and similar surveys created for the division of land likewise are not "accurate surveys" for purposes of determining the scope of policy coverage. Unlike the mortgage drawing, a subdivision plat is a survey and normally is required by statute to conform to reasonably strict standards for detail, monumentation and field work. However, such plats typically are not required to depict any improvements. In most states, they also do not plot existing easements (other than those being reserved or created concurrently with the filing of the plat). Therefore, subdivision plats and similar land division surveys are not sufficient to disclose all of the matters shown by a full land survey. For example, in *Lawyers Title Ins. Corp. v. Knopf*,[78] a subdivision plat was found not to be an accurate survey that would cause an insurer to remove the survey exception:

> The Knopfs assert in their brief that, as a matter of law, the subdivision plat was a survey within the meaning of the policy. The assertion is erroneous. The survey exception in the policy refers to "an accurate survey and inspection of the premises." The policy clearly contemplates a current, on-site examination and measurement of the property. The subdivision plat, although apparently prepared by a surveyor, was not necessarily based on such an examination and/or such measurements.[79]

In addition, a subdivision plat is not prepared for the benefit of a lot owner, and the surveyor's certificate does not run to such an owner. The insurer insists on a certification running to it and its insured so that, once it gives coverage based on the survey, it has a right to recoup if the surveyor has made a mistake.

12.3.5.3 Proof Of Survey Accuracy

As is stated in § 12.3.5.2, the ALTA/NSPS survey standards provide reliable evidence of what matters would be depicted, and in what fashion, on an accurate survey. In some cases, a survey contains a proper certification and appears to be accurate and complete, but there is some question as to the accuracy of its method or its completeness. Typically, the best evidence as to the survey's accuracy is in the form of expert surveyor testimony.

In *Waterview Associates, Inc. v. Lawyers Title Ins. Corp.*,[80] the insured legal was a "parcel of land in ... Section 2" described by metes and bounds. The insured got a survey depicting the land according to the metes and bounds measurements. Later, an eighth line of Section 2 was monumented for the first time by the city engineers. The neighbor filed suit, asserting title up to the new monument, and won. The lake frontage for the insured parcel was reduced by 30 feet. The court refused to grant summary judgment in favor of the insurer on its assertion that the survey exception negated coverage for the insured's "loss" of the disputed land. It held that the question of whether the dispute over the land would have been shown on an accurate survey was a fact question on which expert testimony was required. Citing *Waterview*, a Maryland court also ruled that expert testimony

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[78] 109 Md.App. 134, 674 A.2d 65 (1996); cert.den. 343 Md. 333, 681 A.2d 69 (1996).

[79] 674 A.2d at 71, fn. 1.

[80] 30 Mich.App. 687, 186 N.W.2d 803 (1971).

is required to establish whether an overlap would be disclosed by an accurate survey, and refused to decide the scope of the survey exception on summary judgment.[81]

12.3.6 Gaps And Gores Between Parcels

A party may purchase several parcels that appear to be contiguous to each other, but that do not necessarily abut along all or any of their supposed common boundary line. For example, if the insured is conveyed the West 20 acres and also the East 20 acres of the same quarter-quarter-section, but the quarter-quarter-section contains 42 acres instead of the normative 40 acres, there will be a two-acre strip of land lying between the two parcels. The land lying between the two parcels is known as a gap or gore. It can be difficult to determine who owns the gap strip, if it is not owned by the present owner of the two parcels.

The title insurance policy insures the title to the parcels described in Schedule A. However, if there is land lying between two parcels described in the policy, there is no coverage against an ownership claim by someone else as to that land.[82] The survey exception confirms the lack of any policy coverage for a possible gap or gore between the insured parcels.[83] The survey exception also negates coverage for the abandonment of an insured easement, when that fact would be depicted or noted on a survey prepared using the ALTA/NSPS survey standards.[84]

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[81] *Lawyers Title Ins. Corp. v. Knopf*, 109 Md.App. 134, 674 A.2d 65 (1996); cert. den. 343 Md. 333, 681 A.2d 69 (1996).

[82] This fact has been acknowledged for perhaps as long as title insurance has been in existence. See the discussion of gaps and gores in T.D. McCullough, *Surveys, Do or Don't—Will or Won't*, in *Title News*, Volume 39, Number 7 (July 1960), p. 8. More recently, the lack of policy coverage for gaps and gores was discussed in the explanation for ALTA's adoption of a contiguity endorsement, as the ALTA 19 series, in Clifford L. Morgan, *New Endorsement Forms Advance Industry*, in *Title News*, Volume 83, Number 1 (January/February 2004), p. 24. Mr. Morgan, who was then the chair of the ALTA Forms Committee, observed that "When the land described in the policy is made up of several separately described parcels that appear to have somewhat contiguous boundaries, the insured and its counsel are quite often concerned about whether the parcels are contiguous and, if so, what boundary of a given parcel is contiguous to what boundary of another. They also are concerned that there may be strips, gaps, or gores between the respective contiguous boundaries." The ALTA 19 endorsement provides that assurance, he explained, impliedly acknowledging that the standard policy does not.

[83] As is explained in § 12.3.5.2, the best evidence of what an accurate survey would show is whether or not the issue must be depicted or noted on a survey prepared based on the ALTA/NSPS survey standards. Gaps and gores must be shown on such a survey. Section 6(B)(vii) of the 2011 ALTA/NSPS Minimum Standard Detail Requirements For ALTA/ACSM Land Title Surveys states that an ALTA/NSPS survey shall show: "The relationship of the boundaries of the surveyed property (i.e. contiguity, gaps, or overlaps) with its adjoiners, where ascertainable from Record Documents and/or from field evidence gathered during the process of conducting the survey of the property being surveyed. If the surveyed property is composed of multiple parcels, the extent of any gaps or overlaps between those parcels shall be identified. Where gaps or overlaps are identified, the surveyor shall, prior to preparation of the final plat or map, disclose this to the insurer and client for determination of a course of action concerning junior/senior rights."

[84] In *Haley v. Hume*, 448 P.3d 803 (Wash.App. 1 Div. 2019), the seller to the insured, Hume, had abandoned a recorded access easement by allowing her neighbor to take out a culvert that had rerouted a stream to go on the far side of the easement path. After the culvert was removed, the stream went back to its natural bed, bisecting the path of the driveway and making it unusable. Hume's property abutted a public street, and was not rendered landlocked by her abandonment of the easement. Several years later, Hume conveyed her property to Haley, apparently together with the

The issue of possible gaps and gores has spawned what is known as a contiguity endorsement, which indemnifies the insured in the event that some other party claims to own a gap parcel.[85] See § 9.11.2 for a discussion of the ALTA contiguity endorsement.

12.3.7 Shortage In Area

FORM 50, Appendix A
Shortage in acreage

If the area of the insured parcel is less than what is recited in the policy or in a survey map referenced in the policy, that shortage in area does not, by itself, evidence an adverse claim against the insured title. A question about the parcel's true area does not cause the insured to own any less than the full parcel conveyed to the insured. The very purpose of a survey is to locate in the field what has been described in the deed. Variances in area as shown on prior deeds or plats and as measured in the field are the norm rather than the exception, particularly as survey equipment becomes more precise.

The 2006 ALTA policies contain Covered Risk 2(a)(iii), which protects against "variations" that affect title and which would be disclosed on an accurate and complete land survey. An insured might argue that this coverage is broad enough to protect against a shortage in area, although the better reading of the coverage is that it does not so provide. Covered Risk 2(c), and the decisions construing that provision, are fully discussed at §9.9.1.

Contini v. Western Title Ins. Co.[86] held that the Schedule A legal description was not an affirmative assurance of acreage. The policy described the land as government lots. The court pointed out that, by definition, government lots contain fewer acres than perfect quarter-sections.

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easement. Haley's title insurance policy contained a survey exception that read in part "...other matters which would be disclosed by an accurate survey or inspection of the premises." A court declared that Hume had abandoned the easement. Haley sued his title insurer based on his inability to use the easement. The court found no policy coverage, because of the survey exception. The court held that the best evidence as to what matters would be disclosed by an accurate survey was found in the ALTA/NSPS survey standards. The court relied on several ALTA/NSPS survey standards in order to reach this conclusion: "These minimum ALTA/NSPS requirements confirm that if Haley had conducted a survey in 2005, it would have disclosed that the easement area was exclusively possessed by someone other than Hume. The survey would have disclosed the recorded easement benefitting Haley's property. Following the ALTA/NSPS standard, the survey would have noted the evidence of Pugh's possession, noted that the easement was not observable at the time the survey was made, noted that there was evidence of use by someone other than Hume, and noted that there was a stream in the middle of the easement area. All of these would have indicated that the condition of the easement area in 2005 was inconsistent with the use of the easement that Haley believed he was acquiring. As such, a survey would have disclosed the loss that Haley now asserts."

[85] In *Rio Mesa Holdings, LLC v. Fidelity Nat'l Title Ins. Co.*, 2019 WL 4639103 (Cal.App. 5 Dist.) (unpublished), the insured's counsel drafted a custom contiguity endorsement that he contended gave the assurance that there was "the ability to move freely among the parcels" described in the endorsement. However, there is no assurance of access from parcel to parcel in the ALTA 19 series endorsements.

[86] 40 Cal.App. 3d 536, 115 Cal.Rptr. 257 (Cal.App. 5 Dist. 1974).

Therefore, the Schedule A description supported the insurer's argument that the policy made no assurance as to acreage.

The inclusion of a survey exception in the policy makes it clear that there is no assurance as to the quantity of acreage being conveyed.[87] In *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*,[88] the insured walked the land with the seller and was shown a 1975 survey describing the land as containing about 18.3 acres. The purchase contract set the price at "$16,000 per acre" and referred to the property as "19 acres more or less." The insurer had insured the property many times before. Each time, the deed and policy used a metes and bounds description which enclosed a parcel of about twelve acres. The last deed of record concluded by saying "CONTAINING 12.486 acres." However, the insurer issued its commitment using the description from the 1975 survey, not the last deed and policy description. Later, the insured discovered that the 1975 survey was inaccurate, and that the parcel had always contained about twelve acres, not nineteen. The insured sued the insurer for the land deficiency, and on the basis that it had a duty to disclose what it knew about the true acreage. The New Jersey Supreme Court reversed the trial and appellate courts, and held the insurer not liable. The court stated:

> In the absence of a recital of acreage, a title company does not insure the quantity of land. Title companies are in the business of guaranteeing title, not acreage. [citations omitted] To obtain such insurance, an insured should provide the title company with an acceptable survey that recites the quantity of land described or obtain from the company an express guaranty of the quantity of land insured in the policy.
>
> *   *   *
>
> Whatever else the phrase "other matters" might mean in a survey exception, it clearly refers to the dimensions of the lot lines and the size of the lot. The size of a tract simply cannot be ascertained with any certainty from a search of public records alone. The reason is that land exists on the ground, not on paper. When a description refers to a point in the line of another, only a survey can reveal the actual size of a piece of property and the amount of land included in a deed. A shortage in acreage is one of the facts that an accurate survey and inspection would disclose.[89]

In *US Life Title Ins. Co. v. Hutsell*,[90] for example, the policy insured two parcels and recited their acreage as shown on the survey. Schedule B contained a survey exception. Finally, the title

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[87] *Fee v. Stahley*, 2008 WL 4849844 (Minn.App.) (unpublished) (policy did not assure that property had same shore frontage or acreage as represented by real estate agent; survey exception negated any coverage); *Wolf v. Clack*, 2009 WL 5173715 (Tenn.App.) (unpublished) (survey exception "means what it says," that policy does not protect against either record overlap or shortage in area).

[88] 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992).

[89] 562 A.2d at 216.

[90] 164 Ga.App. 443, 296 S.E.2d 760 (1982).

agent stated by a cover letter to the policy that "the survey has been insured." The court found the survey exception in "direct conflict" with the "survey has been insured" statement, and reversed a summary judgment in favor of the insurer. It stated:

> Shortage of area ... may be sufficiently related to the standard notions of title defect or encumbrance as to be a risk allowed coverage by title insurance.[91]

Therefore, an affirmative assurance as to acreage can cancel out the survey exception as to acreage.

12.3.8 Shortage In Distance

FORM 51, Appendix A
Shortage in distance

If a dimension or boundary line of the insured parcel is shorter than what is recited in the policy or on the subdivision plat, that shortage in distance does not, by itself, evidence an adverse claim on title. A question about the parcel's true dimensions does not cause the insured to own any less than the full parcel conveyed to the insured. The very purpose of a survey is to locate in the field what has been described in the deed. Variances between distances as recorded and as measured are the norm rather than the exception, particularly as survey equipment becomes more precise.

Therefore, a mere shortage in distance does not invoke policy coverage, whether or not the policy contains a survey exception. The policy provides no assurance that a distance recited on a recorded subdivision plat is accurate, even when the policy does not contain a survey exception. The policy is not a guarantee of the accuracy of the recitals on the subdivision plat, and the policy does not incorporate those recitals by reference merely by using the platted legal description in Schedule A. On unplatted land, the policy also does not assure the insured that the land has the full area which is represented by the recited distances, even when the policy does not contain a survey exception. However, a recital of distance in the policy has been found to create coverage when the inaccurate distance envelops a parcel owned by someone other than the insured, and the policy does not contain a survey exception. On unplatted land as well as platted land, however, coverage as to most situations that could be classified as a shortage in distance is negated by the survey exception.

The 2006 ALTA policies contain Covered Risk 2(a)(iii), which protects against "variations" that affect title and which would be disclosed on an accurate and complete land survey. An insured might argue that this coverage is broad enough to protect against a shortage in distance, although the better reading of the coverage is that it does not so provide. That Covered Risk is fully discussed at §9.9.1.

The policy does not assure or guarantee the accuracy of the distances recited on recorded subdivision plats. In *Sommers v. Smith and Berman, P.A.,*[92] the purchasers "thought, because of

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[91] Id.

[92] 637 So.2d 60 (Fla.App. 4 Dist. 1994).

representations made by the seller and the real estate broker, that one boundary of the lot was further from the house than it actually was." In a suit against the insurer, the court ruled in the insurer's favor, holding that there "was no defect in the title of the property which they were conveyed and which was insured.[93] The fact that the insurer did not limit its survey exception to matters disclosed by the survey did not create coverage which otherwise did not exist. Because the title to the property was not defective in any way, "the validity of the exclusion has no bearing on the merits of buyers' claim."[94] Also, in *Mims v. Louisville Title Ins. Co.*,[95] the court held that there was no duty to defend a complaint that alleged that the subdivision plat contained mistakes in the sizes and descriptions of the lots and the location of the streets. The policy contained a survey exception, which the court found to exclude coverage.

The policy does not insure the accuracy of distances recited in the Schedule A legal, even when the survey exception is removed. However, the legal description recited in Schedule A of the policy is not a policy term, and conflicting calls in the description of the insured parcel cannot create coverage. Rather, Schedule A is merely a declarations page, and the description of the insured parcel merely identifies the land insured, as discussed in §8.2. Some courts have correctly found that an apparent conflict between two calls in the legal description does not invoke policy coverage.[96] Other courts have incorrectly held that two conflicting calls in the insured's legal description result in an "ambiguity" in the policy that should be construed in the insured's favor so that the policy insures the title to a parcel that is larger than what was actually conveyed.[97]

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[93] 637 So.2d at 61.

[94] 637 So.2d at 62.

[95] 358 So.2d 1028 (Ala. 1978).

[96] In *Lynburn Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 191 Ga.App. 710, 382 S.E. 2d 599 (1989), the insured property was described by courses and distances. The property was bounded by public streets or alleys on all sides. A survey was obtained and the survey exception removed. Later, the insured discovered that the insured property was smaller than as stated in the survey. The court construed the policy as insuring ownership to the monuments of the public streets and alleys, not the stated distances. In doing so, it used the general survey principle that monuments prevail over distances. To bolster this conclusion, the court noted that the monuments were obvious, and the insured had not been led to believe from the policy description that it had bought the larger hypothetical parcel. Rather, it said: "It follows that plaintiff purchased exactly what it bargained for--property lying between Bancroft Circle, Second Street and the public alley. The mere fact that the length of the call lines did not meet plaintiff's expectations is of no consequence. Plaintiff received good title to the land in question. See Land Trust Co. v. Morgan, 22 Ga.App. 388, 95 S.E. 1006. This action to recover title insurance proceeds cannot, therefore, be permitted to stand."

[97] In *Lagomarsino v. San Jose Abstract & Title Ins. Co.*, 178 Cal.App.2d 455, 3 Cal.Rptr. 80 (Cal.App. 1 Dist. 1960), the policy description called to both an iron pipe and to the boundary of a railroad right-of-way, and used a distance of 90.50 feet. The iron pipe was located at 90.50 feet. The distance to the accurate right-of-way boundary was 70.50 feet. The court said that the recitation of both the pipe and the distance created an ambiguity in the legal description which was to be construed in the insured's favor. This ruling was bolstered by the court's finding that the insured believed that the iron pipe was placed at the true boundary with the right-of-way. However, *Lagomarsino* does not refer or construe a survey exception. In *Marandino v. Lawyers Title Ins. Corp.*, 156 Va. 696, 159 S.E. 181 (1931), the policy legal description recited: "Beginning at the Northeast corner of 22nd and Broad Streets, as established by ordinance of City Council of the City of Richmond, approved October 14, 1911, thence running Northwardly along and fronting on the

When the policy contains a survey exception and the land is unplatted, the exception reinforces the lack of coverage for an inaccurate distance in the policy legal description.[98] In *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*,[99] one boundary line was described both by a call and distance and by reference to the land of an adjoiner. Later it was discovered that the true distance to the adjoiner's land was significantly less than as stated in the deed and policy. The court held that the policy insured only up to the adjoiner's land, not the full (erroneous) distance of the survey call. The *Walker Rogge* court, as in *Lynburn*, found that the insured received all of the property owned by the grantor, and therefore had no loss.[100] Also, in *Bennett v. Investors Title Ins. Co.*,[101] a policy that contained a survey exception was found not to protect against the effect of a survey which inaccurately showed the width of a highway right-of-way. The *Bennett* court relied on *Walker Rogge* in making its ruling.

12.3.9 Overlaps

An overlap between two recorded deeds should be depicted on an accurate survey, and is excepted from coverage by a survey exception.[102] However, an overlap is not discovered in survey field work, because it is created by recorded deeds for adjoining parcels that each purport to convey some of the same land to different grantees.[103] As one court stated, "a classic case of an overlap"

Eastern line of 22nd Street 38 feet and 5 inches… ." A five-foot strip of land had previously been taken for street, reducing the frontage to about 33 feet. The insured had built a retaining wall in the part taken for street. The court held that, because the policy legal description contained an inaccurate distance which included the land previously conveyed, the policy insured title to the land taken for street. The court rejected the argument that coverage was negated by the reference in the policy legal description to the ordinance by which the road width was set. Again, *Marandino* contained no discussion of a survey exception.

[98] In *Patel v. Lawyers Title Ins. Corp*., 2013 Ark.App. 670, 2013 WL 6002069 (Ark.App.) (unpublished), however, when the legal description had a call of a certain distance to the southerly right of way of a road, and the distance was later shown to be inaccurate, the court refused to rule as a matter of law that the call to the adjoining road controlled the distance, and that the survey exception negated coverage.

[99] 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992).

[100] In *Walker Rogge*, the court considered whether a reference to a deed to a neighbor is actually a monument, and found that it was. The insured had argued, with some support, that a "monument" should be limited to physical or natural objects. The *Walker Rogge* court disagreed. See §12.3.5 for a discussion of what may be considered a "monument."

[101] 635 S.E.2d 649 (S.C. 2006).

[102] *Downing v. Eubanks*, 557 N.E.2d 1027 (Ind.App. 1990); *RLB, Inc. v. US Life Title Ins. Co. of New York*, 774 S.W.2d 607, 609 (Tenn.App. 1989); *Fischer Sand and Aggregate, LLP v. Old Republic Nat'l Title Ins. Co*., 2017 WL 1316130 (Minn.App.) (unpublished).

[103] See *Fischer Sand and Aggregate, LLP v. Old Republic Nat'l Title Ins. Co*., 2017 WL 1316130 (Minn.App.) (unpublished), in which the overlap was created by the division of a larger parcel by deeds conveying land by acreage, when the land contained fewer total acres than were recited in the two deeds. The court found that the survey exception negated coverage for the overlap.

exists where "[the insured's] deed covers a portion of the land described in a prior deed held by [the neighbor]."[104] The effect of an overlap is that the junior conveyance of the overlap area conveys no title, as one court explained this way:

> 'If a grantor conveys property, part of which belongs to the grantor and part of which belongs to another, the deed is good as to the property owned by the grantor and a mere nullity as to the property not owned by the grantor.' Lisenbee v. Parr (1970), 62 Tenn.App. 518, 465 S.W.2d 361, 365, cert. denied.[105]

One decision held that the survey exception would apply only if "the problem was something not susceptible of ascertainment through title examination but only through an accurate survey."[106] This is a false limitation on the survey exception. Although an overlap is almost always based on two recorded deeds, the deed to the adjoiner is not in the chain of title to the insured parcel. The title examiner is not required to examine deeds in the chains of title to neighboring parcels, which do not impart constructive notice to a buyer of the insured parcel. See §3.4.7.5 for a discussion of the doctrine of constructive notice in regard to the chain of title. Thus, most courts have found correctly that the survey exception applies to an overlap without considering if the source of that overlap could be discovered in a title search.[107]

A boundary line dispute can be mischaracterized as being an overlap. In *American Title Ins. Co. v. Carter*,[108] the disputed boundary was described on both deeds as the quarter-quarter section line. One party claimed the issue was an overlap of recorded descriptions. The court accurately concluded that the issue was not an overlap, which results from two inconsistent boundaries, but a dispute as to where the agreed-on line ran--that is, a question of "where 'on the ground' that line should be drawn."[109]

An overlap, therefore, is the result of conflicting conveyances, not a matter of possession such as an encroachment or adverse possession. The insurer may be required to prove that the overlap would be disclosed on an accurate survey. The correct analysis of an alleged overlap is:

1. Determine whether or not the legal descriptions for the two neighboring parcels can

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[104] *RLB, Inc. v. US Life Title Ins. Co. of New York*, 774 S.W.2d 607, 609 (Tenn.App. 1989).

[105] *Downing v. Eubanks*, 557 N.E.2d 1027, 1029-30 (Ind.App. 1990).

[106] *Lawyers Title Ins. Corp. v. Knopf*, 109 Md.App. 134, 674 A.2d 65, 72 (1996).

[107] *Geiger v. Chicago Title Ins. Co.*, 2011 WL 3802724 (Wis.App.) (unpublished). In *Fischer Sand and Aggregate, LLP v. Old Republic Nat'l Title Ins. Co*., 2017 WL 1316130 (Minn.App.) (unpublished), the overlap was created by the division of a larger parcel by deeds conveying land by acreage, when the land contained fewer total acres than were recited in the two deeds. The court found that the survey exception negated coverage for the overlap.

[108] 670 So.2d 1115 (Fla.App. 1996), later decision, 710 So.2d 1020.

[109] 670 So.2d at 1117.

be harmonized. There is no overlap if the two parcels share a common and agreed-on boundary line, even if a measurement appears to conflict, as discussed in §12.3.9.1.

2. If an overlap exists and would be shown on an accurate survey, the overlap is removed from coverage by the survey exception, as addressed in §12.3.9.2.

3. If an overlap exists but would not be shown on an accurate survey, the exception may not apply, as is discussed in §12.3.9.3.

12.3.9.1 Harmonizing Claimed Overlaps

Courts recognize valid public policy in harmonizing descriptions whenever possible to avoid overlaps and other boundary disputes. This is done principally by use of the "monuments over distances" survey law rule. See §12.3.8 for more discussion of what constitutes a monument.

In *Bernhard v. Reischman*,[110] the court applied the monuments over distances rule to find that no overlap existed and thus the insured did not suffer a loss. The insured land lay on the south slough of a river. If a call in the insured description was given effect, it had the effect of vesting title in the insured to a large parcel of land that had accreted to the neighboring parcel. However, the deed also referred to the "bank" of the river. The court held that the policy did not insure the insured as owning to the called distance, but merely to the bank of the river. Thus, there was no overlap in descriptions. Further, the court found that "[a]n accurate survey would have disclosed the substantial discrepancy between the [actual v. deeded] courses and distances in the deed and the calls referenced to the South Slough."

12.3.9.2 Determining Whether Overlap Would Show On Survey

FORM 52, Appendix A
Overlap

An overlap of two recorded deeds is shown on an accurate survey. For example, a surveyor performing an ALTA/NSPS survey is required to show any overlap disclosed by a recorded document.[111] Those standards are discussed at §12.3.5.

A court may require expert testimony to establish that an accurate survey would show a record overlap.[112] The court found expert testimony to be required to establish whether an overlap

[110] 33 Wash.App. 569, 658 P.2d 2 (1983).

[111] The February 23, 2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys say, at ¶6(b)(vii), "The relationship of the boundaries of the surveyed property with its adjoiners (e.g., contiguity, gaps, overlaps), where ascertainable from documents provided to or obtained by the surveyor pursuant to Section 4 and/or from field evidence gathered during the process of conducting the fieldwork. If the surveyed property is composed of multiple parcels, the extent of any gaps or overlaps between those parcels shall be identified. Where gaps or overlaps are identified, the surveyor shall, prior to or upon delivery of the final plat or map, disclose this to the insurer and client."

[112] *1440 Empire Boulevard Development Corp. v. Lawyers Title Ins. Corp.*, 60 A.D.3d 1354, 874 N.Y.S.2d 857 (Table), 2009 N.Y. Slip Op. 02072 , 2009 WL 724411 (N.Y.A.D. 4 Dept.) (unpublished) (insurer did not present expert

would be disclosed on an accurate survey or by a title examination. Therefore, the court refused to decide the matter for either party on summary judgment.

Some cases have held that an overlap would be disclosed by an accurate survey.[113] Others have held the opposite.[114] An exception that includes the word "overlap" is deemed to except recorded overlaps.[115] *RLB, Inc. v. US Life Title Ins. Co. of New York*[116] found no coverage as to an overlap because of the survey exception. The court stated that the policy does not define "overlap," but supplied this definition:

> … [W]here [one] deed covers a portion of the land described in a prior deed held by [another], the facts show a classic case of an overlap. While we are not aware of any authority which defines the term "overlap" as used in this policy, we think that the facts of this case come within the common, ordinary meaning of the term.[117]

In *RLB*, the competing deeds each contained metes and bounds descriptions. In 1943, when the TVA bought to the south, its northerly boundary line was the north line of a road. The road was later moved south. When the insured purchased, its deed conveyed to the north line of the existing road, which the county surveyor had incorrectly assumed was in its former location. Thus, the insured description contained land owned by the TVA between the new roadway and the true boundary. The court found the overlap excepted even though it was created by instruments in the public records. It

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testimony that the claimed overlap would be shown on an accurate survey, and insured produced survey that did not show overlap).

[113] *RLB, Inc. v. US Life Title Ins. Co. of New York*, 774 S.W. 2d 607 (Tenn.App. 1989); *Downing v. Eubanks*, 557 NE2d 1027 (Ind.App. 1990); *Wolf v. Clack*, 2009 WL 5173715 (Tenn.App.) (unpublished) (survey exception "means what it says," that policy does not protect against either record overlap or shortage in area).

[114] See *1440 Empire Boulevard Development Corp. v. Lawyers Title Ins. Corp*., 60 A.D.3d 1354, 874 N.Y.S.2d 857 (Table), 2009 N.Y. Slip Op. 02072 , 2009 WL 724411 (N.Y.A.D. 4 Dept.) (unpublished). In *Crawford v. Safeco Title Ins. Co.*, 585 So.2d 952 (Fla.App. 1991), the court found that the possession exception was not applicable, because the conflicting deed was recorded. The court did not knock out the survey exception due to the recording of the deed. Rather, the court found a question of fact as to whether or not a recorded deed overlap was excepted (which overturned a summary judgment for the insurer). In *Pentecost v. Lawyers Title Ins. Corp.*, 704 So.2d 1103, 23 Fla.L. Weekly D199 (Fla.App. 1 Dist. 1997), rev.den. 718 So.2d 169 (1998), the insureds were sued for being "wrongfully in possession of" a portion of the plaintiffs' land, to which the insureds countered that they "own[ed] title to the lands in dispute under their deed." The insurer was found obligated to defend the insureds, apparently because the suit challenged title to land described in the policy. However, the appellate court did not address whether or not the survey and possession exceptions would negate the duty to indemnify.

[115] *Geiger v. Chicago Title Ins. Co.*, 2011 WL 3802724 (Wis.App.) (unpublished). In *Fischer Sand and Aggregate, LLP v. Old Republic Nat'l Title Ins. Co*., 2017 WL 1316130 (Minn.App.) (unpublished), the overlap was created by the division of a larger parcel by deeds conveying land by acreage, when the land contained fewer total acres than were recited in the two deeds. The court found that the survey exception negated coverage for the overlap.

[116] 774 S.W.2d 607 (Tenn.App. 1989).

[117] 774 S.W.2d at 609.

held that, while the competing deeds were recorded, the existence of the overlap could only be discovered in the field because it depended on the location of the roadway.[118]

Likewise, in *Downing v. Eubanks*,[119] an overlap created by two deeds from a common grantor was found not to be covered as a result of the survey exception. The insured deed was the second conveyance. The court denied the insured's claim to the land. As to the policy claim, the court stated: "[a]n accurate survey of Tract 1 would have resulted in the overlap being covered by the policy." The *Downing* court came to this conclusion because a survey of the overlapping Tract 2 did indeed show the overlap area. The court even attached the survey as an exhibit to the opinion to prove the point. *Downing* agrees with the ALTA/NSPS survey standards. See §12.3.5.

In *Swanson v. Mid-South Title Ins. Co.*,[120] the insured deed overlapped with an earlier deed. The two parcels had a common grantor, but did not come from the same chain of title. The court found that there was no notice in the chain of title, because the overlapping property was from a different chain. Thus, the insurer was not responsible for not reporting the overlap deed.[121] The *Swanson* court also found that the overlap would not have been disclosed by an accurate survey. It held that there was no physical evidence of the neighbor's possession of the disputed land at policy date. In so finding, however, the court did not address the usual standard that a survey is obligated to review deeds of adjoiners. The *Swanson* court did not finish its analysis there, however. It ruled that the broad language of the *Swanson* survey exception[122] limited the policy to insurance of the "record title":

> [w]ith the survey exception a part of the policy, the obligation of Mid-South was only to insure the title to the property actually acquired by Swanson if the defects were not revealed by the record title.[123]

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[118] "[W]ithout extrinsic proof, it would be impossible to locate RLB's property with respect to the northern line of the TVA property. We think the situation presented is exactly what the exclusion in the title policy refers to: a set of facts under which the true location of the boundary line could only be established by an accurate survey." 774 S.W.2d at 609 (Tenn.App. 1989).

[119] 557 N.E.2d 1027 (Ind.App. 1990).

[120] 692 S.W.2d 415 (Tenn.App. 1984).

[121] The court stated: "As to ascertaining any defect or conflict from the public record, we find, as the trial court implicitly found that the tracts of land conveyed to Bue and Swanson respectively were separately described tracts of land in the deed by which the grantor Kelly acquired title. Joe Fowlkes, attorney, who prepared the title papers and examined the title testified, 'I searched the title and it's clearly an encroachment. It is not a situation where somebody conveyed off some of this property. There's never been a conveyance off of this tract that Mr. Swanson has. The line has been encroached upon through the years, and of course that happens with time, particularly when you have got a description that old. That description goes back at least 75 or 80 years.'" 692 S.W.2d at 418-9.

[122] The exception in the *Swanson* policy read: "Any discrepancies, conflicts, encroachments, servitudes, shortages in area and boundaries or other facts which a correct survey would show."

[123] 692 S.W.2d at 420.

Because it had already ruled that the overlap could not have been discovered by a competent exam of the public records, the insurer was not responsible for any loss caused by the overlap.[124]

In *Nautilus, Inc. v. Transamerica Title Ins. Co.*,[125] the insured property bordered water. The adjoining property description included land to a government survey meander line, and had already been platted showing the meander line as the boundary line.[126] The insured land included a metes and bounds description of tidelands lying between the ordinary high and low tide lines. The tidelands had also been included in the adjoining plat. The court ruled that a survey would have shown the meander line and the tide lines, but not the neighbor's claim of title. Therefore, the court ruled that the matter was not removed from coverage by the survey exception.

12.3.9.3 Affirmative Coverage For Overlap Area

Endorsements that assure that the parcel insured is as depicted on a referenced survey are discussed in §9.11.2. A similar affirmative coverage was found to exist when the insurer adopted a new description created by a survey, in *Lawyers Title Ins. Corp. v. McKee*.[127] In that case, an overlap had been created by an unrecorded deed. Early deeds to the insured property excepted the land conveyed in that deed, but more recent conveyances did not contain the exception. The land was a ranch, and there was no physical evidence of a possession line. The insured thought he was buying the land in the unrecorded deed, and he obtained a survey that included the overlap area. The insurer agreed to issue the policy using the survey description. Although the policy contained a survey exception, the court found that, when the insurer adopted the survey description, it affirmatively insured the title to the overlap area against adverse claims. The crux of *McKee* is its holding that the insurer gave an affirmative assurance that the insured owned the overlap parcel by adopting the survey description.

12.3.10 Encroachments

The survey exception removes coverage for improvements on neighboring land that encroach onto the insured property, and also improvements on the insured land that encroach onto an adjoining parcel.[128] The survey exception has been found unambiguous in the context of

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[124] *Swanson* is not the only case which says that the inclusion of the survey exception limits the policy to insurance of "record" title. In *Muench v. Oxley*, 90 Wash.2d 673, 584 P.2d 939 (Wash. 1978), the policy contained the survey exception. The court rejected a boundary line dispute claim, stating: "Here, there was nothing, express or implied, which suggested that the title insurance policy insured more than the record title to the property."

[125] 13 Wash.App. 345, 534 P.2d 1388 (1975).

[126] "In 1951, the property was platted and submitted with maps to the county commissioners, who approved the platting. An addendum to the plat, which was of record when Transamerica issued the title insurance policy to Nautilus, shows the eastern boundary of the property owned by Nautilus to be the government meander line which the map locates in the waters of Hood Canal."

[127] 354 S.W.2d 401 (Tex.App. 1962).

[128] "'To encroach' may be defined in ordinary terms as "to enter by gradual steps or by stealth into the possessions or

encroachments.[129] The exception is not skirted by calling the encroaching improvement something else, such as a "protrusion."[130]

12.3.10.1 Types Of Encroachments Excepted

The following types of encroachments have been held to be excepted by a survey exception:

1. A neighboring driveway's encroachment onto the insured parcel, resulting in a claim of prescriptive easement.[131]

2. A neighbor's sewer drain field encroaching onto the insured property.[132]

3. The encroachment of the insured's house onto the neighbor's property.[133] The survey exception negates any assurance of title to buildings encroaching onto neighboring land.[134]

4. The encroachment of a subsurface footing for a retaining wall onto the insured property.[135]

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rights of another." Webster's Third New International Dictionary 747 (1976). The same source defines 'encroachment' as 'an instance of encroaching (as in the building of a structure in a public park or a fence that projects over a neighbor's land).' Id." *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67, 76, note 8 (D.D.C. 1993).

[129] *Muscat v. Lawyers Title Ins. Corp.*, 135 Mich.App. 26, 351 N.W.2d 893 (1984); *Alden v. Schuster*, 2008 WL 2039075 (Conn.Super. 2008) (unpublished). See also §12.3.2, regarding ambiguity and the survey exception generally.

[130] *Cook Consultants, Inc. v. Larson*, 677 S.W.2d 718 (Tex.App. 1984), aff'd in part and rev'd in part *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567 (Tex. 1986).

[131] *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 397 S.E.2d 100 (Va. 1990). However, in *Allpress v. Lawyers Title Insurance Corp.*, 218 Tenn. 673, 405 S.W.2d 572 (1966), the insured alleged that an encroaching driveway would not have been disclosed by an accurate survey. Based solely on this contested fact, the court found that there was a question of fact as to whether the driveway would have been shown, and denied the insurer's motion for summary judgment.

[132] *Ely v. Munshower*, 4 Pa.D. & C.3d 430 (1977).

[133] *Alden v. Schuster*, 2008 WL 2039075 (Conn.Super. 2008) (unpublished); *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (Cal.App. 1 Dist. 1978); *Cook Consultants, Inc. v. Larson*, 677 S.W.2d 718 (Tex.App. 1984), aff'd in relevant part in *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567 (1986); *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984). The *Heyd* court, however, allowed the insured to amend its pleadings to assert that the house encroachment should somehow have been discovered by the insurer in its separate role as abstractor of title.

[134] *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984); *Cook Consultants, Inc. v. Larson*, 677 S.W.2d 718 (Tex.App. 1984), aff'd in part and rev'd in part in *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567 (1986) (survey exception removes coverage against effect of house's encroachment onto neighbor's property).

[135] *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993). However, the *Kayfirst* court found that such an underground encroachment was not excepted by the survey exception. The court construed the survey exception

5. The encroachment onto the insured property of eaves and a downspout.[136]

6. The encroachment by the insureds onto their neighbor's land of "virtually everything beyond [the insureds'] back door, including their swimming pool, surrounding concrete deck and appurtenant equipment."[137]

12.3.10.2 Encroachment Onto Adjoining Land Of Structure On Insured Land

FORM 79, Appendix A
Encroachment

When a building on the insured parcel encroaches onto adjoining land, the policy does not insure the title to the encroaching structure and any possible coverage is negated by the survey exception.[138] However, the policy may insure ownership of a building if that structure is specifically identified in Schedule A as being part of the Land.[139] An encroachment may also be considered to be covered by the policy if an endorsement insures that improvements are located as shown on a survey, as discussed in §12.3.15.

The Residential policy's Covered Title Risk 12, protecting against enforced removal of

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as excepting only those encroachments which would be disclosed by an accurate survey, and held that this subsurface encroachment would not have been shown. See §12.3.3 for a discussion of the construction of the exception.

[136] *Houston Title Guaranty Co. v. Fontenot*, 339 S.W.2d 347 (Tex.App. 1960). However, the court found that these encroachments were not excepted, because the exception used did not include the word "encroachment." Further, the court ruled that a "correct" survey is different from a "complete" survey, and that the insurer did not establish that a "correct" survey would show encroaching eaves and downspouts. The court finally rested its finding of coverage on the conclusion, however, that the dispute concerned title to the land underneath the encroachment, not the encroachment itself.

[137] *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr. 771, 773 (Cal.App. 2 Dist. 1994).

[138] *Hand v. Old Republic Nat'l Title Ins. Co.*, 2011 WL 1103725 (Tex.App.-Fort Worth) (unpublished) (policy did not insure title to wavy wall that strayed beyond insured's boundary line in places, and survey exception negated duty to defend against neighbor's trespass lawsuit); *631 North Broad Street, LP v. Commonwealth Land Title Ins. Co.*, 2018 WL 4051798 (E.D.Pa. 2018) (unpublished), aff'd 2019 WL 3383878, 778 Fed.Appx. 164 (3rd Cir. (Pa.) 2019) (unpublished) (encroaching wall not insured in policy, based on definition of Land, which lack of coverage was buttressed by the survey exception, with appeals court stating that "the underlying litigation involved an encroachment or boundary dispute that a complete and accurate survey would have disclosed."); *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006) (underground parking garage built in street not part of insured Land; sole coverage would be if encroachment was so substantial as to render title to insured Land unmarketable).

[139] *Broadway Realty Co. v. Lawyers Title Ins. & Trust Co.*, 226 N.Y. 335, 123 N.E. 754 (1919). For further discussion of this case under the subject of what constitutes land, see §8.7.

"structures," does not cause the policy to insure the ownership of an encroaching structure.[140] See §3.2.3.1.7 regarding forced removal coverage.

12.3.10.3 Encroachments Not Visible

Almost every form of visible encroachment would appear on an accurate survey. However, a survey will not disclose rights completely below or above the surface for which there is no surface evidence. In *Kayfirst Corp. v. Washington Terminal Co.,*[141] a neighbor's step footing buried four feet underground extended seven feet inside the property line. The court found the encroachment a covered matter, because the encroachment was an "encumbrance." The court also held that it rendered title unmarketable. However, the court found the survey exception inapplicable because it considered the exception limited to those encroachments that would be disclosed by a survey.

Kayfirst follows the cases under the inspection clause and regarding adverse possession that find policy coverage for possession issues that would not be shown on an accurate survey. See §12.2.5 regarding limitations on the possession exception, §12.3.17.2 regarding matters not visible relating to the inspection clause, and §12.3.5.3 on the subject of what is meant by an accurate survey.

12.3.11 Boundary Line Disputes

FORM 77, Appendix A
Boundary line dispute

A survey exception typically excepts boundary line disputes. The exception applies to a true boundary line dispute, in which the neighboring legal descriptions do not conflict and the issue is strictly where the true boundary line is located.[142] A boundary line dispute can also be based on a

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[140] *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr. 771, 776 (Cal.App. 2 Dist. 1994). The measure of damage for an encroachment for which the policy provides protection is the lesser of the diminution in value resulting from the defect, or the cost to remove it. If the insurer protects against an encroachment and then removes it, under its right to clear title, the insured suffers no compensable loss. See *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), in which an encroachment onto an easement was resolved by payment for a partial release.

[141] *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993), relying on *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424 (1909), which had also held encroachments to be encumbrances which made title unmarketable.

[142] *American Title Ins. Co. v. Carter*, 670 So.2d 1115 (Fla.App. 1996), later app., 710 So.2d 1020, held that when both deeds called to the same line, the problem was not an overlap but a question of "where 'on the ground' that line should be drawn," and thus an excepted boundary line dispute. In *Fischer v. First American Title Ins. Co*., 388 S.W.3d 181 (Mo.App. W.D. 2012), the court observed that "a boundary by acquiescence exists if there is an uncertain boundary and the landowners fix the boundary by an 'agreement that is presumed as a result of long acquiescence.'" It found that a boundary by acquiescence did not even invoke a Covered Risk, and also was removed from coverage by the possession exception. The court did not reach the survey exception, which also appeared in the policy. In *Hofmann v. Chicago Title Ins. Co.*, 107 Wash.App. 1010, 2001 WL 803756 (Wash.App. 1 Div.) (unpublished), the insured property bounded on a state highway. The insured learned that the highway boundary was nearer than the seller had represented. The distance in the insured property's legal description may also have been inaccurate as a result. The court found the matter removed from coverage by the survey exception, even though the legal description did not except the recorded highway deed:

line set by agreement or acquiescence, such as the placement of a fence in a location by agreement of the two neighbors.[143]

The term boundary dispute is sometimes used as a label for a disagreement that is really of a different variety. Overlaps between two deeds of record are discussed at §12.3.9. Adverse possession claims decided under the possession exception are discussed at §12.2.5. Those cases decided under the survey and inspection exception are found at §12.3.17.1.

Some boundary line disputes are caused by surveyor error in measuring and setting of monuments in the field. Such errors create contradictory field evidence as to the true or established boundary line, the simplest example being two monuments placed at a corner used as the point of beginning for two or more parcels. (By contrast, apparent overlaps are often resolved by tying both parcels' descriptions to an undisputed monument.) For example, in *Stearns v. Title Ins. & Trust Co.*,[144] two recorded private surveys disagreed as to the proper placement of the government survey line between two government lots. The survey exception removed coverage for the dispute. The insurer had no duty to prosecute the insured's action to determine the boundary line, or to defend the insured against the neighbor's counterclaim.[145]

Similarly, in *Kuhlman v. Title Ins. Co. of Minn.*,[146] the insured placed a new building in reliance on the boundary line as shown on an inaccurate survey. Later, the neighbor obtained what the parties stipulated was an accurate survey. Using the correct boundary line, the building was too close to the boundary line to allow trucks to load and unload at the insured's building. The exception was found to apply, and coverage denied. Also, a court determined that the survey exception would remove coverage as to a boundary dispute that apparently resulted from inaccurate dimensions shown on a recorded subdivision plat.[147]

The exception does not negate coverage for a claim of reformation. A seller's claim that extra

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"Here, an accurate survey would have taken into account the 1953 Deed that conveyed a portion of the land to the state for future highway expansion. [citing Walter G. Robillard, *Clark on Surveying and Boundaries*, The Michie Company] Such a survey may have disclosed a question of location, boundary and area regarding the Hofmann's property. Because the claim against Chicago Title presents a boundary question that an accurate survey may have disclosed, we find that the Schedule B survey exception excludes coverage." *Id.* at 3.

[143] See *Muench v. Oxley*, 90 Wash.2d 673, 584 P. 2d 939 (Wash. 1978) (boundary line dispute resulting from claim to old fence line); *Fischer Sand and Aggregate, LLP v. Old Republic Nat'l Title Ins. Co*., 2017 WL 1316130 (Minn.App.) (unpublished) (exception negated coverage for boundary dispute based on fence line set in a disputed location).

[144] 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (Cal.App. 4 Dist. 1971).

[145] 18 Cal.App. 3d 162, 95 Cal.Rptr. 682 (Cal.App. 4 Dist. 1971).

[146] 177 F.Supp. 925 (W.D.Mo. 1959).

[147] *Lefkovich v. Kearns*, 2005 WL 1154389 (Conn.Super.) (unpublished). *Lefkovich* was not a dispute about policy coverage, however, but a malpractice action brought by the purchasers against their attorney on the theory that he should have advised them to obtain an owner's policy. The court found that the lawyer did not commit malpractice, because the policy would not have protected the buyers against the boundary dispute.

land had been conveyed by mutual mistake was found not to be a boundary line dispute.[148] A boundary line dispute did not exist when the proper interpretation of the insured's deed would be to say that it excepted the parcel claimed by the true owner.[149]

12.3.12 Water Boundaries

Establishing a boundary line along a body of water is a science that requires the combination of title records, survey field work, and historical research as to the water's edge at time of the original government grant and since. The surveyor or other expert must attempt to determine the origin of the dry land, as fill, alluvion or possibly accretion resulting from a man-made protrusion such as a breakwall. State laws differ on the question of whether the state or the adjoining owners have title to the bed of a water body.[150]

The ALTA title insurance policies state that they do not insure any right or title that the insured may hold in the bed of an adjoining body of water.[151] Nonetheless, it is common practice for a title insurer to place a water rights exception in Schedule B of a policy that insures a parcel adjoining or near a body of water. Such a water exception confirms the lack of any policy assurance concerning any rights the insured may have in such water body, as further discussed in § 8.9. A water exception is not an affirmative assurance that the insured parcel abuts the water body named in the exception.[152]

It is common for dry land to be added to a parcel abutting a water body by the natural processes of accretion and reliction, and for such parcel to shrink due to erosion of the shore. There are various methods used to divide the new dry land created by accretion and reliction between the adjoining owners on the shore. Also, a river may change course by an avulsive movement. This can cause a parcel to lose or gain shore frontage. However, because avulsion is a sudden action that cuts off an oxbow in the river, the rule is that ownership of the oxbow does not change hands when the avulsive movement occurs.

The changes in the size and shape of shoreland property due to accretion, reliction, erosion and avulsion affect title. It is very common for the policy to contain a water exception that negates

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[148] *Chanoux v. Title Ins. Co.*, 258 S.W.2d 866 (Tex.App. 1953).

[149] *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962).

[150] See, for example, Nielsen, *Insuring Title to Riparian and Littoral Property*, Michigan Real Property Review, Summer, 1990; Nielsen, *Determining and Surveying Water Boundary Lines in Michigan*, Michigan Bar Journal, September, 1987; and decisions and articles cited therein.

[151] The definition of Land in Condition 1(g) of the 2006 ALTA policies says: "…The term 'Land' does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or *waterways*, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy." (emphasis added)

[152] *Schiller v. Fidelity Nat'l Title Ins. Co.*, 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished) (parcel separated from the shore of Lake Tahoe by a buffer strip along the shore of the man-made lake was not insured as being on the shore because the policy contained an exception for the rights of the public in the lake).

coverage for any dispute over the title to accreted or relicted land.[153] In addition, coverage for disputes about ownership of accreted or relicted land may be negated by a survey exception or a possession exception.[154] In *Bernhard v. Reischman,*[155] the court held that a dispute over accretion on a river concerned "boundary and area," invoking a survey exception that used those terms. However, in *Nautilus, Inc. v. Transamerica Title Ins. Co.,*[156] the survey exception was held not to apply when neighboring parcels were described using overlapping water boundary lines, and the insurer "knew from the public record about the conflict between the Trail's End plat and the Nautilus property at the time it issued its policy." Therefore, the court said that:

> …although a survey would establish a line of ordinary high water and the meander line, the dispute was over who owned the land between those points. A survey would therefore not be dispositive of the dispute; the exception does not apply.[157]

The court also held that the insurer could have and did find the overlap in the public records was not altered by the fact that the complaint also alleged adverse possession.

12.3.13 Survey Obtained But Not Submitted For Survey Coverage

The mere fact that an insured obtained a survey does not render the survey exception null, if the insured did not request or pay for removal of the survey exception. At least three fundamental insurance principles lie as foundation for this conclusion. First, courts abhor an interpretation that gives coverage by estoppel. In most markets, the survey exception is removed only on payment of an additional premium. When there is an established premium for a coverage, the court should find that no such coverage was given when no premium was paid.[158] Second, it is also fundamental that an

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[153] In *Schiller v. Fidelity Nat'l Title Ins. Co*., 444 P.3d 459 (Table), 2019 WL 3202204 (Nev.) (unpublished), the court found no coverage in the policy concerning nearby Lake Tahoe, in part because the policy contained a water exception.

[154] Note, however, that in *Plastow v. Lawyers Title Ins. Corp.*, 2011 WL 6370570 (W.D.Mich.) (unpublished), the court read survey, possession and water exceptions narrowly so that it was able to find a duty to defend the insured in a lawsuit about accretion, and then applied the same elastic reasoning to find a duty to indemnify also—and this notwithstanding the fact that the insureds had owned the parcel for 30 years before they bought insurance, so that much of the accretion had occurred while they were the owners.

[155] 33 Wash.App. 569, 658 P.2d 2 (1983). There was no evidence of the existence of the substantial accreted lands in the public records, and a survey would have alerted the insurer that the accreted land could be considered part of the neighbor's description.

[156] 13 Wash.App. 345, 534 P.2d 1388 (1975).

[157] 13 Wash.App. 345, 534 P.2d 1388, 1391 (1975).

[158] *Stearns v. Title Ins. & Trust*, 18 Cal.App. 3d 162, 95 Cal.Rptr. 682 (Cal.App. 4 Dist. 1971); *Contini v. Western Title Ins. Co.*, 40 Cal.App. 3d 536, 115 Cal.Rptr. 257 (1974), which held: "What appellants are seeking from the Western Title Insurance Company policy is extended coverage without having requested that type of coverage and without having paid the additional premium." The court rejected the insured's demand.

insurer must be aware that it is assuming a risk in order for it later to be held liable for that risk.[159] Third, as many cases point out, the survey exception is not removed automatically on receipt of just any survey. Most importantly, the survey must be accurate. If not, the insurer is not obligated to remove the exception.[160] In addition, once a title issue is disclosed by the survey, the insurer has the right to make an exception for that matter, negating coverage.[161]

Therefore, the survey exception is fully enforceable even when the insured obtained a survey before the closing and the description in the policy was created by the surveyor, but the insured did not contract for a policy free of the exception.[162] The insured may not estop the insurer into coverage by claiming in a negligence cause that the insurer had a duty to notice and advise the insured of an encroachment.[163] Note that the insurer is well-advised to let the consumer know that the coverage may be obtained and that, if that coverage was not elected, the policy would contain the exception. See §12.3.4. It is also persuasive to show that there is a significant charge for the removal of the exception.[164] The fact that insurers charge, and some insureds pay, large extra premiums for assumption of the survey risk establishes its value.

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[159] "Assuming arguendo that the ALTA lenders policy is a representation that the contingencies insured against will not occur, a purchaser insured by a CLTA standard coverage may not recover for damages sustained as a result of his reliance upon them. Thus, even if Transamerica had represented to Columbus and Wells Fargo that the house was located entirely on parcel 4, and did not encroach onto parcel 1, Transamerica would be liable for negligent misrepresentation only to Columbus and Wells Fargo. There would be no liability to Walters if he relied upon such representations to his detriment, even if such reliance was reasonably foreseeable. To hold otherwise would give the purchaser the benefit of extended coverage without having paid the additional premium therefor. (*Contini v. Western Title Ins. Co.* (1974) 40 Cal.App.3d 536 at pp. 543-544, 115 Cal.Rptr. 257.)" *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655, 666 (Cal.App. 1 Dist. 1978).

[160] For example, "RLB next asserts that the survey exception should not defeat this claim since the description in its deed was based on a survey (the 1972 survey) which did not reveal the encroachment or overlap. We think the answer to that contention is clear. The reference in the policy to an 'accurate survey' could hardly refer to a prior survey which in fact created the overlap." *RLB, Inc. v. US Life Title Ins. Co. of New York*, 774 S.W. 2d 607, 609 (Tenn.App. 1989).

[161] *Stearns v. Title Ins. & Trust*, 18 Cal.App. 3d 162, 95 Cal.Rptr. 682 (Cal.App. 4 Dist. 1971) reasoned held that "Appellant purchased a standard coverage policy. ... At additional cost he could have purchased a policy affording extended coverage insuring against risks such as those involved in Corona's claim. [citations omitted] The purchase of such extended coverage would have necessitated his obtaining a correct survey, however [citations omitted], and the boundary dispute would in all likelihood have become known to the insurer" and thus excepted from coverage.

[162] *Muench v. Oxley*, 90 Wash.2d 637, 584 P.2d 939 (Wash. 1978); *RLB, Inc. v. US Life Title Ins. Co. of New York*, 774 S.W. 2d 607 (Tenn.App. 1989); *Kuhlman v. Title Ins. Co. of Minn.*, 177 F.Supp. 925 (W.D. Mo. 1959); *Lawyers Title Ins. Corp. v. McKee*, 354 S.W.2d 401 (Tex.App. 1962); *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (Cal.App. 5 Dist. 1974).

[163] *Ely v. Munshower*, 4 Pa.D. & C.3d 430 (1977).

[164] See *Muench v. Oxley*, 90 Wash.2d 637, 584 P.2d 939 (Wash. 1978); *Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (Cal.App. 5 Dist. 1974).

12.3.14 Owner Claim Based On Loan Policy Survey Coverage

Removal of the survey exception for the lender insured does not provide coverage to the owner insured. On occasion, the survey exception is removed for the lender but not the owner. An owner might later claim that he or she should be treated as if the exception had been removed from the owner's policy also. See §7.7 for a discussion of owners claiming the benefit of coverages given in loan policies.

This is not sound reasoning. First, the owner may not bootstrap into the lender's coverage because he did not pay for the coverage. In most jurisdictions, there is a charge for such coverage. To give it by estoppel is contrary to the premium structure, which in many states must be justified when filed. Second, the risk in removing the exception for an owner is significantly greater than it is as regards the lender. The lender must establish not only that a title defect exists, but also that there has been a loan default and that its security has been impaired. See §3.2.4 regarding loss under a loan policy. Third, many "surveys" used to delete the survey exception from a loan policy are mortgage inspection reports or similar products that are not surveys. They most certainly are not "accurate" surveys conforming to ALTA/NSPS Standards or state-promulgated minimum survey standards. They do not locate evidence of possession lines, survey monuments, improvements, easements, and other detail that affects an owner's use of the property. Mortgage inspection reports are designed to satisfy lender customers essentially that the primary improvements are located on the described property. They recognize that lenders have different, lesser purposes in obtaining survey products. Lenders do not set fences, construct improvements or, most importantly, have disputes with neighbors which are worked out in court under the guise of boundary line disputes.

12.3.15 Survey Attached Or "Insured"

A policy is sometimes issued that attaches or refers to a survey or a map. The policy may then also contain a general assurance regarding the survey, such as "the survey has been insured,"[165] that it "shows clear,"[166] or that there are "[n]o variations or encroachments"[167] other than those shown as exceptions.

The most common survey-related endorsement is the ALTA survey endorsement, which insures that the "land is the same" as that delineated on the referenced survey. This endorsement has been found to assure "that the Property's boundaries are located as shown on the Boundary Survey, and nothing more." The court rejected the insured's contention that the endorsement had the effect of assuring the insured that all physical matters depicted thereon were in exactly the location shown.[168] The survey endorsement is further discussed at §9.11.2.

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[165] *Hutsell v. U.S. Life Title Ins. Co.*, 157 Ga.App. 845, 278 S.E.2d 730 (1981).

[166] *MacBean v. St. Paul Title Ins. Corp.*, 169 N.J.Super. 502, 405 A.2d 405 (App.Div. 1979).

[167] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987).

[168] *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co.*, 2007 WL 3334210 (W.D.N.C.) ((unpublished). The issue in the case was the location of tree stump burial pits, which were superimposed on the boundary survey from an earlier map in the public records. The insured, a homebuilder, built new homes on some of the pits and they sank.

In two cases, courts implied assurances regarding surveys without any affirmative language. In one case, the policy showed an exception for a matter on a survey, which the court deemed sufficient to serve as an assurance against any inaccuracy in the referenced survey.[169] In the second case, a recorded drawing was referred to in the legal description, with the statement "which said plat is duly recorded." The recorded "plat" was a mere sketch, and not sufficient to identify the boundary lines of the property. The court found the insurer responsible for the cost of a survey to establish where the property boundaries were.[170]

When a map was attached to the commitment with a substantial disclaimer, neither the inclusion of the map nor the disclaimer were deemed to expand or contract the coverage of the policy.[171] The attachment of a "property sketch" to the policy, with an appropriate caveat, was found not to be an affirmative coverage.[172]

12.3.16 Effect Of Removal Of Survey Exception

By removing the survey exception, the insurer indemnifies against most matters related to boundary lines, encroachments and overlaps. The ALTA Residential and Homeowner's policies provide certain affirmative assurances. See §§9.14.1 and 9.14.2. The CLTA 126.1 endorsement offers the insured certain assurances which are similar to those found in the Residential policy.

The following types of survey errors or matters have specifically been held compensable when the survey exception has been removed, or an affirmative assurance given, unless another exception or exclusion also applies:

1. The failure to show an encroachment of the insured's sidewalk onto the neighbor's property.[173]

2. The failure to report to the insured the existence of encroachments onto the insured

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[169] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); appeal 215 N.J. Super. 306, 521 A.2d 1300 (1987).

[170] *Miller v. Lawyers Title Ins. Corp.*, 112 F.Supp. 221 (E.D. Va. 1953). *Miller* agrees with the cases finding the insurer liable for the cost of determining boundary lines when the insured legal description is so deficient that the legal cannot be surveyed or located on inspection. See §12.3.8 and §8.5 for further discussion of deficient legal descriptions.

[171] *Santos v. Sinclair*, 884 P.2d 941, 945 (Wash.App. Div. 2 1994). The disclaimer read: "The Company has not surveyed the premises described in [blank]. The sketch below is furnished without charge solely for the purposes of assisting in locating said premises and the Company assumes no liability as to the validity, location, or ownership of any easement or other matter shown thereon, nor for the inaccuracies therein, including the accurate location of boundaries, including water boundaries. This sketch does not purport to show all highways, roads and easements adjoining or affecting said premises, nor is it a part or modification of the report, commitment, policy or other title evidence to which it may be attached."

[172] *Fee v. Stahley*, 2008 WL 4849844 (Minn.App.) (unpublished) (property sketch used to remove survey exception on loan policy only, which may have been attached to policy, was not a survey, contained a caveat about accuracy, and did not negate survey exception as to issue of property's area and dimensions).

[173] *McMinn v. Damurjian*, 105 N.J.Super. 132, 251 A.2d 310 (Ch. 1969).

property of neighboring front steps and other building improvements, as disclosed by a survey.[174]

3. The incorrect placement of a side lot line, and damages for subsequent judgment prohibiting the insured from using cellar door because it opened onto the neighbor's property.[175]

4. The incorrect placement of a power line easement 50 feet from house as opposed to the true measurement of five feet from the house.[176]

5. The incorrect labeling of an adjacent thoroughfare as a public street. The insureds built their house facing the "street." Later, they learned that the "street" was really a lot on which the neighbor later built a house. The insured's house faced the neighbor's new house rather than the true public street.[177]

6. The fact that the "plat" which the policy stated was "duly recorded" was a mere drawing with no distances and calls, description, or anything else necessary to establish where the insured property was located. The insurer was required to pay the cost of surveying the property.[178]

7. An incorrect statement of the amount of acreage.[179]

8. Shortage in dimensions, causing "loss" of land and damages because the lot would support fewer apartments than would a lot of the size shown on the survey.[180]

9. The encroachment of the insured's barn and fence onto the neighbor's property.[181]

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[174] *Glyn v. Title Guarantee & Trust Co.*, 132 App.Div. 859, 117 N.Y.S. 424 (1909).

[175] Id.

[176] *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987).

[177] *MacBean v. St. Paul Title Ins. Corp.*, 169 N.J.Super. 502, 405 A.2d 405 (N.J.A.D. 1979).

[178] *Miller v. Lawyers Title Ins. Corp.*, 112 F.Supp. 221 (E.D. Va. 1953).

[179] *Hutsell v. U.S. Life Title Ins. Co.*, 157 Ga.App. 845, 278 S.E.2d 730 (1981).

[180] *Sunset Holding Corp. v. Home Title Ins. Co.*, 172 Misc. 759, 16 N.Y.S.2d 273 (Sup.Ct. 1939).

[181] In *Rackouski v. Dobson*, 634 N.E.2d 1229 (Ill.App. 3 Dist. 1994), the court held: "This exception squarely addresses the dispute in the present case regarding the barn building which allegedly encroaches on plaintiff's property. However, "Schedule B" of the policy states that "[t]he standard exceptions referred to on the inside front cover are deleted." Thus, appellee expressly waived the exception to coverage that specifically deals with the allegations asserted in plaintiff's complaint. ... [W]e believe that the logical conclusion is that the policy, as executed, does cover such

10. The failure to make specific reference to an easement of record, physical evidence of which was shown on the survey. The policy exception for "dirt driveway crosses adjoining lands" did not give the insured adequate notice of the nature of the interest.[182]

Thus, the removal of the survey exception extends considerable coverage to the owner or lender as to off-record matters that are otherwise beyond the scope of the policy's protection.

However, the removal of the exception is not itself a coverage.[183] The removal of the exception is not an assurance by the insurer of the accuracy of any matter depicted on the survey that is delivered to the insurer to induce it to remove the exception.[184]

12.3.17 Inspection Of Premises

The inspection clause bars recovery by the purchaser from its insurer for any matters that the insured would have discovered if she or he had looked at the property. A commonly used form of survey exception includes this inspection clause:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

The inspection clause is not found in some versions of the survey exception, and is not found in

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"encroachments, overlaps … which would be disclosed by an accurate survey… ." 634 N.E.2d at 1231.

[182] *Amidano v. Donnelly*, 615 A.2d 654 (N.J. Super. 1992). The court may have come to the same conclusion that the insurer was liable for failing to report the recorded easement if the survey exception had not been removed. The court stated: "The careful description of easements which Meridian excepted from coverage by reference to the recorded instruments creating them, justifies a reasonable policyholder conclusion that title was insured against easements other than those specific easements, although subject to the exceptions for encumbrances in other named categories. See Caravan Products Co., Inc. v. Ritchie, 55 N.J. 71, 74-75 (1969). The Donnellys argue that had Meridian intended to except the recorded easement granted by the Ort deed, it should have listed it as 'as contained in Deed Book 237, page 340.' We agree." 615 A.2d at 658.

[183] *First American Title Ins. Co. v. Dahlmann*, 291 Wis.2d 156, 715 N.W.2d 609, 2006 WI 65 (Wis. 2006); *Community Credit Union v. AmeriTitle & Abstract, Inc*., 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished).

[184] *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co.*, 2007 WL 3334210 (W.D.N.C.) (unpublished) (policy did not insure limits of stump burial holes as depicted on survey). However, in *Fidelity Nat'l Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848 (5th Cir. (Tex.) 2014), the Fifth Circuit Court of Appeals ruled that the removal of a phrase from the state-mandated survey exception used in Texas increased the coverage of the policy, and in effect created a coverage against the inaccuracy of a line drawn on the survey presented to the insurer. The line was intended to depict the boundary of a flowage easement, which covered land below a certain elevation. In the same policy, an exception for the recorded flowage easement was also found not to remove coverage for the issue, because that exception was modified to add the phrase "and shown on survey dated March 22, 2006 by Mark Paine, RPLS # 5078." The court held that this limited the exception to that part of the flowed area as depicted by the surveyor.

Covered Risk 2(c) of the 2006 ALTA policies, the so-called survey coverage.

A survey exception that contains an inspection clause becomes a graft of two related sets of issues with some overlap. As was stated by the *Walker Rogge* court:

> A survey and inspection serve related but different purposes. The purpose of an inspection, which is performed by merely visiting the property, is to disclose such matters as physical encroachments, evidence of adverse use, and monuments. By comparison, a survey, as this case demonstrates, can involve extensive research and field work. Unlike a mere inspection, a survey relates the property as described in recorded instruments to the land as it exists.[185]

As is discussed at §12.3.5, determining what an accurate survey will show is a precise, relatively objective analysis. There are no precise rules about what would be revealed on an inspection of the premises.

The inspection clause removes coverage for matters by which the insured is bound because they would be discovered in an inspection of the property before a purchase.[186] In other words, the inspection is a duty of the purchaser as a part of a good faith purchaser's duty to investigate the property.

An inspection shows visible possession by another. As stated by one court:

> All the authorities agree that possession, in order to constitute notice, must be actual possession of the party, or his agent or tenant, consisting of acts of occupancy which are open, visible and unequivocal, and in nature sufficient upon the observation of a subsequent purchaser to put him on inquiry as to rights of the possessor.[187]

The exception is worded "*and* inspection of the premises." However, most courts have read "and" as "or." A matter need not be revealed both by an accurate survey and an inspection for the survey exception to apply.[188]

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[185] *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992).

[186] In *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347 (Tex.App.-Houston 14 Dist. 1998), the property was subject to two easements allowing the government to drop bombs on it. The easements were recorded after closing. The insured purchaser inspected the property with the seller beforehand. He saw a caliche road, signs warning of bombing activity, government employees and vehicles on the property, and a spotting tower. He did not go in the tower, so he did not see the military's maps, charts, telephone and radio. He also made no inquiry of the military personnel, although the seller talked to one in his presence. The easements were found binding on the insured based on his inquiry notice, not constructive notice. The same notice was found to void policy coverage under the inspection clause of the survey exception.

[187] *Shaver v. National Title & Abstract Co.*, 361 S.W.2d 867, 869 (Tex. 1962) (citing *DeGuerin v. Jackson,* 50 S.W.2d 443 (Tex.Civ.App. 1932), aff'd 124 Tex. 424, 77 S.W.2d 1041).

[188] "[T]he court ruled that for the exception to apply, the defect must be disclosed by both an accurate survey and a

12.3.17.1 Visible Possession Including Adverse Possession

FORM 53, Appendix A
Matters visible on inspection

The inspection clause of the survey exception typically refers to evidence of possession that would be visible on an inspection of the property. Three types of interests commonly disclosed by inspection are adverse possession, public use of a dedicated road, and easements.[189]

When adverse possession is evidenced by matters that would be disclosed on an accurate survey, the survey exception negates coverage. This is true whether or not the exception includes the inspection clause.[190] The better view is that the exception negates coverage even when the insurer removes the possession exception. See §12.2.4 for a discussion of adverse possession claims under the parties in possession exception.

Adverse possession rights often have physical evidence such as an improvement, structure or sign that would be disclosed by an accurate survey. Perhaps the most common example is a fence, which is an encroachment but often also the basis for a claim of adverse possession. Similarly, a claim of a prescriptive easement is often evidenced by an improvement or structure. For example, a utility that lays a pipe or transmission line may also claim a prescriptive easement in the absence of a written easement grant.

Some adverse possession rights would not be disclosed on an accurate survey, but would be observable on an inspection of the property. An adverse possession claim was found to be excepted by the inspection clause of a survey exception in *Bothin v. Calif. Title Ins. & Trust Co.*[191] The court held the possession would be disclosed by inspection, and thus was excepted:

> It was left to the appellant to determine, by an inspection and examination of the property, whether there was adverse occupancy or not, to determine for himself by actual measurement, survey, or examination of the premises whether he was getting what he contracted to purchase, or whether there was an adverse claim of title of any

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physical inspection of the property. Because an inspection would not have revealed the shortage, the court found the exception to be inapplicable. We disagree with the analyses of both courts. ... It would distort the title policy to the point of illogic to expose Chelsea to the risk of the results of an accurate survey merely because those results could not be revealed by an inspection of the premises." *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992).

[189] A tenant's interest would also normally be disclosed by inspection. Several cases hold that a tenant's rights are excepted by the "parties in possession" exception. See §12.2.1. The inspection clause of the survey exception should also apply to tenants' rights.

[190] See *Walker Rogge, Inc. v. Chelsea Title & Guarantee Co.*, 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992) ("It would distort the title policy to the point of illogic to expose Chelsea to the risk of the results of an accurate survey merely because those results could not be revealed by an inspection of the premises.").

[191] 153 Cal. 718, 96 P. 500 (1908).

character by the occupants of the whole or any portion of the premises.[192]

Improved streets are also usually visible on inspection, and thus excepted.[193] A *de facto* inspection clause was imposed as to a street dedication, even though the survey exception had been removed from the policy. In *Malkin v. Realty Title Ins. Co. Inc.*,[194] a former owner of the property had deeded a 10-foot strip of the property, a platted lot, for public street. The insured obtained a survey, which mistakenly described the full lot, but showed that the 10-foot strip was part of the paved roadway. The policy used the survey legal description. Although the survey exception was removed, the court held that the insureds had "assumed" the risk that the strip was not owned by their grantor. As to the insureds' claim that they had paid an additional premium to get the survey exception removed, the court relied on the inspection clause. It said:

> we [do not] think it likely [that] either Mr. Malkin or his attorney thought that the appellee, for an additional $60, would undertake the obligation of evicting Montgomery County from its occupancy of part of the lot or, in the alternative, of paying the Malkins $2,500.[195]

The *Malkin* court set a higher standard for the insured's "due diligence" because the insured was relatively sophisticated, and was represented by a lawyer.[196]

The insurer does not have a duty to inspect the land on the insured's behalf. Texas has codified this understanding by promulgating a "waiver of inspection." If the insured signs the waiver, the insured agrees that the insurer will not inspect, and the policy will contain the inspection clause.[197]

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[192] 96 P. at 502. The court did not actually rely on an inspection clause, apparently because the older form of policy the court interpreted did not have one. The exception relied on was for "tenure of the present occupant." The court's rationale, however, was entirely consistent with and better supported by the wording of the inspection clause.

[193] In *Mellinger v. Ticor Title Ins. Co.*, 93 Cal.App.4th 691, 113 Cal.Rptr.2d 357 (Cal.App. 1 Dist. 2001), a 20-foot strip of the insured parcel was improved with what the court described as a "busy" public street. There was conflicting testimony about whether or not a right-of-way grant existed, or was evidenced in the public record. The insurer obtained summary judgment on its argument that the parties in possession exception removed coverage because there was no evidence in the public records of the city's claim to own the road. It relied principally on *Native Sun Investment Group v. Ticor Title Ins. Co.*, 189 Cal.App.3d 1265, 235 Cal.Rptr. 34 (Cal.App. 4 Dist. 1987), which held that the same exception removed coverage as to the state's claim to own the ocean shore. The appeals court acknowledged that the exception would be a valid defense if the right-of-way was not shown in the public records.

[194] 244 Md. 112, 223 A.2d 155, 157 (1966).

[195] 244 Md. 112, 223 A.2d 155, 157 (1966).

[196] *Malkin* is discussed at §9.1.3.4, regarding the sophisticated policyholder exception to the rule that an insurance contract is construed against the insurer as drafter.

[197] The "Waiver of Inspection" provided as follows: "I hereby waive inspection by you of such property and accept your policy subject to rights of parties in possession, and those under whom they hold, and to any visible and apparent

Visible use of property may put the insured on a duty to inquire, which would lead to the insured discovering that the possessor holds an unrecorded interest. Such inquiry notice, if binding on the insured, causes the easement or other interest to be excepted from coverage under the inspection clause.[198] However, when a survey was obtained which showed a billboard, and the insurer did not make exception for the unrecorded billboard lease, the insurer was found to have assumed the risk, even though it did not remove the general survey and inspection exception.[199]

12.3.17.2 Recorded Easements; Equivocal Evidence Of Possession

Courts are reluctant to excuse the insurer's failure to report a recorded easement based on the survey exception or the inspection clause. Thus, when power poles are located near the edge of the property, or near a reported easement, courts have rejected the inspection clause on the insureds' testimony that they thought the utility lines were outside the property line or inside the reported easement.[200] Also, the clause has been held not to apply as to recorded easements for which there is no visible evidence of possession,[201] such as an underground pipeline[202] and a drainage ditch.[203]

However, sometimes the evidence on inspection is so unmistakable that the inspection clause can be considered sufficient to except even a recorded easement. In *Halvorson v. National Title and Abstract Co.*, the obvious nature of the high tension wire easement bisecting the property apparently convinced the court that the insured must have assumed or agreed to the easement's existence.[204] As

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roadway or easement over or across the subject property, the existence of which does not appear of record, if any such parties are not in possession of, or if any such roadway or easement affects the premises upon which you have issued such policy, and take it upon myself to inspect such premises and obtain possession thereof from the present occupants." See *Sterling v. Stewart Title Guar. Co.*, 822 S.W.2d 1 (1991).

[198] See *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347 (Tex.App.-Houston 14 Dist. 1998).

[199] *Eller Media Co. v. DGE, Ltd.*, 2004 WL 2002449, 2004-Ohio-4748 (Ohio App. 8 Dist. 2004) (unpublished). The court was influenced by the fact that the title insurer also did not seem to think the general exception sufficient, because it added a specific exception after the claim was received: "… [W]hen [Surety's examiner] learned of the claim and impending lawsuit, he wrote the 'billboard exception' into the title policy. As noted by the judge, the survey contained no identification or notations about the billboard or any rights of parties to it... This explicit exception was unilaterally inserted to avoid contractual obligations to DGE."

[200] *McDaniel v. Lawyers' Title Guaranty Fund*, 327 So.2d 852 (Fla.App. 1976); *Happy Canyon Inv. Co. v. Title Ins. Co. of Minn.*, 38 Colo.App. 385, 560 P.2d 839 (1976).

[201] *Morton v. Attorneys' Title Ins. Fund, Inc.*, 32 So.3d 68, 34 Fla. L. Weekly D1406 (Fla.App. 2 Dist. 2009) (easement to maintain creek not visible and not excepted, relying on *McDaniel* for principle that "a title insurer cannot hide behind its policy's accurate survey exception to avoid liability when a title defect is of record.").

[202] *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953); *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 216 So.2d 255 (Fla.App. 1968); *Shaver v. National Title & Abstract Co.*, 361 S.W.2d 867 (Tex. 1962); *San Jacinto Title Guaranty Co. v. Lemmon*, 417 S.W.2d 429 (Tex.App. 1967).

[203] *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734 (Tex.App. 1977).

[204] 391 S.W.2d 112 (Tex.App. 1965).

in *Malkin v. Realty Title Ins. Co. Inc.*, discussed in the previous section, the court implicitly relied on Exclusion 3(a) in addition to the inspection clause. Similarly, in *RLB, Inc. v. US Life Title Ins. Co. of New York*,[205] the court found that survey stakes at the true boundary line were adequate notice that there was an overlap in descriptions. The insured protested that he thought the stakes represented an easement, but the court rejected the argument. It apparently believed that the insured was on sufficient notice to require it to at least make further inquiry.

On occasion, the inspection clause is inapplicable because the visible evidence of possession is not unequivocal enough to put the buyer on notice. A neighbor's claim of adverse title was not excepted, when the primary evidence was an advertising sign on the insured parcel for the neighbor's tourist attraction.[206] The insured admitted observing the signs. The insured was held not to be responsible to deduce that the signs were evidence of a claim of ownership. The court also did not find any "due diligence" duty on the purchaser's part to contact the sign owners.

12.3.17.3 Evidence Of Physical Access

FORM 22, Appendix A
Physical barrier to access

The fourth primary situation in which the inspection clause has been invoked in reported decisions is when there is no physically open and improved street adjoining the insured parcel. The policy insures a right of access, but not that an abutting public street is physically open and improved. See §9.7 regarding the right of access coverage. The survey exception reiterates that the insurer does not protect the insured against the lack of an improved, adjoining street. In *Krause v. Title & Trust Co. of Florida*,[207] the insureds admitted they had a right of access, but wanted the insurer to pay for the substantial fill required to make it useable by normal vehicles. The court held that the policy insures only that there is a right of access. It bolstered its argument with the inspection clause, stating:

> The policy here specifically excepted any facts revealed by an accurate survey. The physical condition of the existing access was easily ascertainable by a simple inspection of the site by the purchasers. As the title company insured the quality of the title as shown by the record and there was access of record, it was not required to aid in the suit by appellants Krause and Beane to establish a grant of necessity.[208]

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[205] 774 S.W.2d 607 (Tenn.App. 1989).

[206] *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975).

[207] 390 So.2d 805 (Fla.App. 1980).

[208] 390 So.2d at 806.

Krause built on *Title & Trust Co. of Florida v. Barrows*.[209] In *Barrows,* the platted "street" was only the extension of a sandy beach, and was covered by the tide in the spring and fall. The court reversed a judgment in favor of the insured landowner, saying:

> In the case here before us, there is no dispute that the public record shows a legal right of access to appellant's property via the platted Viejo Street. The title insurance policy only insured against record title defects and not against physical infirmities of the platted street.[210]

Finally, in *Gates v. Chicago Title Ins. Co.*,[211] the insured testified that the trek from the public street to his property was "indescribable" and a mere "goat path." The court held, however, that the policy insures only the right of access. Further, it found the insurer was not responsible for inspecting the property for the insured, or for insuring that the access route was passable.[212]

12.4 Easements Not Shown By Public Records

FORM 54, Appendix A
Unrecorded easement exception

The policy contains a standard exception for "easements or claims of easements not shown by the public records," or similar wording. This exception spans unrecorded easement grants,[213] and claims of easements by necessity,[214] prescription[215] and implication.[216] The exception also applies to

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[209] 381 So.2d 1088 (Fla.App.1979).

[210] 381 So.2d at 1090.

[211] 813 S.W.2d 10 (Mo.App. 1991).

[212] The Court cited both *Barrows* and *Krause* in holding: "It is true that the western road, the route by which plaintiff Gates had a right of access, was a difficult one and, in its present condition, of only limited usefulness, but if plaintiff had a right of access, even though over a rough and nearly impassable route, he makes no case under his title insurance policy. A title insurance company may not be expected to investigate the physical condition of a way of legal access to the insured property to determine if it is passable."

[213] In *Daniel v. Coastal Bonded Title Co.*, 539 So. 2d 567 (Fla.App. 1989), the exception was found applicable to unrecorded easements. However, the insured had a cause of action based on the alleged failure of the insurer as closing agent to alert the insured to the easements and some encroachments shown by a survey in the insurer's possession at closing. In *Armitage v. First American Title Ins. Co*., 2007 WL 2137954 (Cal.App. 1 Dist.) (unpublished), the exception was found to apply to a conditional easement granted in an unrecorded purchase contract. In *Mann v. Old Republic Nat'l Title Ins. Co.*, 975 S.W.2d 347 [Tex.App.-Houston (14 Dist.)], the insured was found to have inquiry notice of unrecorded easements in favor of military to use land for aerial target practice. *Mann* is further described in §12.3.17.

[214] In *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660 (Va. 1994), the court stated: "The easement by necessity at issue in this case clearly was unrecorded at the time the policies were issued. Furthermore, this exclusion reinforces the nature of a title insurance company's business, which is to provide insurance coverage for the validity of the title to the extent

a post-policy claim that a recorded easement should be reformed to encumber the insured property, because such a claim of easement is not in the public records on date of policy.[217] The exception also takes away coverage for easements that are recorded, but are not in the chain of title to the insured parcel.[218]

The exception does not apply to easements that *are* in the public records.[219] The policy definition of public records is limited to those records that, under state law, impart constructive notice of interests in real estate. The definition of public records is fully discussed at §9.12. This exception is consistent with other standard exceptions in limiting the insurer's risk to "record" matters. See §12.3.1 regarding the rationale for the survey exception.

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diligent examination could or should have discovered defects at the time of policy issuance. Title insurance indemnifies the policyholder for those discoverable, but undiscovered, defects in the title, not for every claim which ultimately might affect the title." 442 S.E.2d at 663. In *Seilham v. Commonwealth Land Title Ins. Co.*, 360 F.Supp.3d 412 (E.D.La. 2018), the court said that a title insurer had no duty to defend the insured against the Louisiana equivalent of an easement by necessity (a servitude by "destination of the owner" under Louisiana Civil Code article 741) because of the exception for easements not shown by the public records.

[215] In *Louisville Title Ins. Co. v. Guerard*, 409 So.2d 514 (Fla.App. 1982), the court found the unrecorded easements exception negated coverage for a claimed prescriptive easement. A California decision, *Bailey v. State Farm Ins. Co.*, 810 F.Supp. 267 (N.D. Cal. 1992), also held that the insurer had no duty to defend against a claimed prescriptive or implied easement based on the unrecorded easements exception, although the primary evidence in the case concerned possession and the possession exception would have been equally applicable. See §12.2.5 concerning the possession exception and a claim of prescriptive or implied easement.

[216] *Bailey v. State Farm Ins. Co*., 810 F.Supp. 267 (N.D. Cal. 1992), held: "Schedule B of the policy excludes, "easements, liens, encumbrances, or claims thereof, which are not shown by the public records"). The Flagg litigation asserted a right to the easement by prescription, implication, balancing of hardships, and estoppel. None of these would appear in the public records. Strictly construing the policy exclusion against Fidelity, the claims in the litigation are plainly excluded from coverage under the policy." 810 F.Supp. 267, 271 (N.D. Cal. 1992). To the same effect, as to prescriptive easements, is *Gebrayel v. Transamerica Title Ins. Co.*, 888 P.2d 83 (Or.App. 1995) (claim of prescriptive or implied easement excepted under either unrecorded easement exception or parties in possession exception).

[217] *Campbell v. Ticor Title Ins. Co*., 2007 WL 1822391 (Wash.App. Div. 3) (unpublished). However, when the policy contained a combined "accurate survey" and "unrecorded easements" exception, the latter clause was found to be limited by the former, causing only those unrecorded easements that would be shown on a survey to be excepted. *Hon, Inc. v. Central Mo. State Univ. Board of Regents*, 678 S.W.2d 413 (Mo.App. 1984). The *Hon* case is further discussed at §12.2.5.

[218] See *Snow v. Pioneer Title Ins. Co.*, 84 Nev. 480, 444 P.2d 125, 128 (1968), discussed further below, this section, and *Seilham v. Commonwealth Land Title Ins. Co.*, 360 F.Supp.3d 412 (E.D.La. 2018).

[219] An unrecorded easements exception did not negate coverage for utility lines for which an easement had been recorded, in *C 1031 Properties, Inc. v. First American Title Ins. Co*., 175 Wash.App. 27, 301 P.3d 500 (Wash.App. Div. 3 2013). In *Schram v. Fidelity Nat'l Title Ins. Co.*, 2017 WL 168920 (N.D.Ind.) (unpublished), the court held that the exception did not negate a duty to defend the insured just because the complaint did not allege that the claimed easement was recorded. The insurer also obtained an affidavit from the plaintiff in which he averred that the easement was not recorded, but the court still found a duty to defend. In *Robbins v. Mason County Title Ins. Co*., 5 Wash.App.2d 68, 425 P.3d 885 (Wash.App. 2 Div. 2018), the court held that the exception did not negate a duty to "defend" the insured against the treaty rights of a Native American tribe to harvest shellfish along tidelands including part of the insured parcel, despite the fact that those rights were identified only in a treaty and a federal court decision issued after the policy date.

The modern policy definition of "public records," and especially its reference to state law, was provoked by *Hahn v. Alaska Title Guaranty Co.*[220] In that case, an easement was found not excepted by the standard unrecorded easement exception even though it was created by an executive order that was published only in the Federal Register. *Hahn* stands alone in its expansive interpretation of the "public records" definition found in the 1970 ALTA policy. Its ruling would be impossible under a fair reading of later versions of the ALTA policies.

In *Upton v. Mississippi Valley Title Ins. Co.*,[221] an easement was excepted when filed in a set of public records, but those records were not considered by state law to impart constructive notice to purchasers of real estate. The court found that the scope of the term "unrecorded" in the exception is defined by the types of records that state law says impart constructive notice. A title insurer's practice in searching some records that do not impart constructive notice did not affect the unambiguous scope of the exception.

> We find nothing ambiguous in the definition of the term "public records" contained in the policy ... . The parties by contract clearly limited the records-search requirement with express reference to the law that determines those records which impart constructive notice. The determination of which records "by law impart constructive notice of matters relating to land" was patently a question of law for the trial court. In resolving that question, we need only to give effect to the obvious meaning of the word "law" and refer to those things of which the law is composed, namely the statutes, constitution, and case precedent of this state.[footnote omitted] The only law we find declaring that certain records shall impart constructive notice of matters relating to land is Code of 1975, Sections 35-4-51 and -63 set out above. We find no cases, nor are we cited to any legal precedent whatsoever in this state, that holds that any other court records, in addition to those in the office of the probate judge of any county, shall impart constructive notice of an easement in real estate.[222]

Likewise, an easement recorded outside of the chain of title does not impart constructive notice. Thus, coverage as to such an easement is removed by this standard exception:

> Any instrument executed by such an owner which is recorded before his acquisition or after his relinquishment of title is considered outside the "chain of title." 6 Powell, Real Property, 293; 8A Thompson, Real Property (1963 Replacement), §4340. In an extensive series of articles by Francis S. Philbrick, the most relevant of which appears at 93 U.Penn.L.Rev. 391, it is explained that this restriction affords the only practicable method of modern title search, for the alternative would require (in Nevada) searching the records of a century under the name of an owner who might

[220] 557 P.2d 143 (Alaska 1976).

[221] 469 So.2d 548 (Ala. 1985).

[222] 469 So.2d at 555-556.

> have held title for but a week.
>
> Applying this rule to the case at bar, the Anderson-Coffee Agreement was not within the chain of title and so was within the exclusion from Snow's title insurance policy of "easements, liens or encumbrances which are not shown by the public records." The Title Company therefore had no duty to Snow either (1) to make good any damages which he might sustain from the existence of the Anderson-Coffee Agreement or (2) to defend him against Mesa's assertion of its rights under the agreement.[223]

Similarly, an easement granted by the State of Texas by legislation, covering all "submerged land or lands owned by the State of Texas," was excepted as to property conveyed by the state before the law was passed. The court found as a matter of law that the easement did not affect the insured property, and was not in the chain of title.[224] Also, in *First American Title Ins. Co. v. J.B. Ranch, Inc.*,[225] public roads disclosed only on road maps in the county clerk's office were excepted from coverage by an exception for "[e]asements, claims of easements or encumbrances which are not shown by the public records." The road maps were held not to impart constructive notice under the Utah statutory scheme. In *Miller v. Title Insurance Co. of Minn.*,[226] an identical exception was found to remove coverage as to records in the city engineer's office that showed that municipal water and sewer lines had been installed under the surface of the insured's property. The Montana court found the policy definition of "public records" to be unambiguous. The court found:

> According to Title Insurance Company, the contract definition of "public records," in conjunction with the Montana statutes relating to recorded instruments (70-21-209, MCA) and constructive notice (70-21-302, MCA), make it clear that title insurers and abstractors search only record title in the offices of the clerk and recorder and the clerk of court in the county in which the real property is located. Pursuant to Montana's statutory scheme, documents recorded or filed in the office of the clerk and recorder or clerk of court impart constructive notice. Nowhere in the insurance policy or Montana statutes related to recording is there a suggestion that the records of the city engineer and water department impart constructive notice to purchasers of real property. While documents located in a city engineer's office or water department may be subject to public inspection as public records under § 2- 6-202(1), MCA, such documents do not by law impart constructive notice. Accordingly, we agree with Title Insurance Company and conclude that the term

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[223] *Snow v. Pioneer Title Ins. Co.*, 84 Nev. 480, 444 P.2d 125, 128 (1968).

[224] *First American Title Ins. Co. v. Adams*, 829 S.W.2d 356 (Tex.App. 1992).

[225] 966 P.2d 834 (Utah 1998), reh.den.

[226] 1999 MT 230, 987 P.2d 1151 (Mont. 1999).

"public records" in the Millers' policy is not ambiguous.[227]

However, an easement that lacked a legal description and most other legal formalities was found to be sufficiently definite nonetheless to be considered a public record.[228] To the same effect are *Ryczkowski v. Chelsea Title & Guaranty Co.*[229] and *First American Title Ins. Co. v. Adams*.[230]

12.5 Construction Liens

The fourth standard exception is for construction liens. The subject of construction liens is covered in Chapter 10.

12.6 Taxes

The final standard exception, in most parts of the country, is for real estate taxes. Taxes are discussed in full at §9.4.

12.7 Special Exceptions

In addition to the standard exceptions, Schedule B contains "special" exceptions (more appropriately termed exclusions that are specific to the parcel whose title is insured). The policy provides no coverage for a matter described in a Schedule B exception.[231] There is tremendous variety in the types of special exceptions that may appear in a policy. This chapter discusses the principles governing how these exceptions are construed.

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[227] 987 P.2d at 1153.

[228] *Hill v. U.S. Life Title Ins. Co. of N.Y.*, 731 S.W. 2d 910 (Tenn.App. 1986).

[229] 85 Nev. 37, 449 P.2d 261 (1969).

[230] 829 S.W.2d 356 (Tex.App. 1992).

[231] See *First American Title Ins. Co. v. Hegedus*, 2013 WL 4077033 (D.Del.) (unpublished), which held that the insurer was not responsible for paying a loss due to use restrictions that were excepted in Schedule B. In *Palmer v. Chicago Title Ins. Co*., 2013 WL 3049343 (S.D.Tex.) (unpublished), the insureds admitted that the insurer informed them of a new exception for a mineral instrument at closing, but they did not realize the effect of that instrument until years later. The court said that "the party claiming fraud has a duty to use reasonable diligence in protecting his own affairs, including to read documents that the party signs." It said that, because "the closing documents disclosed the mineral liens," there had been "no actionable misrepresentation… ." Also, although it would seem self-evident that the policy does not assure affirmative rights in an excepted encumbrance, the court so found in *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. Jul 23, 2009). In that case, an insured demanded that the insurer prosecute a lawsuit to enforce the claimed violation of restrictions by her neighbor. The court ruled that the insurer had no such duty, in large part based on the fact that the policy excepted the restrictions. In *Flagstar Bank, FSB v. Lawyers Title Co*., 2014 WL 1725746 (Cal.App. 2 Dist. 2014) (unpublished), the court held that a lender that bought loans that the originator claimed were first liens had neither a contract nor a fraud claim against the title insurer, when the lender later opened the policies and realized that they excepted prior deeds of trust that had not been paid off at closing. The lender's case appears to have been doomed at the summary judgment hearing, when Flagstar's lawyer was forced to say "I will concede that my client could have figured out they had been scammed sooner if they had read the policy." In *Sewell v. Fidelity Nat'l Financial*, 2016 WL 728012 (D.Md.) (unpublished), affirmed by 668 Fed.Appx. 510, 2016 WL 4761319 (4th Cir. (Md.)) (unpublished), the court ruled that an

Section 12.7.1 discusses what an exception must state to give adequate disclosure of the effect of the instrument. The claimed duty to highlight specific terms within an instrument is discussed below at §12.7.2. Section 12.7.4 analyzes when a general or broad exception gives notice of a specific recorded item. Section 12.7.5 considers those cases when no direct exception is made for a defect. Some states impose a separate duty to "abstract" title by reciting Schedule B exceptions, as discussed in Chapter 15. Finally, the insurer has no duty to remove special exceptions, or give legal advice to a proposed insured as to how exceptions can be removed, as discussed in §12.7.6.

12.7.1 Adequacy Of Notice Given By Exception

FORM 56, Appendix A
Exception gives adequate notice of defect

FORM 80, Appendix A
Exception conspicuous, plain and clear

Matters that are recited as exceptions on Schedule B of the policy are excepted (excluded) from coverage.[232] The insurer also has no policy liability for the lack of an exception for a recorded matter if that instrument does not constitute a lien or encumbrances on title.[233]

Insurers craft exceptions so as to explain with reasonable specificity the risks and subjects for which there is no coverage. Sophisticated insureds often spend great amounts of time and energy

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owner's policy does not protect the insured against the loss of title due to the foreclosure of a mortgage signed by the owner and excepted in the policy. In *Fo Ge Investments LLC v. First American Title Ins. Co.*, 27 Neb.App. 671, 935 N.W.2d 245 (Neb.App. 2019), the insured owner purchased property subject to an existing mortgage, and the policy excepted that mortgage. The court held that the insured owner obtained no coverage against the foreclosure of the excepted mortgage, even if the foreclosure was triggered by the seller's default under a loan that the insured did not assume.

[232] *Heyse v. Case*, 114 Conn.App. 640, 971 A.2d 699 (Conn.App. 2009), cert.den. 293 Conn. 905, 976 A.2d 705 (Conn. Jul 23, 2009) (insurer had no duty to prosecute lawsuit to enforce violation of restrictions excepted on Schedule B); *De Maio v. Commonwealth Land Title Ins. Co.*, 2008 WL 4372997 (D.Md. 2008) (unpublished) (insurer not liable to insured when utility company installed large transformer on property pursuant to excepted utility easement); *Herr v. Forghani*, 2011 WL 1833829 (Wash.App. Div. 1) (unpublished) (exception for covenants and easements as shown on plat negated coverage for claimed overburdening of an easement on the insured property, despite the insured's claim that his extended-coverage policy "did away with" the Schedule B exceptions).

[233] *Luboff v. Security Title & Guaranty Co.*, 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965) (no duty to show developer agreement which was not a defect, lien or encumbrance); *Sala v. Security Title Ins. & Guarantee Co.*, 27 Cal.App.2d 693, 81 P.2d 578 (Cal.App. 2 Dist. 1938); (no duty when lis pendens not shown, then removed as cloud on title); *Peterson v. Title & Trust Co. of Fla.*, 431 So.2d 311 (Fla.App. 1983) (no duty to show or resolve applicability of restrictions not shown); *Laurence v. Kruckmeyer*, 124 Ariz. 488, 605 P.2d 466 (App. 1979) (no duty to show easement as affecting parcels which it did not affect); *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins. Co.*, 128 So.3d 107 (Fla.App. 3 Dist. 2013) (no duty to except rights barred by marketable title act). See also §9.5, regarding the insuring provision as to defect, liens and encumbrances, and §9.4, regarding the lack of duty to report that property lies in a special taxing district.

negotiating and drafting the limitations to coverage that they will accept. An exception is adequate if it gives a plain and understandable recitation of the defect, lien or other matter that is the subject of the exception.[234] An exception is adequate when it is not capable of two or more constructions, and is not buried in affirmative assurances but is identified as an exclusion from coverage.[235] Stated another way,

> It is well settled that an "'insurer may exclude certain losses from coverage if it uses 'language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.'" ... A provision excepting certain losses from coverage is therefore not automatically construed against the insurer. Rather, it is only when the insurer uses language that is ambiguous, that "doubt is resolved against the insurer."[236]

The insurer "is under no duty to advise the insured of the effect of the exclusion on coverage."[237] Further, the acceptance by the insured of a policy or endorsement without objection is

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[234] "It is generally acknowledged that a title insurer's duty of disclosure regarding an instrument affecting title is satisfied by a statement of the nature of the document, recording information, etc. The underwriter is not required to set forth its contents [citation omitted], nor to provide an explanation as to its legal effect or implications [citation omitted]. An exception to coverage that is 'plain and understandable' in its statement of the subject will be effective [citation omitted]." Robert E. Ellis, *Title Insurance Law Handbook*, p. 270. See also *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264 (D. Idaho) (unpublished) (vendor's liens were removed from coverage by exception for memorandum of agreement and option because court found that, since a seller's lien must arise from a sale contract, the excepted instruments were "indispensable to the creation of the statutory liens; no liens would have arisen without them"). In *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished), exceptions for a pending lawsuit and lis pendens were enforceable to remove coverage for the entire dispute, with the court finding each exception to be sufficiently clear and understandable so as to exclude coverage for the matters they described.

[235] *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. Cal.) (unpublished). In *Blaser v. DeVries*, 2011 WL 5965762 (Mich.App.) (unpublished), the court ruled that an exception for restrictions on "the use of the premises not appearing in the chain of title" encompassed a building size restriction that was not recorded against the parcel but enforced under the common plan of restriction doctrine, despite the insured's argument that there is a distinction between a building restriction and a use restriction. In *Nuzzo v. Horvath*, 2011 WL 3795035 (N.J.Super.A.D.) (unpublished), an exception for "conditions and restrictions" stated in three recorded deeds was adequate to remove coverage for the obligation to maintain a dam, which was recited in the deeds, and the reasonable expectations doctrine did not obligate the insurer to abstract the instruments, which the court observed would be akin to the practice of law.

[236] *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah 1998), reh.den.

[237] *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d at 837. An exception for an "easement of the State of Missouri, by condemnation suit No. 215119 ..." put the insured on notice of the condemnation suit. The insurer was not liable for any loss caused by a restriction on access to the property created by the condemnation, although the exception did not recite that it restricted access to the property and copies of the condemnation petition and order were not delivered to the insured, in *Livingston v. Title Ins. Co. of Minn.*, 373 F.Supp. 1185 (E.D. Mo. 1974), aff'd, 504 F.2d 1110 (8th Cir. 1974).

an agreement by the insured to accept the limitation on policy coverage created by the exception.[238]

The title insurance commitment has been found to be a source of notice of recorded matters to a purchaser or lender. Arizona takes the view that an insured is bound by notice of public records disclosed by the insured's title insurer in the course of its examination of title.[239] An exception to the title insurance policy gives the purchaser notice of substantive rights of others in the property, which can trigger the running of a statute of limitations on claims against others as to the adverse matter.[240] A real estate broker may have a fiduciary duty to the purchaser to review the commitment and highlight the matters it discloses.[241] However, what the insurer knows or has in its title plant, but does not disclose in the commitment, is not imputed to the insured merely because it obtains a policy from the insurer. California and other states do not allow imputation of notice of the public record from the insurer to the insured. See cases discussed at §9.12.1.

When the property is a condominium, the policy will typically except the documents by which the ownership regime was created. Disputes concerning the manner in which the condominium is operated or governed, or the interpretation of the governance documents, should be considered removed from coverage both by the exception for the declaration, bylaws and other governance documents, and by Exclusion 3(a), for matters "agreed to" by the insured.[242] However,

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[238] *Livingston v. Title Ins. Co. of Minn.*, 373 F.Supp. 1185 (E.D. Mo. 1974), aff'd, 504 F.2d 1110 (8th Cir. 1974); *Green Harbour Homeowners' Ass'n, Inc. v. Chicago Title Ins. Co.*, 74 A.D.3d 1655, 905 N.Y.S.2d 304 (A.D. 3 Dept. 2010), *app.den.* 2010 WL 4116983, 2010 N.Y. Slip Op. 85507 (exception for "variations between the number and location of" units conveyed in prior deed and parcels shown on subdivision map was adequate to negate coverage for dispute over the ownership of lots mistakenly conveyed to both insured and subdivision association, and insurer's insertion of exception because of the very defect claimed by insured and its refusal to remove the exception were deemed strong evidence that policy did not insure against risk).

[239] In *Hall v. World Savings and Loan Ass'n*, 189 Ariz. 495, 943 P.2d 855 (1997), the deed by which the owner/borrower took title recited that nominal consideration had been paid for the property. A judgment creditor sought to have the insured mortgage found junior to the judgment under a fraudulent conveyance statute, based on the notice provided by the title insurer. The court agreed "that the title company was [the lender] World's agent for purposes of the title report, and thus World is bound by whatever notice the title company had while acting within the scope of its authority." However, because it is not uncommon in Arizona for a deed to recite nominal consideration, "nothing on the face of the recorded documents alerted either the title company or World to the possibility of fraud or the need for further investigation."

[240] In *DiPietro v. City of New Rochelle*, 658 N.Y.S.2d 319, 237 A.D.2d 324, 1997 N.Y. Slip Op. 02182 (A.D. 2 Dept. 1997), for example, the insured "had knowledge of certain statements about the reverter provision from the title report and the title policy," which notice was found to create a duty to inquire further, and which started the limitations period as to claims against the seller.

[241] *Field v. Century 21 Klowden-Forness Realty*, 63 Cal.App. 4th 18, 73 Cal.Rptr.2d 784 (Cal.App. 4 Dist. 1998). Contrast *Field* with *Wright v. C & S Family Credit, Inc.*, 1998 WL 195954 (Tenn.App.) (unpublished), in which a lender was found not to be a fiduciary to its borrower, and therefore under no obligation to disclose to the borrower the existence of a judgment lien against the property. The borrower had failed to obtain a title policy as it purchased the land. Thus, the court reasoned further that, even if the lender were a fiduciary, it would have no duty to disclose the judgment, because the borrower's own "common observation or ordinary diligence would have furnished the information." Id. at 4.

[242] See, for example, *Schwartz v. Stewart Title Guar. Co.*, 1999 WL 475850 (Ohio App. 8 Dist.) (unpublished), finding no coverage as to an insured's assertion that his unit encroached on common elements.

when the validity of the insured's rights in the condominium are in dispute, the policy may be said to have assured that the insured's rights were validly granted or created by reciting the unit in Schedule A, and a court may strain to find the exception not broad enough to negate coverage for the issue.[243] The phrasing of an exception for a condominium declaration does not relieve the insured of the obligation, imposed by law, to be informed of the content of the instrument.[244] The exception refers to a document in the public records, which the insured can inspect; often, the insurer delivers a copy of the instrument to the insured for that purpose.

An exception for a recorded instrument is typically sufficient to remove coverage for all disputes concerning the instrument or its subject, including actions to enforce the instrument.[245] An exception for a recorded restriction also removes coverage as to any violation by the insured of the restriction. In *Dalessio v. Williams*,[246] Schedule B stated "[t]his policy does not insure against loss or damage by reason of the following: ... 6. On the Plat of Crystal Shores Subdivision ... a. Plat Restrictions... ." A garage built just prior to policy date violated the restrictions. The court rejected the argument by the insureds that the exception covered only the restrictions, not their violation:

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[243] In *Piper v. Nitschke's Northern Resort Condominium Owner's Association, Inc.*, 322 Wis.2d 604, 777 N.W.2d 677, 2009 WI App 182 (Wis.App. 2009), the plaintiff unit owners asserted that one defendant's unit had been declared in an amendment to the condominium declaration that was invalid because it was not signed by all owners, and that the other defendants' units as built encroached onto common elements. The court resorted to a highly technical parsing of the exception for the condominium declaration, bylaws and other governance documents, concluding that the exception was not broad enough to negate coverage for the dispute.

[244] In *Wilmington Plantation, LLC v. Fidelity Nat'l Title Ins. Co.*, 2012 WL 2131149 (M.D.Tenn) (unpublished), the first version of a commitment exception labeled a condominium declaration as "protective covenants." The insured claimed that he did not know that the property, which was vacant land, was part of a condominium, and sought damages from the insurer for the reduced value of the land as being in a condominium regime. However, the exception provided the recording data of the excepted instrument, and a revised commitment described the declaration accurately. Also, the deed described the property as units in a condominium. The court held that the policy was not a representation, and the insurer was not liable.

[245] *Fatell v. Stewart Title Guar. Co.*, 2009 WL 3158166 (D.Colo.) (unpublished) (exception for unpatented mining claims reserved or excepted in patent sufficient to remove coverage for mining claim that was reserved in excepted patent, although mining claim might also be discoverable in public records); *CIA, Gary Gresko, S.A. v. Stewart Title Guar. Co.*, 2009 WL 1010964 (D.N.J.) (unpublished) (exception for any loss caused by lawsuit was sufficient to effectively nullify policy when insured's deed was later rescinded by the excepted litigation); *Yen v. Chicago Title Ins. Co.*, 2013 WL 5429458 (Cal.App. 4 Dist.) (unpublished) (exception for lease also negated coverage for dispute about lease); *A. Gugliotta Development, Inc. v. First American Title Ins. Co. of New York*, 112 A.D.3d 559, 976 N.Y.S.2d 172, 2013 N.Y. Slip Op. 08034 (N.Y.A.D. 2 Dept. 2013) (exception for trail easement also excepted rights of travelers to use trail); *IQ Holdings, Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861 (Tex.App.-Houston 2014) (exception for terms of condominium declaration negated coverage for exercise of right of first refusal created in that instrument; insurer had no duty to abstract important terms of declaration in exception). In *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc.*, 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished), exceptions for a pending lawsuit and lis pendens were enforceable to remove coverage for the entire dispute. The court refused to parse the exceptions so narrowly that they would leave coverage for certain aspects of the broader title dispute.

[246] 111 Ohio App.3d 192, 675 N.E.2d 1299 (9 Dist. 1996), app.den. 77 Ohio St.3d 1481, 673 N.E.2d 142 (1996).

> Reading exclusion 6(a) in light of the language preceding the list of exclusions, we note that the policy excluded coverage for loss or damage "by reason of" the plat restrictions. The damage to the Williamses occurred by reason of those restrictions. Under the plain language of the exclusion, First American was not obligated to compensate the Williamses for the damage arising from [the lawsuit about the restriction violation]. As such, it had no duty to defend the Williamses ... .[247]

Similarly, in *Dickins v. Stiles*,[248] the insured was sued for violating a restrictive covenant excepted in the policy. The court found that the insurer had no duty either to defend or indemnify, because of the exception. The court also found no duty to defend a claim that the restriction was part of a common plan of restriction. An exception for matters that depicted on a recorded survey was found to be broad enough to cover all such matters, even those that were not accurately shown on that survey.[249]

When a policy excepts one recorded instrument but not a second instrument on the same subject, but the excepted instrument refers to the unexcepted document, the exception may be deemed sufficient notice of both encumbrances.[250] The exception directs the proposed insured to a review of the excepted document, which in turn provides notice of the non-excepted instrument.

When there are two instruments of record concerning the same subject or right and the excepted document does not reference the non-excepted document, the exception is broad enough to encompass the second instrument.[251] However, the exception may not be deemed adequate when the

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[247] 675 N.E.2d at 1301. A lone dissenting justice would have found coverage. The survey exception was removed. The offending garage was built after the survey date and not shown on it. The dissenter reasoned "[Insurer] admits that this [the removal of the survey exception] means coverage for items which a correct survey would show, provided they are not of public record. The violation of the plat restrictions does not show on any public record, so it seems to me that coverage exists." Id. at p. 4. This reasoning ignores the majority's logic as to the very purpose of the exception for the restrictions, and would absolve a property owner of any duty to examine and understand those recorded encumbrances that restrict the use of the property.

[248] 81 Wash.App. 670, 916 P.2d 435 (1996).

[249] *Shea Homes, LLC v. Old Republic Nat'l Title Ins. Co*., 2007 WL 3334210 (W.D.N.C.) (unpublished) (all tree stump burial pits excepted from coverage, although exception referred only to those depicted on survey and insured argued that the covered matter was the burial pits *not* disclosed on the survey).

[250] *Nilesh Enterprises, Inc. v. Lawyers Title Ins. Corp.*, 2009 WL 2998204 (W.D.Tex.) (unpublished) (when policy excepted one recorded restriction document but not another, question of fact remained as to whether or not unexcepted restrictions caused diminution in value). In *Czarnecki v. Phillips Pipe Line Co.*, 524 S.W.2d 153 (Mo.App. 1975), one recorded encumbrance made further reference to three separate recorded easements. An exception for the encumbrance was sufficient to put the insured on notice of all three easements, negating coverage. In *Parks v. Stewart Title Guar. Co.*, 2018 MT 33N, 2018 WL 1064088 (Mont.) (unpublished), an easement that was recited in both a deed and a recorded abstract of a purchase agreement. The Montana Supreme Court held that a policy exception for the easement created in the abstract was adequate to negate all coverage for the easement.

[251] In *Beaudin v. Stewart Title Guar. Co.*, 2019 WL 422208 (Cal.App. 1 Dist.) (unpublished), the court held that there was no coverage concerning a neighbor's easement over the insured property when the owner's policy excepted one recorded instrument disclosing the easement, although the policy did not also except a second instrument about the same easement. In *Pandora Distribution, LLC v. Ottawa OH, LLC*, ___ F.Supp.3d ___, 2019 WL 2924995 (N.D. Ohio 2019)

instrument excepted is only remotely related to the recorded instrument that is not excepted, or the non-excepted instrument substantially affects the insured's rights.[252] An exception for "building lines and easements" as shown on a subdivision plat was found not to be adequate to encompass three recorded oil and gas pipeline easements encumbering the property, especially because a surveyor testified that the references to the easements on the plat were "substandard."[253]

In *Soluk v. Security Union Title Ins. Co.*,[254] the insured land was burdened by a private drive created when the land was divided, giving access to the rear parcel. The drive was shown on a land division map, and two covenants about its use and maintenance were recorded. The policy excepted the "effect of" the covenants, but did not specifically except the drive as shown on the map. The court found that the insurer was not obligated to defend or indemnify the insured in a dispute with the neighbor over the width of the drive:

> If the Soluks elected to ignore the contents of the covenanted restrictions, that was their prerogative. However, they cannot now claim that they were entitled to a defense or indemnification when the Policy explicitly advised the Soluks that it

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(not yet released for publication), reconsid.den. 2019 WL 5729932, A policy exception for an encroaching overhead conveyor, and the license that allowed it to be built, negated the title insurer's duty to defend the insured in a later dispute over ownership of the conveyor, despite the lack of a separate exception for another recorded agreement about the structure.

[252] See *Dulac v. Chicago Title Ins. Co.*, 2009 WL 3838999, 26 Mass.L.Rptr. 199 (Mass.Super.) (unpublished) (exception for recorded Torrens petition did not clearly encompass title defect listed in Torrens officer's report refusing the application, leaving question of fact for trial). In *Bohr v. First American Title Ins. Co.*, 2008 WL 2977353 (M.D.Fla.) (unpublished), the policy excepted an easement allowing the neighbors to use a pool on the insured property. It failed to except an amendment making the easement permanent, which the insured claimed thwarted her development plans. The insurer did not assert that the easement exception was broad enough to also cover the amendment. In *GC Finance, LLC v. Old Republic Nat'l Title Ins. Co.*, *GC Finance, LLC v. Old Republic Nat'l Title Ins. Co.*, 2010 WL 1408823 (M.D.Tenn.) (unpublished), affirmed 2011 WL 5966512 (6th Cir. (Tenn.)) (unpublished), the policy excepted a gas pipeline easement, but not a partial release of the easement that reduced its path but inserted greater rights of access for maintenance. The insured claimed that the maintenance provision in the amendment allowed the easement holder to interrupt play at the insured golf course. The court found the title insurer not liable, because the partial release limited the encumbrance and made the property more valuable, not less. In *Lawyers Title Ins. Corp. v. Stribling*, 294 Ga.App. 382, 670 S.E.2d 154 (Ga.App. 2008), the policy contained several exceptions for private drives running through the insured property. The court found that a vague complaint might claim the right to use a drive crossing the property for which there was no exception, and therefore there was a duty to defend the insured, despite the insurer's protest that the policy exceptions removed coverage for all private drives. Similarly, in *Cohn v. First American Title Ins. Co.*, 2010 WL 3342971 (Cal.App. 1 Dist.) (unpublished), an exception for an access easement "as shown upon" the filed subdivision map was found not to be broad enough to cover a claimed easement by necessity for the benefit of land outside of the subdivision, even though the easement path was placed in the same 40-foot strip shown on the subdivision map, because the easement by necessity came into being before the plat was recorded. In *Cox v. Commonwealth Land Title Ins. Co*., 59 A.3d 1280, 2013 ME 8 (Me. 2013), the court strained to find that a policy gave coverage for an easement extinguished of record and replaced by an easement that was excepted, because the policy also excepted a condominium declaration that referred to the easement that was later extinguished.

[253] *Crossman v. Yacubovich*, 290 S.W.3d 775 (Mo.App.E.D. 2009).

[254] Case No. B131586-NON-OP, Cal.App. 2 Dist., Div. 2, 9/25/00 (unpublished).

> excluded coverage for disputes over the effect of the restrictive covenants.

The court found the exception for the covenants broad enough to also encompass the map:

> There is good reason why Security Union's predecessor in interest excluded coverage for "the effect" of the Chaney covenants. The insurer undoubtedly anticipated that a lawsuit would be filed to reform the grant deeds to reflect that the parcels created by the Chaneys' subdivision are burdened by a private street, in accordance with the 1966 covenants... By signaling its refusal to defend against a dispute over "the effect" of the Chaney covenants, the insurer adequately warned the Soluks that they were purchasing the property at the risk of having "the effect" of the covenants resolved adversely to them. The exclusion advised the Soluks that the insurer would not participate in any future dispute over the covenants or the nature of the unobstructed private street...

When an easement was shown only as being set forth in a mortgage on the property, and no exception was made for the easement itself, such notice was sufficient when the insured also had actual knowledge of the easement from the seller.[255] The court stated:

> Granted the company did not indicate the easement in bold face or red letters, the fact remains that the information was made available. The effect of an easement, valid or not, was a factor to be resolved as between vendor and purchaser depending upon the terms of their contract. It was not for Inter-County, as Tomgil quietly intimates, to negotiate, renegotiate or bear the brunt of any disabilities of Tomgil's contract.[256]

An insurer that excepted outstanding taxes on a cooperative had no duty to inform an officer of the cooperative that taxes were unpaid. The taxes conflicted with a representation by the developer, but the policy itself contained no misrepresentation, and the insurer had no duty to police the transaction on behalf of the insured.[257] Similarly, a title agent had no duty to "point out any outstanding encumbrances" on title, such as that the legal description included more land than the borrower intended to mortgage.[258] Also, an insurer that excepted a set of restrictions had no duty to advise the insured that they created a homeowners' association having the power to enforce them.[259] A title insurer was not required to recite in an exception for an access easement that the easement was

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[255] *Sullivan v. Tomgil Building Corp*., 46 Misc.2d 613, 260 N.Y.S. 2d 465 (Suffolk Cty.Sup.Ct. 1965).

[256] 46 Misc.2d at 615.

[257] *Rockville Tudor Apartment Corp. v. Bodner*, 1997 WL 34847566 (N.Y.Sup.) (unpublished).

[258] *Miller v. Wilson Title Co.*, 2000 WL 1023755 (Tex.App.-Dallas) (unpublished).

[259] *Shah v. Anderson*, 2000 WL 146715 (Tex.App.-Dallas) (unpublished).

exclusive.[260]

The insurer does not have a duty to identify the parties to an instrument, its nature, terms or significance. For example, the insurer has no duty to explain the effect of a wetlands designation, when the fact of such designation is disclosed.[261] The insurer also has no duty to explain the risk of subsidence from mining operations, when the fact of a mineral reservation is properly noted.[262] An exception for "any claim or title of the State of California and /or the United States of America as to all or any portion of said land lying within the bed of Clear Lake ... under natural conditions" was found sufficient to except the state's later claim of title to the high water mark of the lake.[263]

A statement that is made part of a Schedule B exception is not an affirmative assurance.[264] In some parts of the country, it is customary for the title insurance commitment or policy to append the statement "affects parcel ___" below the exception for a recorded instrument, when the policy insures title to two or more parcels. This type of statement is not an assurance that the document does *not* affect other parcels insured on the same policy. Rather, the statement is a courtesy to the customer to assist in the review of what is sometimes a long and complicated title report. In *Walton v. First American Title Ins. Co.*, [265] the policy insured title to two parcels, each of which was in a different but related subdivision. Each subdivision had a separate declaration of restrictions and easements. Both sets of restrictions were excepted in the policy. At the insured's request, and after the policy was issued, the insurer inserted statements below both exceptions tying them to the two respective parcels. However, one set of restrictions imposed an easement on the lot in the other subdivision, which became the source of the dispute. The court determined that the Schedule B statements were not affirmative assurances against the possibility that the restriction declarations would affect all parcels.

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[260] *Vorgitch v. Fidelity Nat'l Title Ins. Co.*, 2002 WL 86870 (Cal.App. 2 Dist.) (unpublished).

[261] *Manley v. Cost Control Mktg & Man., Inc.*, 583 A.2d 442 (Pa.Super.Ct. 1990).

[262] *Holmes v. Alabama Title Co.*, 507 So.2d 922 (Ala. 1987).

[263] *Lyon v. Western Title Ins. Co.*, 178 Cal.App.3d 1191, 224 Cal.Rptr. 385 (Cal.App. 1 Dist. 1986).

[264] In *The Peoples Bank v. Troutman*, 2015 WL 4511540 (Tenn.App. 2015) (unpublished), app.den. Nov. 24, 2015, the court held that a loan policy that excepted a deed of trust did not protect the insured against the lien, and the inclusion of the phrase "subordinated by Subordination Agreement" in the exception was not an assurance or coverage. In *Wells Fargo Bank, N.A. v. Commonwealth Land Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 2062947 (D.Nev. 2019) (permanent citation not yet available), appeal filed June 11, 2019, the court held that a statement in an exception for a declaration of restrictions, that "said covenants, conditions and restrictions provide that a violation thereof shall not defeat the lien of any ... Deed of Trust...," was not an affirmative assurance, but a recital of one term in the excepted instrument. The court said that the insurer "gave no assurance that the statement in the CC&Rs was correct, it merely gave notice of what the CC&Rs said."

[265] 844 N.E.2d 143 (Ind.App. 2006).

12.7.2 Special Terms Contained In Excepted Item

FORM 57, Appendix A
Special term contained in excepted instrument

An insured sometimes asserts that an exception for a recorded instrument is inadequate if it does not describe all of the types of rights granted in that instrument. Insureds have also asserted that an exception provides inadequate notice if it does not highlight the important terms in the excepted instrument, or contains an inaccuracy in a name or amount recited in the exception.

These arguments have no merit under any circumstance in those jurisdictions that have held that the title insurance policy is not an information product, which is the majority of states. See the state-by-state review at §15.12. Further, even in the small number of states in which an insurer can be liable for failing to inform the insured of the existence of a recorded instrument by excepting it from policy coverage, the argument is tenuous that the insurer has a further duty to "abstract" the recorded instrument to highlight its important terms. As is discussed in §12.7.1, the large majority of decisions have held that the insurer fulfills its entire duty to exclude a matter by making exception for a recorded instrument, at which point the insured has both the ability and the duty to read the document to be informed of its effect on the insured parcel's title. A number of decisions have held that an exception applies to every interest that springs from the excepted instrument, and that the exception need not highlight a particular term in that document.[266]

The decisions discussed below that have found a duty to accurately or fully disclose the terms of the excepted instrument have been overturned, either explicitly or implicitly, by later rulings in those jurisdictions that a title insurance policy is not an abstract of title. They are discussed only to inform the reader that their holdings are no longer valid law.

A 1963 lower court New Jersey decision found that an exception for "restrictions" in certain deeds did not except a condition in the same deeds stating that certain buildings were to be built before the property could be resold.[267] However, in 1989, the New Jersey Supreme Court held that a

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[266] In *TIMAC Realty v. G & E Tremont LLC*, 121 A.D.3d 457, 994 N.Y.S.2d 91, 2014 N.Y. Slip Op. 06858 (N.Y.A.D. 1 Dept. 2014), the court held that a buyer could not lay off its due diligence about water charges to the insurer by asserting that the exception for those charges in the policy should be more informative, saying: "…title reports function to apprise title insurers of defects in title; they do not serve to warn prospective purchasers of every risk facing the property… . If plaintiff relied on the title report for a list of water meters on the property, it did so at its own risk." An exception for a mortgage was not deficient by not reciting that the lien may secure other debt to the same lender, in *Private Lending & Purchasing, Inc. v. First American Title Ins. Co.*, 54 Mass.App.Ct. 532, 766 N.E.2d 532 (Mass.App. 2002). The court reasoned: "Private Lending's contention, that failure to disclose the existence of a dragnet clause constitutes an undisclosed defect, lien, or encumbrance on title to the property, rests upon the erroneous conclusion that such a failure transforms the excepted lien or encumbrance into a defect in title. ... Schedule B of the Pace and Triad policies took exceptions to ... the Luso mortgages, not to certain terms or provisions of the mortgages, or to the legal effect of those instruments. The dragnet clause provision does not create a separate lien or encumbrance beyond the mortgage itself; rather, it expands the scope of the obligation that the mortgage secures. ... Attorney Cohen found the Luso mortgages in his title search; the problem lay in his failure to read all the mortgage provisions. In effect, and contrary to the plain meaning of the policy, Private Lending attempts recovery under the policy not for an undiscovered or misindexed lien or encumbrance, but for one discovered and excepted from coverage."

[267] *Feldman v. Urban Commercial*, Inc., 78 N.J.Super. 520, 189 A.2d 467 (Ch. 1963), aff'd, 87 N.J.Super 391, 209

title insurance policy is not an abstract of title, and a title insurer may not be sued for negligent misrepresentation of the state of title, premised on a title insurance policy and absent a separate contract to search and examine title.[268]

The 1956 *Trisdale* decision from California held that, when an exception for a utility easement recited the wrong name as the easement holder, the insurer was liable to the insured for extra money paid to release the easement twice, even though the exception correctly recited the recording data for the instrument and the insured could have reviewed it himself. The court said: "A reference to an encumbrance belonging to 'A' is not a reference to an encumbrance belonging to 'B'."[269] In effect, the court found an exception to be a coverage, and considered the policy to be in the nature of an abstract of title. The California title insurance code has since been rewritten to define a title insurance policy as being a contract of indemnity rather than an abstract of title, vitiating the *Trisdale* holding.

A 1933 New York decision held that an exception for "restrictive covenants" in a certain recorded deed did not encompass a reverter clause in the same instrument.[270] In 1993, a New York court ruled that an exception that listed a mortgage as being in the amount of $100,000, instead of the correct figure of $180,000, caused the insurer to be liable for the difference in amounts.[271] However, New York has since held that a title insurance policy is not an information product, and those decisions are no longer good law in New York.

The 1977 Texas decision of *Northland Building* held that policy exceptions for two deeds of trust that stated that they were "securing a note for" a recited dollar amount gave the affirmative assurance that the debt secured by the deeds of trust was no greater than the stated amounts, and obligated the insurer to pay the loan balances above the stated amounts.[272]. However, current Texas law prohibits claims for passive rather than active misrepresentation of the state of title. Further, later Texas decisions disagree with the reasoning of *Northland Building*. For example, in *Roscoe v. U.S. Life Title Ins. Co. of Dallas*,[273] the court rejected a claim that the insurer had a duty to inform the insured of a balloon payment term in its exception for a mortgage the insured was assuming:

A.2d 640 (App. Div. 1965). In *M.R.M. Realty Co. v. Title Guarantee & Trust Co.*, 270 N.Y. 120, 200 N.E. 666 (1936), by contrast, the court found that very similar deed conditions were not enforceable and did not affect title.

[268] *Walker Rogge Inc v. Chelsea Title & Guaranty Co.*, 562 A.2d 208 (N.J. 1989).

[269] *J.H. Trisdale, Inc. v. Shasta County Title Co.*, 146 Cal.App.2d 831, 304 P.2d 832 (Cal.App. 3 Dist. 1956).

[270] *Holly Hotel Co. v. Title Guarantee & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1933).

[271] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co.*, 156 Misc.2d 814, 595 N.Y.S.2d 302 (Sup.Ct. 1993).

[272] *Southwest Title Ins. Co. v. Northland Building Corp.*, 552 S.W.2d 425 (Tex. 1977).

[273] 105 N.M. 589, 734 P.2d 1272 (1987).

> It is well-settled that a person entering into a contract has a duty to read and familiarize himself with its contents before he signs and delivers it. Smith v. Price's Creameries, 98 N.M. 541, 650 P.2d 825 (1982). Roscoe's failure to read and familiarize himself with the terms of the mortgage he agreed to assume, when that information was readily available, clearly indicates a lack of reasonable diligence. Had Roscoe made reasonable inquiry or examined the original mortgage, he would have discovered the balloon payment. ... Here, USLife's policy insures against loss or damages due to "[a]ny defect or lien or encumbrance on such title." Schedule B of the policy specially excludes from coverage any loss or damage resulting from the mortgage in question. This exception is clear and unambiguous.[274]

Similarly, another Texas decision held that the insurer was not required to indicate in its exception for a deed of trust that it contained a due-on-sale clause.[275] The court explained that:

> It is not the purpose of a title policy to set forth in full detail a detailed explanation of the full terms and provisions of each instrument affecting the property, but give only sufficient information to put them on notice of the existence of such instruments. If every title exception in a title policy set forth the full details of every instrument involved, it would more resemble an abstract of title than a title policy. Under Lyon's theory, if the property was subject to an oil gas and mineral lease, it would be necessary to set forth in minute detail the many things that are involved in this type of lease, such as the length of the primary term, the amount of delay rentals, the amount of royalty payable, etc. See Jernigan v. Page, 662 S.W.2d 760 (Tex.App. - Corpus Christi 1983, no writ) where it was pointed out that the purpose of the recording statutes in Texas was to provide notice to all persons of the existence of recorded material and the effect of same, so that a person interested in the property could look at the full instrument by examining the record.[276]

12.7.3 Ambiguous Language In Exception

An exception is an exclusion from coverage. The rule that an exclusion is construed against the insurance company will typically apply to the interpretation of an exception. In construing exceptions, courts ordinarily limit poorly worded exceptions to their most narrow reasonable construction.[277] For example, when both the mortgagor and the IRS had rights of redemption after a

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[274] 734 P.2d at 1274.

[275] *Lyons v. Montgomery*, 685 S.W.2d 390 (Tex.App. 1985); aff'd in relevant part, 701 S.W.2d 641 (Tex. 1985).

[276] 685 S.W.2d at 393.

[277] See *Desjardins v. Fidelity Nat'l Title Ins. Co.*, 2013 DNH 086, 2013 WL 2949089 (D.N.H.) (unpublished), which held that the statement in Schedule B that "Exceptions Numbered 1 and 2 of the Owner's Policy do not limit the coverages described by the Covered Title Risks set forth in the Cover of the Owner's Policy" completely negated the survey exception as a limitation on the covered risk. See a complete discussion of the doctrine that an insurance policy is

foreclosure sale, an exception for "[r]ights of redemption from foreclosure of mortgage" was found not to give adequate notice of the IRS's redemption rights. The agent's failure to use the underwriter's more descriptive exception was considered to be evidence that the agent intended to confuse or mislead the insured.[278] Also, when a general exception was inconsistent with the nature of a recorded interest, the exception was found ambiguous, and thus read in a light most favorable to the insured.[279]

The presumption that the insurer suffers the risk of ambiguity would not be proper, however, when the insured has written the exception or negotiated its terms. Frequently, special exceptions are redrafted by the proposed insured. Such exceptions should be construed against the insured.

12.7.4 Adequacy Of Blanket Exceptions As To Recorded Matters

A general form of exception may remove coverage for a specific recorded interest or encumbrance. The mere fact that the exception is general rather than specific does not cancel its effect, if the general exception accurately describes the recorded interest.

Until recently, title insurers have not made a regular practice of inserting blanket exceptions for classes of rights that are normally the subject of recorded instruments. However, insurers began inserting such exceptions in short-form loan policies. That practice later migrated to owner's policies, in certain jurisdictions and under certain limited circumstances. Such exceptions are enforceable.[280] Their scope is dependent on the phrasing of the exception. For example, in *Cobb v.*

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construed against the insurer, and the unique limitations on this doctrine in regard to title insurance, at § 9.1.3.4.

[278] *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990). The insurer was found to have recklessly misrepresented the facts to the proposed insureds by the deliberate use of an exception contrary to the clear form contained in the underwriter's own manual. The agent who prepared the commitment testified that he did not use the underwriter's form because it "would 'only clutter the commitment.'" 570 So.2d at 583.

[279] *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978).

[280] In *Seba v. Lawyers Title Ins. Corp*., 2008 WL 5273509 (Mich.App.) (unpublished), rev.den. 483 Mich. 1019, 765 N.W.2d 330 (Mich. 2009), an exception for easements and restrictions of record in an owner's policy was found to negate liability for a recorded use restriction that was not discovered in the title search. In *Crawford v. Lawyers Title Ins. Corp.*, 310 Ga.App. 611, 714 S.E.2d 137 (Ga.App. 2011), when the title insurance policy excepted "[a]ny easements or servitudes appearing in the public records," the insured's deed also excepted easements of record, and the insured admitted that she knew of a particular easement before she purchased, the court held the exception enforceable. The court also said that the insured could not prove detrimental reliance on the title commitment, which did not make specific exception for the recorded instrument. In *Metro Bank v. Mississippi Valley Title Ins. Co*., 2012 WL 4344600 (N.D.Ala.) (unpublished), the court held that an exception for "Restrictive Covenants, if any" on an owner's policy was enforceable, and negated coverage for a recorded restriction limiting the property's use to grazing land, which frustrated the insured's intent to build a house on the property. In *Pasha v. Commonwealth Land Title Ins. Co*., 2014 WL 5510931 (Ky.App.) (unpublished), the court found an exception for "[a]ny easements or servitudes appearing in the public records" to bar coverage for a use restriction for which the policy did not contain a separate exception that identified the instrument by its recording data. It said that the use restriction was a "servitude." Because that word is not defined in the policy, the court turned to Merriam-Webster's Collegiate Dictionary, which provided this definition: "a right by which something (as a piece of land) owned by one person is subject to a specified use or enjoyment by another." The court said that definition perfectly fit the restriction, and that classifying a use restriction as a servitude was consistent with Kentucky law. In *Rouse v. North American Title Ins. Co.*, Northern District of Georgia federal court, Atlanta Division, Civil Action

Stewart Title Guar. Co.,[281] an owner's policy excepted "Restrictive Covenants affecting the property described in Schedule A." A recorded restriction frustrated the insured's development plans. The insured argued that the exception was limited to restrictions "described in Schedule A." The court rejected the argument, and held that the exception removed coverage for the restrictions.

One commonly-used exception that does not make reference to a specific recorded instrument is an exception for any part of the insured property which may have been taken, dedicated or laid out for use as a public road. It is common industry practice to make such an exception when the property is not platted. The reason is that, in many states, public roads may exist within such property by ancient takings not in the chain of title, or by virtue of public use for a period of time. The only means of determining that such a roadway exists is by inspecting the property.

In *Hofmann v. Chicago Title Ins. Co.*,[282] there was a recorded conveyance of a road lying within the insured property. The legal description in Schedule A did not except the highway conveyance, but described the property as bordering the road. Further, the policy contained a general road exception modified by the phrase "unless disclosed of record." The insureds argued coverage because the title insurer failed to "list a highway disclosed by public record." They cited *Shotwell v. Transamerica Title Ins. Co.*[283] and *Santos v. Sinclair*,[284] both of which found that a general road exception applied only to the improved portion of the roadway and not the balance of the land conveyed by a deed in the public records. The court held that, "[b]y negative implication, this clause provides coverage for roads and highways disclosed by the public records." However, the court found that the Schedule B survey exception negated this implied coverage.

A road exception was found to remove coverage for a claimed public roadway in *Gebrayel v. Transamerica Title Ins. Co.*[285] The exception in *Gebrayel* read "[R]ights of the public in and to that portion of the herein described property lying within the limits of streets, roads and highways." A Washington case, however, held that an exception for "right of way for existing roads" excepted the 15-foot-wide roadway that was "existing" and in use, but not the entire 40-foot dedicated area.[286] Similarly, a general exception for the right to "use" the property was not sufficient to cover a prior dedication of the fee simple interest, since a right to use implies an easement rather than fee.[287]

No. 1:17-CV-04709-LMM, June 29, 2018 (no Westlaw citation available), the court said that an exception for "[c]ovenants, conditions, restriction, easements and/or servitudes" negated coverage for a prescriptive easement claim.

[281] 2007 WL 4460198 (Tenn.App.) (unpublished).

[282] 107 Wash.App. 1010, 2001 WL 803756 (Wash.App. 1 Div. 2001) (unpublished).

[283] 91 Wash.2d 161, 588 P.2d 208 (1978).

[284] 76 Wn.App. 320, 884 P.2d 941 (1994).

[285] 888 P.2d 83 (Or.App. 1995).

[286] *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978). A similar case is *Amidano v. Donnelly*, 615 A.2d 654 (N.J. Super. 1992).

[287] *Robey & Co. v. City Title Ins. Co.*, 261 Cal.App.2d 517, 68 Cal.Rptr. 38 (Cal.App. 1 Dist. 1968).

Exceptions

Courts routinely enforce exceptions that do not recite recording data for recorded instruments, but which are sufficiently descriptive and applicable to put the insured on notice of those rights. An exception for "the rights if any, of the City of New York arising from the mapping of Bergen Avenue" was found to except an easement for private street rights reserved in a deed recorded in 1926.[288] The easement emanated from the subdivision plat that mapped out the street. Therefore, the City's claim fell under the exception. An exception for "rights of way, public or private" was found sufficient to except a recorded right-of-way.[289] Also, an exception for "reservations contained in patents from the United States of America" was sufficient to except the mineral interest in the property reserved by the U.S. and since conveyed.[290] In *Crews v. Griffith*,[291] there was no recorded conveyance of the adjoining road and the policy excepted "roads ... not shown of record." The insured argued that the exception did not apply because the road was depicted on numerous maps "of record." The court said that "the reliability of all title opinions in Louisiana would be undermined" if such a broad brush stroke were applied:

> [I]s an examiner of title bound to know what "numerous public maps" reveal in the absence of an actual public record establishment of the public road or servitude of passage? ... The phrases [sic] "of record" cannot be read so broadly as to include all vehicle travel paths that appear on every survey filed in the conveyance records. In this case, the travel path is a clearly defined paved (at least in part) road. The Griffiths are seeking insurance against the prospective determination of the character of the road. That is not the purpose of title insurance.[292]

In *Yaffie v. Lawyers Title Ins. Corp.*,[293] the court reformed the policy to remove a road exception based, in part, on the title agent's testimony that the policy was intended to protect against a claim that any part of the insured property had been taken in fee simple for road purposes. The dispute concerned land within the policy description that had recently been abandoned as a public road. Schedule B contained an exception for "title to or rights of the public and others ... in ... adjacent streets, roads and ways... ." The insureds' attorney, who also served as the title agent, testified that he did not intend the exception to negate coverage for the fee title to the road, because it was within rather than adjacent to the insured parcel, and that the purpose of this road exception was

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[288] *Scaglione v. Commonwealth Land Title Ins. Co.,* 303 A.D.2d 671, 757 N.Y.S.2d 84 (N.Y.A.D. 2 Dept. 2003).

[289] *Sylvania v. Stein*, 177 N.J.Super. 117, 425 A.2d 701 (Ch. 1980).

[290] *Devlin v. Bowden*, 97 N.M. 547, 641 P.2d 1094 (1982). An exception for a reservation of mineral rights has the effect of removing the mineral interest from the insured estate. *Eames v. St. Paul Title Ins. Co.*, 654 S.W.2d 560 (Tex.App. 1983).

[291] 856 So.2d 1229 (La.App. 3 Cir. 2003), reh.den. Nov. 5, 2003.

[292] 856 So.2d at 1232.

[293] 1998 Me. 77, 710 A.2d 886 (Me. 1998).

to remove coverage for "claims related to use of roads that abut the covered parcel."[294] The court held that the attorney-agent's "unique situation" as agent of both parties made "his intentions, almost by definition, the mutual intentions of the parties." It reformed the policy to remove the exception.

An exception that adequately describes the subject of the title defect or encumbrance removes coverage as to the matter, even if the exception does not identify the nature of the adverse party's rights or their source. A common source of disputes of this nature is exceptions for physical features or improvements that are depicted on a survey. However, when the scope of the exception is narrower than, or different from, the rights that actually exist, the exception has been found not to remove coverage. Thus, in *Boel v. Stewart Title Guar. Co.*,[295] a policy insuring title to a platted lot made exception for "[a]ny question which may arise or claim of loss which may result from the existence of an underground ditch, which does no[t] appear to affect improvements situated on the land," as disclosed by an "on site inspection." In fact, the United States owned a 30-foot strip of land running through the insured parcel and across some of the platted streets, and the developer had relocated the ditch built by the U.S. so that some of it now lay outside the land owned by the government. The Idaho Supreme Court found the "ditch" exception insufficient to remove coverage for the claim of fee title, because "[t]he fact that the federal government coincidentally utilized its fee strip for the construction and maintenance of the ditch does not mean that the Boels' damages, related to the existence of the deed, in any way "arise" or "result" from the existence of the ditch." Similarly, an exception for "[d]irt driveway crosses adjoining lands," added after review of a survey, was found not to be adequate notice of a recorded driveway easement. Several driveway easements affecting the property, all of which were described by their recording information except the one at issue. The court found:

> The careful description of easements which Meridian excepted from coverage by reference to the recorded instruments creating them, justifies a reasonable policyholder conclusion that title was insured against easements other than those specific easements, although subject to the exceptions for encumbrances in other named categories.[296]

The court also held that the excepted easements were "of a fundamentally different nature" than the missed easement, and therefore the exceptions provided no notice of it.[297] Also, in *Chicago Title Ins. Co. v. Abstract Associates, Inc.*,[298] an exception for "[f]ences" as shown on a survey was found not to except fee ownership by a party whose deed was missed in the title search. The title commitment

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[294] 710 A.2d at 889.

[295] 137 Idaho 9, 43 P.3d 768 (Idaho 2002).

[296] *Amidano v. Donnelly*, 615 A.2d 654 (N.J. Super. 1992).

[297] 615 A.2d at 659.

[298] Appeal No. 821, April 4, 2000 (Md.Ct.Sp.App.) (unpublished).

did not disclose the correct record owner, causing the insured to purchase the land from the wrong party. The survey showed a fence surrounding the property on which the deed was missed. After acquiring the property for the insured, the insurer sued the agent, which defended claiming that the insurer should have denied the claim based on the "[f]ences" exception. The court held that "a non-specific general exception would [not] exclude an undiscovered recorded ownership interest."

12.7.5 Coverage As To Matters Not Excepted

When an encumbrance, lien or defect in title is not excluded and not excepted in the policy, in most cases the insured is indemnified for actual monetary loss or damage that it suffers due to the matter that is not excepted. As one court noted, the failure to make an exception for a recorded matter has traditionally been considered the most common source of policy claims:

> A title insurance company has an obligation to answer for any loss due to a defect in a title if it has not excepted that defect from its coverage. It cannot escape liability when it does not except a defect that is a matter of public record. It is generally assumed that a title defect that appears in the public records but that is not noted is covered by a title policy.
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> *   *   *   *
>
> It has been said that the most common error in the title insurance industry is the negligent failure to note a title defect appearing in the public records.[299]

When a matter is not excepted, the policy permits the insurer to resolve the claim in several ways, including the removal of the encumbrance or lien or payment of loss to the insured.

No affirmative policy coverage is created by the insurer's removal of an exception. It is not uncommon for a title insurer to provide an informational "note" or exception concerning a matter related to the property but not within policy coverage. The removal of such a note or exception after receipt of an affidavit does not create coverage for the subject matter of the note.[300]

The policy is not a guarantee that title is as shown. However, in those states that consider the insurer to have a duty to search and examine title and to except all recorded matters in the commitment and policy, the failure to make an exception for a matter discoverable in the public records is sometimes deemed to be a breach of the policy.[301] This is a paradoxical analysis, however.

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[299] *Parker v. Ward*, 614 So.2d 975, 977 (Ala. 1992).

[300] In *Yellowstone II Development Group, Inc. v. First American Title Ins. Co.*, 2001 MT 41, 304 Mont. 223, 20 P.3d 755 (Mont. 2001), a title agency raised an exception for "recordability and acceptance of documents conveying title," because the property had previously been described as two parcels and the agent believed the division did not comply with the law. The former county attorney gave an affidavit opining that there were "no legal impediments" to deeding out 20-acre parcels without a subdivision plat, and the agent removed the exception. The insured learned that the affidavit was wrong, and that it was prohibited from dividing the land. The court found the matter excluded from coverage. The removal of the exception did not create coverage. However, in *Michael v. Stock*, 162 A.3d 465, 2017 PA Super 99 (Pa.Super. 2017), the court held that an insured might have a reasonable expectation that the policy insured a parcel based solely on the inclusion in the policy of an informational reference to a tax parcel number.

[301] *Laurence v. Kruckmeyer*, 124 Ariz. 488, 605 P.2d 466, 468 (Ariz.App. 1979).

If a matter is excepted, it is excluded from coverage and the insurer has no liability to the insured. The policy protects against those matters *not* excluded. Thus, the insurer should not be deemed to have breached the policy by affording coverage to the insured rather than excluding the matter.

The policy may give notice of the lien or encumbrance other than by an exception, but such notice ordinarily is not sufficient to negate coverage. Reference to an encumbrance in Schedule A is not, by itself, usually sufficient to except the matter from coverage.[302] One court said that a reference in the Schedule A description of the land to a subdivision plat did not remove coverage for a waterline easement shown on the plat, saying:

> The description of the land in the policy was for the purpose of identifying the land covered by the policy and not, as appellant contends, for the purpose of limiting the insurance protection purchased.[303]

Also, a reference to a road right of way in the Schedule A description was not the equivalent of an exception.[304]

An exception for one instrument or subject may or may not be adequate to except another instrument or matter that is either referenced in the same map or document, or located in the same portion of the insured parcel. For example, an exception for one type of right as disclosed on a subdivision plat may or may not be adequate to remove coverage for other types of rights disclosed on the same plat.[305] Also, when two recorded restrictions of the same type encumbered the property, only one of which was excepted, the insurer argued that the insured did not suffer a loss due to the lack of exception for the other. The court viewed the policy as if it were an abstract of title, saying:

> We would agree with this contention except that the restriction which was listed was considered to be ineffective as to the property in question by the Bank's attorney who caused the dentists to be so advised at closing.[306]

Other courts have also found a duty to indemnify when two easements of the same nature

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[302] The fact that the policy described the insured parcel by reference to a recorded subdivision plat was not the equivalent of a Schedule B exception for a utility easement depicted on the plat. *Courchaine v. Commonwealth Land Title Ins. Co*., 2012 WL 6522442 (Wash.App. Div. 3) (unpublished). The court relied on the *Lemmon* and *Shotwell* cases discussed in this section.

[303] *San Jacinto Title Guaranty Co. v. Lemmon*, 417 S.W.2d 429, 431 (Tex.App. 1967).

[304] *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978).

[305] In *Santos v. Sinclair*, 76 Wn.App. 320, 884 P.2d 941 (Wash.App. Div. 2 1994), an exception for "rights, restrictions and reservations" depicted on a plat was found not to be sufficient to except an easement depicted on the same plat. In *Courchaine v. Commonwealth Land Title Ins. Co*., 2012 WL 6522442 (Wash.App. Div. 3) (unpublished), the court relied on *Santo* in finding that an exception for "restrictions" shown on a subdivision plat did not except a utility easement depicted on the same plat, which was granted by a separate recorded instrument.

[306] *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (Fla.App. 1979).

encumbered the property, one excepted and the other not.[307]

The subject of the duty, found in some states, to conduct a search and examination of title, and to disclose recorded instruments, particularly liens, on a title insurance commitment and policy, is discussed in Chapter 15. Several cases are illustrative. A title examiner's intentional failure to list a title matter on a policy in furtherance of criminal fraud can be a criminal act.[308] However, the failure to report an open mortgage on a policy is not an intentional false statement "for the purpose of influencing in any way the action of ... any institution the accounts of which are [federally] insured... upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan... ."[309] Rather, the policy "made no statement" at all about the mortgage, "and did not falsely state that it had been released or was no longer a lien... ."[310]

However, when a recorded document did not affect title but merely gave notice of a claim to a portion of the proceeds from the sale of land, the lack of an exception for the instrument in Schedule B did not create policy liability:

> Put simply, the agreement here is not a title defect because it does not affect title. The agreement merely gives Herman Klickman a lien on one-third of the *proceeds* derived from a sale of the property in question. It does not give Herman Klickman any interest in the property, nor does it give him the right to disturb the buyers in their possession of the property. In short, the buyers could not possibly be affected by the terms of the agreement.[311]

Similarly, an "Agreement to Retain Land in Irrigable Status" was found not to affect the title to the property, and was thus properly not reported on Schedule B.[312] However, an insurer was unsuccessful in arguing that a timber deed did not affect title, on the argument that it only conveyed the timber and not the land on which the trees grew.[313]

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[307] See *Shotwell v. Transamerica Title Ins. Co.*, 91 Wash.2d 161, 588 P.2d 208 (1978), and *Amidano v. Donnelly*, 615 A.2d 654 (N.J. Super. 1992), discussed at §12.7.4.

[308] See, for example, *Milbrandt v. Huber*, 149 Wis.2d 275, 440 N.W.2d 807 (Wis.App. 1989).

[309] 18 U.S.C. § 1014.

[310] *United States v. Thorn*, 17 F.3d 325, 328 (11th Cir. 1994).

[311] *Klickman v. Title Guaranty Co. of Lewis County*, 105 Wash.2d 526, 528-9, 716 P.2d 840 (Wash. 1986).

[312] *Lombardo v. Pierson*, 852 P.2d 308 (Wash. 1993).

[313] *Parker v. Ward*, 614 So.2d 975 (Ala. 1992).

12.7.6 No Duty To Remove Exceptions Or Give Advice

Each title insurer has the right to decide what risks it will take and under what terms.[314] Title insurers set underwriting standards that establish which risks they will accept and which matters against which they will not indemnify. The title clearance process used by title insurance underwriting personnel is so sophisticated that it approaches an art form. Title insurers each have different underwriting standards. An insurer may use an underwriting standard or individual underwriting decision as a marketing tool, by setting a standard that makes the company more accommodating to its customers, although certain states impose regulatory limits on certain behavior.[315] Sometimes, one insurer will make the deliberate decision not to make exception for a known defect, lien or encumbrance, because it considers the matter to have been resolved or barred by an applicable curative law, statute of limitations or other theory or doctrine, but another insurer will insist on making an exception for the matter.

The insurer may not be sued for making exception for defects, liens or encumbrances that it believes do or may attach to the property.[316] An insurer's refusal to issue a policy does not make the title to a parcel unmarketable.[317] See the discussion of the marketability of title coverage at §9.8.1.

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[314] See *Aronoff v. Lenkin Co.*, 618 A.2d 669 (D.C.App. 1992), in which the court held: "We think a title insurer has an unqualified right to select the risks it is willing to underwrite... . Unless it is otherwise bound by law or contract, it may refuse to insure for any reason, sound or not, or for no reason at all." 618 A.2d at 686.

[315] See the statutes referenced in §15.12, adopted in some states, that require an insurer to conduct a title search and examination to certain standards, and which prohibit the practice of insuring over or around a recorded lien.

[316] *Fry v. Title Ins. & Trust Co.*, 187 Cal. 168, 201 P. 115 (1921) (title insurer did not slander title by making exception for judgment that owner believed was not a valid lien). A court may find perplexing an insurer's judgment as to what is and is not a good underwriting risk. See *Mathews v. Moore*, 1997 WL 241741 (Wash.App. 1 Div.) (unpublished), in which the court found it a "mystery" that title insurers would rely on a private trustee's sale to remove liens against the borrower, but not a lis pendens filed in a judicial foreclosure. Nonetheless, it is exclusively within the insurer's province to decide what risks it will assume. In *Weiss v. Lowenberg*, 95 A.D.3d 405, 944 N.Y.S.2d 27, 2012 N.Y. Slip Op. 03366 (N.Y.A.D. 1 Dept. 2012), the sellers sued, claiming that the buyers falsely accusing them at the closing table of having filed a fraudulent probate petition, and accused First American of inserting an exception in the title commitment "in order to accommodate the buyer's desire to avoid closing on the contract." The Appellate Division affirmed dismissal of First American, finding that there was no allegation that First American had procured the buyer's breach of the contract, or even that the buyer *had* breached the contract. Further, it said, the sellers' allegation that the insurer accommodated the buyer by making an exception based on at least a perceived title risk was inconsistent with their claim that First American made the exception maliciously and recklessly. It dismissed the tortious interference with contract claim. In *First Bank Texas, SSB v. W.D. Welch, P.C.*, 2017 WL 2443132 (Tex.App.-Dallas) (unpublished), the court rejected the insured's argument that it was harmed by an exception in a loan policy for a lien that the court determined was subordinate to the insured mortgage. The court said the exception caused no harm, even though the insured paid money to the lien holder to subordinate its lien to the insured mortgage. In *Mattlage v. Dividend Solar Finance, LLC*, ___ F.Supp.3d ___, 2019 WL 6464006 (W.D.Tex. 2019) (not yet released for publication), the court held that a title insurer's listing of a financing statement as an exception in a title insurance commitment was its business decision, not a legal opinion or an assertion that the instrument was a cloud on title. The lender asserted that the financing statement was a lien only on the solar power equipment that it installed, which it considered to be personal property.

[317] *Wilson v. Pacific Coast Title Ins. Co.*, 106 Cal.App.2d 599, 235 P.2d 431 (Cal.App. 4 Dist. 1951).

Exceptions

The insurer is not required to insure a particular title at all. The insurer's business is a private enterprise. There is no constitutional right to the issuance of a title insurance policy.[318] There is no set of rules that imposes a standard of conduct on the insurer, such as title standards promulgated by a state bar association, although a Kansas court so found.[319] Title insurers are not obligated to insure the title to land that may be subject to attack. In a California lawsuit, the plaintiffs alleged that members of the title industry conspired to deny title policies to purchasers of tax titles. The Supreme Court overturned a lower court order striking causes of action based on tortious interference with contract and state unfair competition and restraint of trade laws. The court held that the insurers were permitted to introduce evidence at trial that the refusal to insure was based on legitimate business concerns, including risk.[320]

The insured or its counsel is charged with the duty of determining which exceptions it wishes to have removed before it will accept the title insurance policy. The proposed insured or seller sometimes induces the insurer to remove a commitment exception based on an indemnity, information or an assurance.

The insurer is not obligated to explain to a proposed insured how to go about eliminating a defect, lien or encumbrance. The insurer is also not required to remove a defect, lien or encumbrance as an exception if a curative law, statute of limitations or other theory or doctrine might cure or bar enforcement of a defect, lien or encumbrance.[321] Very often, the application of such a law or doctrine is less than certain under the given circumstances, or might be challenged by a third party.

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[318] In *Hanie v. Atlanta Title & Trust Co.*, 45 Ga.App. 26, 163 S.E. 515 (1932), for example, the insurer refused to insure title to land which it had previously insured. The owner sued for damages. The appellate court upheld a demurrer, holding that "the policy does not obligate the title company to insure the title to the property at a later date."

[319] A Kansas federal court held that an insurer has a duty of "reasonable performance" in its role as abstracter of title, and may not refuse to insure title if title is marketable under those standards, in *In re Lisa, Inc.*, 224 B.R. 173 (D.C.D. Kan. 1998). The court rejected *Aronoff v. Lenkin Co.*, 618 A.2d 669 (D.C.App. 1992), which held that a title insurer is not bound by any such standard. In *In re Lisa,* the title agent had refused to remove liens from Schedule B based on a bankruptcy order for sale free and clear. The state title standards said that such an order effectively removes such liens. The court stated: "Ford [the title agent] next argues that a title insurance company is free to impose any conditions it wants in the insurance policy. The Trustee argues that only reasonable conditions consistent with general title standards may be imposed. The Trustee argued Ford violated a duty of good faith and fair dealing when it refused to issue a policy without the exception. … The Trustee cited the Kansas Title Standards Handbook as evidence that Ford's refusal was inconsistent with general title standards. The bankruptcy court agreed with the Trustee, and relying on the handbook as evidence of what constitutes reasonable performance, concluded Ford had breached its duties under the contract when it refused to issue a policy without the exclusion. This court agrees with the bankruptcy court's analysis."

[320] *Quelimane Co., Inc. v. Stewart Title Guar. Co*., 19 Cal.4th 26, 960 P.2d 513 (Cal. 1998).

[321] For example, in *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265 (Utah 1998), reh.den., the plaintiff property seller alleged that, by making an exception for a judgment, the title agent conspired with the judgment creditor to force the seller to pay the debt even though the debt had been discharged in bankruptcy. The court found no conspiracy and no intent to defraud the seller. Further, the court found that "Guardian was completely justified in refusing to insure against the judgment lien even though it was later held that the judgment lien had been waived" by the bankruptcy discharge. Similarly, in *Watson v. LandAmerica Austin Title*, 338 Fed.Appx. 352, 2009 WL 1106870 (5th Cir. (Tex.)) (unpublished), a title company was found not liable to a seller for a sale he lost because it refused to remove exceptions for federal tax liens against the seller, particularly when the IRS demanded the money from closing and the seller's claimed defense to the liens was proven to be bogus.

For example, in *Wilkinson v. Rives*,[322] numerous judgments and tax liens against the sellers attached to the land and were excepted in the commitment. The sellers settled with the creditors based on their attorney's advice, although a homestead exemption and declaration might have barred enforcement of the liens against the homestead parcel. The sellers sued the insurer, asserting that the insurer had given the advice that the homestead declaration was invalid and that the liens would have to be removed before a policy could be issued. The court found that the title examiner had given no such advice, and that the commitment was not advice or a representation. The court held that the insurer had the right to make "a title decision not to risk possible litigation by issuing a policy of title insurance without showing the judgments and liens as exceptions." Also, it concluded the insurer *could not* give legal advice about the effect of a homestead exemption:

> [The insurer] had no duty to give a legal opinion to appellants concerning the title to the subject property, and in fact was prohibited from doing so. [citing Agreement Between the State Bar of California and The California Land Title Association, 41 Ca.S.B.J. 156 (1966)] ... Appellants' reliance on section 552 of the Restatement of Torts is misplaced for the reasons that the evidence fails to show that CLTC furnished to appellants an inaccurate or incomplete title report or that appellants relied on any statement of CLTC regarding their homestead exemption.[323]

An insurer also has no duty of care to property owners who are not insureds to prevent their property from being conveyed by fraudulent conduct, as discussed at §7.7.

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[322] 116 Cal.App.3d 641, 172 Cal.Rptr. 254 (Cal.App. 2 Dist. 1981).

[323] 172 Cal.Rptr. at 258.

13 Escrow and Settlement

This chapter discusses real estate escrows and the closing of a real estate transaction, whether classified as an escrow, settlement, table closing, or a mail-away or remote closing. This chapter discusses the principles underlying an escrow, the categories of duties undertaken by the escrowee, the theories of recovery against escrowees, and the grounds on which escrowees may recoup losses. Also included in this chapter, at §13.13, is a discussion of state laws and regulations controlling the type of funds that may be delivered to an escrowee.

There are several related subjects discussed in other chapters. Construction escrows are discussed in §10.2. Punchlist and completion escrows are discussed at §10.2.8. Chapter 14 covers closing protection letters. See §17.2 concerning claims that the underwriter is responsible for a title agent's escrow or closing errors, and §17.8.3 regarding the theft of closing money by a title agent.

13.1 Types Of Escrows And Their Purposes

An escrow is the deposit of an instrument and/or money (the deposit) with an independent party (the escrowee), with instructions to deliver the deposit on satisfaction of the conditions stated in the escrow instructions. Not every delivery of property under written instructions constitutes an escrow.[1] The general subject of escrow has been much discussed by scholars.[2]

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[1] In *TCC Historic Tax Credit Fund VII, L.P. v. Levenfeld Pearlstein, LLC*, 2012 WL 5949211 (N.D.Ill.) (unpublished), the court held that, although a lawyer for a party to the transaction may serve as an escrowee, the delivery of money to a party's lawyer with instructions to forward it to three companies did not create an escrow, and a claim for breach of escrow contract failed.

[2] See Burke, *Law of Title Insurance*, Chapter 18; Joyce D. Palomar, *Title Insurance Law*, Chapter 20; Walker & Eshee, *The Safeguards and Dilemmas of Escrows*, 16 Real Estate L.J. 45 (1987); John Hosack, *Recent Developments and Decisions, in Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992, p. 621-770; Boyette, *Title Insurance Liability Beyond the Policy*, Florida Bar Journal, July/August, 1995, pp. 24-34; 30A C.J.S. *Escrows*; 28 Am.Jur.2d Escrows; McCall, *The Title Insurer as Escrow Agent*, the Guarantor, May/June 1988; Raymond Werner, *Closing Real Estate Transactions: Loan Closings: Escrow*, the Guarantor, May/June 1991, July/August 1991 and September/October 1991.

Escrow was first adopted as a method for the delivery of a conveyance instrument. In a conveyance escrow, the conveyance instrument (typically a deed) is deposited with the escrowee, along with written instructions. As one treatise explains,

> As frequently defined, an escrow is a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent, with a stranger or third person, who is not a party to the instrument, to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered over to take effect. The term is also used to express the conditional execution and deposit of a deed or written instrument in such a manner. ...
>
> An escrow agreement is in essence a contractual undertaking to assure the carrying out of obligations already contracted for. It is primarily a conveyancing device designed to carry out the terms of a binding contract of sale previously entered into by the parties; the use of an escrow is simply a customary and convenient method of carrying out an agreement of sale.[3]

An escrow is formed by the delivery to a neutral party of documents and/or closing money, with instructions to deliver the deposits on the happening of certain conditions. The instructions must be clear that every deposit is beyond the depositor's power to recall it, with delivery conditional only on the other party's performance. If the depositor retains any ability to control the deposit, it remains the property of the depositor.[4] Title to the real estate passes when the conditions set by the instructions have been met, at which time the deed is delivered to the purchaser.[5] The grantor has no power to revoke the conveyance once the deed has been deposited into escrow.[6]

In modern times, the principle of escrow has been expanded, and is used for the transfer of

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[3] 28 Am.Jur.2d *Escrows* §2.

[4] 28 Am.Jur.2d *Escrows* §4.

[5] In *Osborn v. Osborn*, 42 Cal.2d 358, 267 P.2d 333 (Cal. 1954), the court said: "Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. If he does not comply with the conditions when required, or refuses to comply, the escrow-holder cannot make a valid delivery of the deed to him."

[6] "At common law an escrow was an instrument for the conveyance of land deposited by the grantor with a third party to be kept by the latter until the performance of a condition or the happening of a certain event and was then to be delivered over to the grantee. The doctrine of escrow was extended at an early date to all sealed instruments importing legal obligations ... More recently the concept has been further expanded to include money and personal property." *Janson v. Cozen and O'Connor*, 450 Pa.Super. 415, 676 A.2d 242, 246 (1996). The same history of escrow is recited in *Hoornstra v. United States*, 969 F.2d 530, 533 (7th Cir. 1992), and *In re Handy Andy Home Improvement Centers, Inc.*, 196 B.R. 87 (N.D.Ill. E.D. 1996). See also 28 Am.Jur.2d *Escrows* §2.

things other than conveyance instruments. Money may be transferred and delivered through escrow.[7] Also, escrows may be used for construction loan disbursing, holdback or punchlist escrows, like-kind exchanges under Section 1031 of the tax code, environmental remediation, non-real estate sales, and for the deposit of money to allow the insurer to insure against title defects. See §10.2 regarding construction escrows. Punchlist and completion escrows are discussed at §10.2.8. See §5.10 regarding indemnities.

The closing of a real estate transaction is conducted in various ways in the United States, and is identified by different terms, the principal labels being settlement, closing and escrow. All real estate closings involve some form or aspect of an escrow. This chapter covers all forms of closings and escrows.

California and other western states operate under what is termed the pure or true escrow system, derived from Spanish law, which is discussed in depth in this chapter. The delayed-funding escrow is used in the Midwest and known as the Chicago form of escrow.[8] The "New York" style of table closing is another form of escrow.[9]

In a table closing, which is common in many Eastern and Midwestern states, the parties all meet at a closing table. The deed or mortgage is delivered when the consideration has been paid and the other conditions to closing have been met. The closer has a role that is similar to that of an escrow officer, but accepts his or her instructions primarily by direct conversation with the parties at the closing table.

It is common in a table closing for the buyer-seller closer to also serve as the closing agent for the lender. The lender issues written loan closing instructions to its closing agent. Those instructions are unilateral, although the lender may require the borrower to sign the instructions to signify his or her agreement with those terms. The lender can be liable to its borrower for the acts of the loan closing agent that the lender appoints.[10] The loan closing agent is the agent solely of the

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[7] 30A C.J.S. *Escrows* §4.

[8] In the Chicago form of escrow, the insurer/escrowee receives funds and documents with instructions to record immediately, but not to fund the sale until it can search title through the date of recording so that it is prepared to issue a policy free of any matters in the recording gap. If a matter does appear in the gap search, the buyer reconveys and the mortgage is discharged of record to confirm that title remains in the seller.

[9] In the New York or table closing, the insurer accepts documents for recording and receives and disburses funds immediately. The closer marks up the title commitment to remove the gap exception and to commit to all coverages required by the insured. A policy is issued in conformity with the mark-up shortly after closing. The key aspect of a New York style closing is that the insurer accepts the risk of title matters that might appear in the gap. The insurer ordinarily does so based on an indemnity from the seller. The New York closer typically receives written instructions from the parties about delivery of money and closing documents.

[10] See *Emigrant Mortgage Co., Inc. v. Costa*, 2017 WL 4104913 (N.J.A.D.) (unpublished), which held that the loan closing agent was the agent of the lender. The court noted that the lender, Emigrant Mortgage, had issued detailed written loan closing instructions that appointed the title company to serve as its agent in closing the loan. The court also noted that Emigrant had required the title agent to deliver a closing services letter (closing protection letter) to Emigrant to cover its acts as settlement agent. The court said that a jury could conclude from these facts that Emigrant had authorized Professional Abstract to close the loan as its agent, and that it had exercised control over its actions as closing

lender in performing the instructions given by the lender.[11] The loan closing agent is not the agent of the borrower, as to the loan.[12] This combination of roles held by the closer is legally permissible due to the fact that the closer owes a limited duty to all parties, and can perform all of his or her duties without violating a duty owed to another party. Cases involving loan closing agents are discussed in various passages of this chapter, particularly §13.9.3 concerning the disclosure of facts about fraud.

In some cases, a loan closing is conducted at the borrower's residence or another place that is convenient to the borrower. In many such transactions, the loan documents are presented to the borrower for signing by a person who may be termed a mobile notary, witness closer or some similar designation. The witness closer is typically a notary public, which allows that person to acknowledge the borrower's signature on the mortgage or an affidavit. The mobile notary typically delivers the signed loan documents to another party, such as a title company, and that other company typically prepares the loan closing statement and delivers the loan money according to the lender's written instructions. The witness closer typically assumes the same standard of care that is imposed on an escrow officer for the witnessing of the signing of closing documents.[13] Cases involving witness closers are discussed in the appropriate passages of this chapter.

In the mail-away or remote closing, the buyer and seller do not meet at a closing table, most commonly because they do not reside in the same locale. The parties typically deliver the closing documents and money to a neutral closer, accompanied by written instructions about how they are to be delivered. In the remote closing, the closing officer has limited contact with the parties, and does not assume the same level of responsibility as does an escrow officer operating under joint written instructions.

Lenders are experimenting with the concept of a loan closing in which the borrower signs the loan documents without being in the presence of any other party, and a notary public acknowledges signatures "electronically." The procedures to be used in such a closing have not yet been well developed. Some states have adopted electronic notary or acknowledgment laws. However, to date,

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agent. The court cited *Sears Mortg. Corp. v. Rose*, 134 N.J. 326, 337 (1993), a seminal New Jersey case on loan closing agency.

[11] See *Countrywide Home Loans, Inc. v. United General Title Ins. Co*., 109 A.D.3d 953, 972 N.Y.S.2d 296 (N.Y.A.D. 2 Dept. 2013), 2013 N.Y. Slip Op. 05982, in which the court found that a lender had no cause of action against its closing agent for the fact that the loan was obtained by impersonation, when the closer accepted as identification from the impersonator a driver's license that was not an obvious fake. The court noted that Countrywide's closing instructions did not require the closer to verify the signer's identity.

[12] See, for example, *Sweeting v. Chicago Title Co.*, 2017 WL 1153354 (Cal.App. 3 Dist.) (unpublished), in which the court held that a loan closing agent owed no duty to the borrower. However, see also *DiRenzo v. Katchen*, 2017 WL 3255237 (N.J.A.D.) (unpublished) (loan closer who signs HUD-1 settlement statement certification has legal duties to buyer that go beyond role of mere notary or witness, but he or she is not automatically a fiduciary and is required to perform only those duties that are found in the written loan closing instructions).

[13] *DiRenzo v. Katchen*, 2017 WL 3255237 (N.J.A.D.) (unpublished) (loan closer who signs HUD-1 settlement statement certification has legal duties to buyer that go beyond role of mere notary or witness, but he or she is not automatically a fiduciary and is required to perform only those duties that are found in the written loan closing instructions).

those laws do not establish consistent standards for an electronic acknowledgment.

Buyers, sellers and lenders can and sometimes do conduct closings without using a neutral escrow officer or closer. However, a closing conducted through an escrowee or closer provides several valuable advantages to the parties. The use of a neutral escrow officer or closer provides a method by which the insureds can get protection against the recording gap, and allows the parties to deposit the documents and funds with an independent stakeholder experienced in the transfer of funds and the recording of documents. Finally, by tying the close of escrow or settlement to the issuance of a title insurance policy in an acceptable form, the proposed insureds receive the assurance that they will receive the policy coverages for which they have bargained.

13.2 Escrow Instructions

The instructions of the principals to the escrowee provide the terms of the escrow. These instructions are sometimes denominated an agreement, but the more proper term is escrow instructions, in that they are the appointment of an agent by one or more principals. This treatise uses the term escrow instructions.

In most cases, escrow instructions must be in writing to be valid.[14] When no signed original instructions can be proven, a party may introduce testimony showing that the instructions were signed.[15] Some instructions may be oral, even when others are in writing.[16] However, oral instructions are not binding if they modify written instructions or are not given jointly by all of the principals.[17] A California regulation requiring escrowees to obtain written instructions did not

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[14] When one party signed instructions, the escrowee was negligent in performing the escrow without signatures of the other parties, particularly after the signing party materially amended the instructions without notice to the other parties. However, the negligence was not malicious and did not support a verdict for punitive damages. *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co*., 185 Cal.App.3d 1149, 230 Cal.Rptr. 276 (Cal.App. 1 Dist. 1986).

[15] *MH Investment Co. v. Transamerica Title Ins. Co*., 785 P.2d 89 (Ariz.App. 1989); *Haufler v. Zotos*, 446 Mass. 489, 845 N.E.2d 322 (Mass. 2006) (one party's 18-month delay in signing escrow instructions did not make escrow voidable at option of other party or demote instructions to mere "offer" to form an escrow).

[16] "As noted in [*Claussen v. First American Title Guaranty Co.*, 186 Cal.App.3d 429, 435, 230 Cal.Rptr. 749 (Cal.App. 6 Dist. 1986)], 'escrow instructions may be oral, even when some are in writing (citations) and some escrow instructions may be implicit in the express instructions given.' (*Gordon v. D & G Escrow Corp*. (1975) 48 Cal.App.3d 616, 621-623 [122 Cal.Rptr. 150]—escrow instructions implicitly required proceeds of sale to be paid to both sellers.)" *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990); *Winslow v. Scaife*, 219 Va. 997, 254 S.E.2d 58 (1979).

[17] *Katleman v. U.S. Communities, Inc.*, 197 Neb. 443, 249 N.W.2d 898 (1977); *Scholz Homes, Inc. v. Wallace*, 590 F.2d 860 (10th Cir. 1979); Burke, *Law of Title Insurance*, §18.2, p.18:5; *Osborn v. Grego*, 596 P.2d 1233 (Kan. 1979) (completion escrow on new construction amended by phone call from builder not binding on homeowner who did not approve, but homeowner's later acts ratified amendment); *Gattozzi v. Midland First American Nat'l Title Service*, 2000 WL 1369890 (Ohio App. 8 Dist.) (unpublished) (unsigned letter from one principal changing tax payment amount insufficient to modify written instructions); *Carrillo v. Accurate Escrow, Inc*., 2003 WL 116675 (Cal.App. 2 Dist.) (unpublished) (unsigned amendment modifying written escrow instruction invalid, especially in light of principal's limited understanding of English language); *Brantley v. Boyd*, 2009 WL 4052682 (N.D.Cal.) (unpublished) (escrowee that accepted telephone instruction to send loan proceeds to party other than borrower was liable to lender for full

exonerate an escrowee from liability for violation of oral instructions.[18] The purchase agreement may serve as some or all of the escrow instructions, or its terms may be incorporated into the escrow instructions, in which case the escrowee is correct in obeying the terms of the purchase agreement as discussed at §13.8.

Escrow instructions may be signed by a representative of a principal. When an escrow principal is an entity, and the instructions are signed by a representative of that entity, the escrowee is not obligated to determine that the representative has authority to bind the principal in the conduct of the escrow.[19] The escrowee is required to obey the instruction of a representative of the entity escrow principal.[20] The escrow may accept instruction from the authorized or empowered representative of the individual escrow principal, which may include an attorney or real estate broker.[21] An escrowee is obligated to investigate a possible mistake in the instructions when the

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amount of loan when the borrowers refused to pay money back). However, a principal may not use the requirement for written instruction to disclaim his own verbal instruction. When a party to the escrow gave verbal instructions to close the transaction, but refused to sign a written amendment necessary to solve a shortfall in the purchase price, that party was not entitled to seek recovery of the shortfall from the escrowee on the theory that the escrowee was obligated to obtain the written amendment which the party refused to sign. *Gris, Inc. v. Rho*, 2003 WL 21758394 (Cal.App. 2 Dist.) (unpublished). When the escrow instructions were one sentence long, a subsequent letter from the principal was properly found to augment the original instructions, and the escrowee was at fault for not obeying the letter instructions. *Int'l Capital Corp. v. Moyer*, 347 Ill.App.3d 116, 806 N.E.2d 1166, 282 Ill.Dec. 578 (Ill.App. 1 Dist. 2004). In *Mew Equity, LLC v. Sutton Land Services, LLC*, 144 A.D.3d 874, 42 N.Y.S.3d 175, 2016 N.Y. Slip Op. 07630 (N.Y.A.D. 2 Dept. 2016), a lender submitted a mortgage release to the escrowee, which recorded it. The court dismissed the claim by the lender against the escrowee alleging that there was an oral agreement to hold the release in escrow, because such an agreement would contradict the plain terms of the instrument, and evidence of such an oral agreement was barred under by the parol evidence rule.

[18] *Zang v. Northwestern Title Co*., 135 Cal.App.3d 159, 185 Cal.Rptr. 176 (Cal.App. 1 Dist. 1982).

[19] *Capital Salvage v. Chicago Title Ins. Co*., 2004 WL 1753213 (Cal.App. 2 Dist. 2004) (unpublished) (escrowee had no duty to confirm authority of LLC member to sign escrowed documents and escrow instructions); *Vournas v. Fidelity Nat'l Title Ins. Co*., 73 Cal.App.4th 668, 86 Cal.Rptr.2d 490 (Cal.App. 4 Dist. 1999) (escrowee had no duty to verify authority of trustee); *837 Prairie Avenue LLC v. Palos Verdes Escrow Co., Inc*., 2011 WL 3916936 (Cal.App. 2 Dist.) (unpublished) (escrowee had no duty to confirm authority of LLC member to bind company to purchase agreement and escrow instructions); *Fey Family Limited Partnership v. Commonwealth Land Title Ins. Co*., 2012 WL 662519 (Cal.App. 2 Dist.) (unpublished) (when son claimed to be general partner of partnership in fraudulent sale of property owned by partnership, escrowee had no duty to father, the real general partner, to detect or prevent unauthorized sale).

[20] *Murrietta Car Wash, Inc. v. North County Bank*, 2003 WL 21481135 (Cal.App. 4 Dist.) (unpublished) (instructions from one member of joint venture were binding and escrowee was obligated to obey them, although other members later asserted that they disagreed with the instructions given).

[21] *Posner v. Equity Title Ins. Agency, Inc.*, 222 P.3d 775, 2009 UT App 347 (Utah App. 2009) (when seller authorized his real estate broker to get deal closed, escrowee was not negligent in taking instruction to close escrow from broker rather than seller directly, and delivery of key documents to broker was sufficient); *American Diversified Properties, Inc. v. Valleywide Escrow, Inc*., 2008 WL 4060942 (Cal.App. 2 Dist.) (unpublished) (broker and co-broker may direct escrowee on payment of commissions when principals delegate this authority to the brokers); *West Knoxville Associates Limited Partnership v. Ticor Title Ins. Co*., 124 F.3d 210 (6th Cir. (Tenn.)) (Table), 1997 WL 561420 (unpublished) (escrowee must establish that attorney for principal has authority to give instructions); 7A C.J.S. *Attorney*

escrowee is notified of the issue by the party's attorney.[22] As with other documents, forged escrow instructions are usually void.[23] A party to the escrow who refuses to sign the escrow instructions may not later sue the escrowee for breach of the instructions, because no contract has been formed between the party and the escrowee.[24]

No task or duty may be added to supplement the duties contained in the written escrow instructions based on testimony about supposed escrow industry customs.[25] Some instructions may be implicit in the express instructions given.[26] In one case, an insurer was held to be an escrowee even though no written instructions were given to it, with the court implying instructions from the terms of the instrument deposited with the insurer.[27]

The escrowee does not have an implied duty to verify the actions of other parties, the authenticity of documents prepared or signed by others, or similar conduct by others.[28]

& Client § 211; 7 Am.Jur.2d *Attorneys at Law* § 129.

[22] *Diaz v. United California Bank*, 71 Cal.App.3d 161, 139 Cal.Rptr. 314 (Cal.App. 2 Dist. 1977).

[23] In *Phleger v. Countrywide Home Loans, Inc.*, 2008 WL 65771 (N.D.Cal.) (unpublished), the plaintiff claimed that the escrow instructions had been forged as part of a loan fraud scheme, and that the escrowee was bound by the "real" instructions which emanated from the plaintiff. The court allowed the case to survive a motion to dismiss, but noted the sophistry in this premise: "Phleger's complaint and her opposition do appear to studiously play upon an equivocation between what might be referred to as the 'actual Phleger' who claims that she did not sign the loans and the 'purported Phleger' who did." In *Penklor Properties LLC v. Buehler*, 2019 WL 1343583 (Tenn.App.) (unpublished), a Tennessee escrowee that paid money to the seller's agent based on a forged amendment to escrow instructions was required to replace the money, because the court said that no reasonable business person would have trusted that the amendment was genuine.

[24] *Lottmann v. Land and Real Estate Investments*, 2007 WL 4532808 (Cal.App. 2 Dist.) (unpublished); *Goldberg, Sager & Associates v. Gilewski*, 2017 WL 1438571, 2017 N.Y. Slip Op. 50544(U) (N.Y. Kings Cty.) (unpublished).

[25] In *Bianchi v. Ladjen*, 2018 WL 1901945 (N.J.A.D.) (unpublished), the court excluded the testimony of an expert witness who claimed to have closed several thousand residential real estate transactions and who said that the escrowee violated its "standard of care" by drafting "an inadequate escrow agreement" that failed to address the risk of loss due to property damage during the pendency of escrow. The court said the witness' testimony was inconsistent with the terms of the purchase contract as to the same risk.

[26] *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990); *Claussen v. First American Title Guaranty Co*., 186 Cal.App.3d 429, 230 Cal.Rptr. 749 (Cal.App. 6 Dist. 1986); *Gordon v. D & G Escrow Corp*., 48 Cal.App.3d 616, 621-623, 122 Cal.Rptr. 150 (Cal.App. 2 Dist. 1975).

[27] The court placed all of the onus on the insurer for obtaining written instructions, saying that it "failed to execute such an agreement with the parties." *Lacy v. Ticor Title Ins. Co.*, 794 S.W.2d 781 (Tex.App.-Dallas 1990).

[28] *Qube Films Ltd. v. Padell*, 2016 WL 881128 (S.D.N.Y. 2016) (unpublished) (escrow instructions calling for escrowee to release money to one party when other party had determined that conditions for release of money had been met did not obligate escrowee to independently verify that conditions had been met before delivery of money); *Batson v. Rim San Antonio Acquisition, LLC*, 2016 WL 6901312 (S.D.N.Y. 2016) (unpublished) (New York escrowee's fiduciary duty only as broad as scope of written duties; escrowee instructed to deliver money based on written instruction from one party had no implied duty to verify who controlled bank account to which money was delivered); *Madison Square*

A valid and enforceable escrow is formed when all necessary parties have signed escrow instructions.[29] When two or more parties give instructions, they must be consistent to form an enforceable escrow agreement.[30] If the instructions are unclear or inconsistent, the escrowee should

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Development Partnership of Arizona v. Chicago Title Ins. Co., 2015 WL 3501556 (Ariz.App. 1 Div.) (unpublished) (when escrow instructions said that one party was to give notice to both escrowee and other party, escrowee was not required to verify that other party received notice that escrowee received and obeyed); *Ramos v. Romero*, 2016 WL 1239277 (Cal.App. 4 Dist.) (unpublished) (escrowee had no general duty to verify that a person was who he purported to be, and escrow instructions contained a valid disclaimer of such a duty; therefore, escrowee was not liable to buyers for fraud caused by impersonation of sellers); *Iglesias v. Pentagon Title and Escrow, LLC*, 206 Md.App. 624, 51 A.3d 51 (Md.App. 2012) (lender's settlement agent owed no duty to person whose identity was stolen by borrower to detect and stop identity theft, or to verify authenticity of power of attorney given to closer); *Mortensen v. First American Title Co., Inc*., 2013 WL 1222566 (D. Idaho) (unpublished) (escrowee had no duty to woman who gave her husband a power of attorney to verify with her that she had authorized him to sign documents on her behalf; power was valid and had not been revoked as of closing); *Brandt v. Sande, d/b/a Land Title Services*, 299 Mont. 256, 1 P.3d 929, 2000 MT 98 (Mont. 2000) (escrowee not required to verify party paid at direction of principal to verify that he held direct assignment of escrow proceeds); *Capital Salvage v. Chicago Title Ins. Co*., 2004 WL 1753213 (Cal.App. 2 Dist. 2004) (unpublished) (escrowee had no duty to confirm authority of LLC member to sign escrowed documents and escrow instructions); *Vournas v. Fidelity Nat'l Title Ins. Co*., 73 Cal.App.4th 668, 86 Cal.Rptr.2d 490 (Cal.App. 4 Dist. 1999) (no duty to verify authority of trustee); *837 Prairie Avenue LLC v. Palos Verdes Escrow Co., Inc*., 2011 WL 3916936 (Cal.App. 2 Dist.) (unpublished) (escrowee had no duty to confirm authority of LLC member to bind company to purchase agreement and escrow instructions); *Fey Family Limited Partnership v. Commonwealth Land Title Ins. Co*., 2012 WL 662519 (Cal.App. 2 Dist.) (unpublished) (when son claimed to be general partner of partnership in fraudulent sale of property owned by partnership, escrowee had no duty to father, the real general partner, to detect or prevent unauthorized sale); *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Idaho App. 1985) (escrowee not required to verify that consideration had been paid for deed delivered to escrowee for recording); *Hooper v. Commonwealth Land Title Ins. Co*., 285 Pa.Super. 265, 427 A.2d 215 (1981) (escrowee instructed to send funds to pay off mortgage did not have additional duty to verify its later discharge); *Humphreys v. Northwestern Title Co*., 2002 WL 475217 (Cal.App. 1 Dist.) (unpublished) (escrow instruction to "secure" note as deposit into escrow did not create implied duty to verify that instrument had not been forged, distinguishing *Lee v. Escrow Consultants, Inc*., 210 Cal.App.3d 915, 259 Cal.Rptr. 117 (Cal.App. 2 Dist. 1989), which found a cause of action against the escrowee for accepting a forged amendment to the escrow instructions). In *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wash.2d 58, 375 P.3d 651 (Wash. 2016), the Washington Supreme Court resolved the question certified to it, ruling in a resounding and well-supported opinion that a title insurer does not owe a duty of care to the property owner in recording a document. The court said: "[p]laintiffs urge us to hold that justice requires title insurance companies to look behind the signatures on the document and police the parties' agreements against conflicting corporate documents or loan agreements. This is not a just result, and placing this burden on title insurance companies increases their costs, slows the recording process, and frustrates public policy, with no appreciable benefit." Subsequently, the Ninth Circuit Court of Appeals affirmed the dismissal of the claims against the escrowee, in *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 668 Fed.Appx. 760, 2016 WL 4572391 (9th Cir. (Wash.) 2016) (unpublished).

[29] *Edwards v. CBD & Sons*, 2018 WL 2303017 (D.Conn. 2018) (unpublished) (deed escrow not unenforceable based on borrower's argument that he was forced to enter into escrow due to his loan default, when escrow was a required condition to loan forbearance agreement).

[30] *Cloud v. Winn*, 1956 OK 267, 303 P.2d 305 (Okla. 1956); *Calcagno v. Drew*, 694 N.Y.S.2d 248, 1999 N.Y. Slip Op. 06933 (N.Y.A.D. 3 Dept. 1999) (letter from buyer's lawyer became escrow agreement when seller's lawyer wrote that he had "no problem whatsoever" with the instructions); *Babcock Place Ltd. Ptnshp. v. Berg, Lilly, Andriolo & Tollefsen, P.C.*, 2003 MT 111, 315 Mont. 364, 69 P.3d 1145 (Mont. 2003), reh.den. June 5, 2003 (law firm may be sued for malpractice for drafting escrow instructions that were ambiguous and did not adequately protect client). In *Gould v.*

get them clarified before proceeding.[31] An escrowee does not violate any duty to a principal by refusing to perform according to its instruction, when the other principal is giving a contrary instruction.[32] An escrowee was liable to one principal of the escrow for failing to deliver supplemental instructions to the other party for signature, which supplemental instructions clarified the due dates in the escrow.[33]

Once clear instructions are given, the escrowee must obey them even if a party directs the escrowee to disregard them.[34] For example, when a letter of credit was deposited as earnest money, and the letter stated that it was to be drawn on if the buyer defaulted, the escrowee was obliged to draw on the letter even though the buyer forbade it.[35] However, an escrowee does not breach the instructions by obeying a demand from one of the escrow principals for the return of money or a document deposited by that party, unless the instructions state that a deposit, once made, cannot be withdrawn.[36]

An escrowee is not liable if it performs according to its instructions.[37] When the escrow

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Mellick and Sexton, 263 Conn. 140, 819 A.2d 216 (2003), a law firm drafted escrow instructions that were used to collect investors' money for a real estate project. The money was delivered to the law firm's client, who did not use it properly, and the investors lost their money. They sued the law firm. The court found that the lawyer did not represent the investors, and had no duty to build protections for the investors into the escrow instructions.

[31] *Diaz v. United California Bank*, 71 Cal.App.3d 161, 139 Cal.Rptr. 314 (Cal.App. 2 Dist. 1977); *Kirby v. Palos Verdes Escrow Co*., 183 Cal.App.3d 57, 227 Cal.Rptr. 785 (Cal.App. 1 Dist. 1986); *Gardenhire v. Phoenix Title & Trust Co*., 11 Ariz.App. 557, 466 P.2d 776 (1970); *Spaziani v. Millar*, 215 Cal.App.2d 667, 30 Cal.Rptr. 658 (Cal.App. 4 Dist. 1963).

[32] *James v. Shavon Ltd*., 2012 WL 6029813 (Tex.App.-San Antonio) (unpublished).

[33] *1939 Argyle, LLC v. First American Title Ins. Co*., 2009 WL 1816053 (Cal.App. 2 Dist.) (unpublished). The appeals court reinstated the jury award of $1.7 million, most of which was a premium paid by the buyer to the seller to induce him to close on the purchase despite his claim that the buyer had missed a deadline that was clarified in the supplemental instructions.

[34] An attorney-escrowee's email stating that he would not release the signed purchase agreement until the buyer's deposit checks had cleared modified his escrow instructions and prevented his clients from delivering the contract and seeking to enforce it. *Vic's Parking Corp. v. Nash*, 26 Misc.3d 413, 890 N.Y.S.2d 803, 2009 N.Y. Slip Op. 29449 (N.Y.Sup.Ct. 2009). In *Versailles Investments, LLC v. First California Escrow Corp*., 2017 WL 2264490 (Cal.App. 2 Dist.) (unpublished), the buyer reserved the right to assign the purchase contract to an entity and instructed the escrowee to alter the signed deed to run in favor of the entity he formed, which it did. The court held that the buyer had no claim against the escrowee for having complied with his instructions.

[35] *Lacy v. Ticor Title Ins. Co.*, 794 S.W.2d 781 (Tex.App.-Dallas 1990).

[36] In *Mazgani v. S.B.S. Trust Deed Network, Inc*., 2016 WL 379591 (Cal.App. 2 Dist.) (unpublished), the borrower sued the escrowee for allegedly breaching its instructions by allowing the sub-escrowee to return the loan money pursuant to the lender's demand. The lender demanded the money because "the loan had been improvidently funded." The court found that obedience to the lender's instruction was not a breach of the escrow instructions.

[37] In *Colonial Savings & Loan Ass'n v. Redwood Empire Title Co*., 236 Cal.App.2d 186, 46 Cal.Rptr. 16 (Cal.App. 1 Dist. 1965), the instructions required that the insurer-escrowee issue policies insuring the deeds of trust as first liens, but

instructions state that one party is to give a notice to both the escrowee and the other party, the escrowee is not required to verify that the other party actually received the notice that was sent to the escrowee, and which it obeyed.[38]

Instructions may be modified with the consent of all parties.[39] Instructions may not be changed by one party without approval of all other parties.[40] However, when one party changes the instructions and the escrowee acts in reliance on the modified instructions, the other party's failure to repudiate the escrowee's action is ratification, which precludes recovery for breach:

> [A]n unauthorized act of an agent may be ratified by a principal, and when ratified it is the equivalent of an original grant of authority. [citations omitted] On acquiring knowledge of the unauthorized act of an agent, the principal should promptly

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"subject to exceptions No. 2, 3 and 4" of the title commitments. One of those exceptions was for assessments by a special assessment district. Therefore, it was not a breach of instructions to break escrow and issue policies subject to such assessments. In *SO5 501, LLC v. Metro-Dade Title Co*., 109 So.3d 1192 (Fla.App. 3 Dist. 2013), the court held that, because the escrow instructions said the escrowee was required to disburse the earnest money at the seller's direction if buyer defaulted on the contract, the escrowee was not required to ask the buyer if it agreed it was in default before disbursing at the seller's direction. The court said that the escrowee "could not have breached its fiduciary duty by, nor was it grossly negligent for, disbursing the funds in the manner instructed by the developer and required by the escrow agreement."

[38] *Madison Square Development Partnership of Arizona v. Chicago Title Ins. Co*., 2015 WL 3501556 (Ariz.App. 1 Div.) (unpublished).

[39] *Jones v. Title Guar. & Trust Co.*, 178 Cal. 375, 173 P. 586 (1918); 28 Am.Jur.2d *Escrows* §5.

[40] *Ogdahl v. Title Ins. & Trust Co*., 72 Cal.App.3d Supp. 41, 140 Cal.Rptr. 148 (A.D.Sup.Ct. Santa Barbara 1977) (overturned by *Contemporary Investments, Inc. v. Safeco Title Ins. Co*., 145 Cal.App.3d 999, 193 Cal.Rptr. 822 (Cal.App. 4 Dist. 1983)); *Katleman v. U.S. Communities, Inc*., 197 Neb. 443, 249 N.W.2d 898 (1977); *Scholz Homes, Inc. v. Wallace*, 590 F.2d 860 (10th Cir. (Kan.) 1979); *Dickens v. First American Title Ins. Co. of Arizona*, 784 P.2d 717 (Ariz.App. 1989). In *Osborn v. Grego*, 596 P.2d 1233 (Kan. 1979), for example, a completion or "punchlist" escrow on new construction was amended by phone by the builder, without like approval by the homeowner, which was not a binding amendment. However, the homeowner's later acts ratified the amendment. In *Crosby v. Kendall*, 247 Ga.App. 843, 545 S.E.2d 385 (Ga.App. 2001) cert.den., attorney-escrowee David Crosby held funds from investors to be used to renovate buildings purchased by Samuel Caldwell, Crosby's long-time client. Caldwell told the investors that one of Crosby's main duties was to make sure that their money was not released until the requirements in the escrow instructions had been met. However, Crosby took order from Caldwell that contradicted the escrow instructions and left the investors without the collateral and liens that Crosby had been instructed to obtain. The court upheld a judgment against Crosby for damage caused by his failure to follow the investors' instructions: "The jury was authorized to conclude that evidence that Crosby communicated solely with Caldwell and failed to procure the necessary documents from him to fulfill his escrow agent duties showed a conscious disregard for consequences, especially in light of Crosby's past attorney-client relationships with Caldwell. Crosby could have contacted the appellees at any time and told them that he was unable to procure the necessary documents. He could have looked at his own paperwork and seen that the escrow agreement requirements were not being met. Instead, he blindly relied on statements made by a past, and possibly present, client to the detriment of those he represented as an escrow agent. Crosby knew he was not fulfilling the requirements of the escrow agreements, and he admitted that on at least one occasion he acted contrary to the escrow agent agreements in his attempt to help Caldwell."

repudiate the act; otherwise it will be presumed he has ratified and affirmed the act.[41]

When one party modifies instructions as to its deposits, and the other parties are aware of and do not object to the modification, the escrowee may obey the modified instruction.[42] A court order instructing the escrowee to disburse deposited funds in a particular fashion supersedes the escrow instructions.[43]

An escrowee is entitled to enforce an escrow instruction provision requiring the parties to pay a fee for the escrow services.[44]

In California, Arizona, Nevada and other true escrow states, the escrowee often appoints a sub-escrowee or sub-escrow to conduct certain functions of the escrow, most typically the receipt and disbursement of the money deposited into the escrow.[45] On occasion, the sub-escrow is also instructed to record documents on the close of escrow. Often, the sub-escrow is the title insurer or title insurance agency that will issue policies in the transaction. An independent escrow company typically is unable to provide adequate assurances to a title insurer (with whom the escrow company has no contractual relationship) that the escrow company has fully and correctly paid off all liens and loans through the escrow. If the escrowee is unable to induce the title insurer to issue policies in the form prescribed by the escrow instructions, the escrowee is typically unable to comply with an instruction to cause the issuance of policies in a certain form. The sub-escrow arrangement allows the title insurer to control the payoff of loans and liens so that it can issue title insurance policies free of exceptions for the liens that the parties have designated to be paid off through escrow, without having to wait and rely on the recording of lien releases. It can take months for such releases to be recorded, and not all liens are released of record.

Under a sub-escrow, the sole principal is the escrowee. The escrow instructions are given by the escrowee to the sub-escrow. The sub-escrow owes a duty solely to the escrowee. The principals to the main escrow are not parties to the sub-escrow, and the sub-escrow does not owe any duty of

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[41] *Osborn v. Grego*, 596 P.2d 1233, 1237 (Kan. 1979) [citations omitted].

[42] *Common Wealth Ins. Systems, Inc. v. Kersten*, 40 Cal.App.3d 1014, 115 Cal.Rptr. 653 (Cal.App. 4 Dist. 1974).

[43] *Kramer v. Chicago Title & Trust Co.*, 69 Ill.App .3d 1015, 26 Ill.Dec. 275, 387 N.E.2d 1105 (Ill.App. 1 Dist. 1979). In *Securities and Exchange Commission v. Champion-Cain*, ___ F.Supp.3d ___, 2019 WL 4686938 (S.D.Cal. 2019) (not yet released for publication), a title insurer escrowee was found to have breached a duty to the court by not having immediately turned over escrowed money on receipt of a court order instructing that all property of an entity was to be paid to the entity's receiver, despite the fact that many people whose money was part of the escrow pool told the escrowee they did not want the receiver to take control of their money.

[44] In *Bong Je Choi v. Prima Escrow, Inc.*, 2019 WL 5157124 (Cal.App. 2 Dist.) (unpublished), the court enforced an escrow instruction requiring the parties to pay escrow fees based on the proposed sale price despite the fact that escrow did not close, but held that the escrowee was not entitled to also collect prevailing-party attorneys' fees.

[45] See *Siegel v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 1181, 54 Cal.Rptr.2d 84 (Cal.App. 2 Dist. 1996), and *Markowitz v. Fidelity Nat'l Title Ins. Co.*, 142 Cal.App.4th 508, 48 Cal.Rptr.3d 217 (Cal.App. 2 Dist. 2006), for a discussion of the sub-escrow arrangement.

care to those principals, as discussed at §13.4. The role and duties of the sub-escrow are further discussed at §§13.6, 13.9.1 and 13.14.

13.3 Legal Relationship Between Escrowee And Others

FORM 81, Appendix A
Escrowee owes no duty to third parties

The escrowee's legal status is classified somewhat differently in the various states. Some consider the escrowee to be a neutral stakeholder in the transaction.[46]

> The escrow relationship is a stakeholder relationship that carries special duties. ... An escrow agent acts as a neutral third party.[47]

Other states consider the escrowee to be a limited agent of all parties to the escrow.[48]

> [T]he escrow holder is generally considered the agent of both parties to the escrow, and he owes an obligation to each party measured by an application of the ordinary principles of agency. Such agency has been held to be for the limited purpose of the escrow, and to continue until the escrow is closed.[49]

California refers to the escrowee as "the limited agent and fiduciary of all parties to an escrow."[50] This agency "is limited because the escrow agent only represents his principals insofar as

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[46] *Citizens National Bank of Roswell v. Davisson*, 229 U.S. 213, 223 (1913); *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157 (Tex.App. 1992); *Wilson v. Carver Fed. Savings & Loan Ass'n*, 774 S.W.2d 106 (Tex.App.-Beaumont 1989); *Bowles v. Key Title Co.*, 163 Or.App. 9, 986 P.2d 1236 (Or.App. 1999) (escrowee's duty is "to hold and dispose of 'stakes,' pursuant to the parties' instructions... .").

[47] *Bell v. Safeco Title Ins. Co*., 830 S.W.2d 157 (Tex.App. 1992). Note, however, that Texas also considers the escrowee a fiduciary.

[48] *Blackburn v. McCoy*, 1 Cal.App.2d 648, 654, 37 P.2d 155 (Cal.App. 2 Dist. 1934); *Gurley v. Bank of Huntsville*, 349 So.2d 43 (Ala. 1977); *Shaheen v. American Title Ins. Co.*, 120 Ariz. 505, 508, 586 P.2d 1317, 1320 (Ariz.App. 1978); *Fretz v. First American Title Ins. Co*., 161 Ariz. 174, 777 P.2d 672 (App. 1989); *In re Munoz*, ___ B.R. ___, 2019 WL 6528810 (Bkcy.N.M. 2019) (not yet released for publication) (while an escrowee is often termed an escrow agent, it is not the agent of an escrow principal, and certainly not its agent for service of legal process). See also, Nagy, *Escrowees' Duty to Disclose Fraud: An Expansion of the Limited Agency Doctrine*, 22 Ariz. L.Rev. 1146, 1149 (1980); Jacobsen, *California Escrow Agents: A Duty to Disclose Known Fraud?*, 17 Pacific L.J. 309, 312-3 (1985); *Winslow v. Scaife*, 219 Va. 997, 254 S.E.2d 58 (1979).

[49] 30A C.J.S. *Escrows* §10 (footnotes omitted).

[50] *Hannon v. Western Title Ins. Co*., 211 Cal.App.3d 1122, 260 Cal.Rptr. 21, 25 (Cal.App. 1 Dist. 1989) [citing *Kirby v. Palos Verdes Escrow Co*., 183 Cal.App.3d 57, 64-65, 227 Cal.Rptr. 785 (Cal.App. 1 Dist. 1986)]; *Spaziani v. Millar*,

he carries out the escrow instructions... ."[51] Courts in some other states have also held that an escrowee owes at least a limited fiduciary duty to the escrow principals.[52]

The negligence of the escrowee as limited agent may not be imputed to the principals of the

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215 Cal.App.2d 667, 30 Cal.Rptr. 658 (Cal.App. 4 Dist. 1963). In *Blackburn v. McCoy*, 1 Cal.App.2d 648, 37 P.2d 153 (Cal.App. 2 Dist. 1934), the court elucidated: "There seems to be a divergence of opinion in the books as to whether the status of an escrow holder is that of an agent or trustee for the parties to the escrow. Conceding that the escrow instructions created an agency in the defendant Title Guarantee and Trust Company for the several parties to the escrow, as contended for by appellant Blackburn, it could not be a general agency for each one of the parties because their interests were conflicting. The status could only properly be classified as an agency on the theory that there was a limited agency as to each party to the escrow, whereby the duties and obligations owing by the escrow holder to each would not conflict with the duties it owed to the other. The usual purpose that prompts the creation of an escrow is the desire of persons dealing at arm's length with each other to have their conflicting interests handled by one person in such a manner as to adequately protect the rights of each of the parties to the transaction. The fundamental principles underlying the obligations of a general agency would not, and could not, tolerate the operation of an escrow, such as we have here, as a general agency. If the several escrow instructions create in the escrow holder an agency, it must be one limiting the obligations of the escrow holder to each party to the escrow in accordance with the instructions given by such party. This in practice has been and is the underlying principle that has made possible the development of the escrow method of handling transactions which has become such an important factor in conveyancing and other business activities. Upon this theory, it has been given almost universal judicial sanction in this and other jurisdictions." 37 P.2d at 155.

[51] *Hannon v. Western Title Ins. Co.*, 211 Cal.App.3d 1122, 260 Cal.Rptr. 21 (Cal.App. 1 Dist. 1989).

[52] *Takayama v. Schaefer*, 240 A.D.2d 21, 669 N.Y.S.2d 656 (N.Y.A.D. 2 Dept. 1998), held that "an escrow agent can be held liable for breach of the escrow agreement and breach of fiduciary duty as escrowee" (citing *Grinblat v. Taubenblat*, 107 A.D.2d 735, 484 N.Y.S.2d 96 (N.Y.A.D. 2 Dept. 1985), and that "[a]n escrow agent not only has a contractual duty to follow the escrow agreement, but additionally becomes a trustee of anyone with a beneficial interest in the trust." The *Takayama* ruling was upheld in *Baquerizo v. Monasterio*, 90 A.D.3d 587, 933 N.Y.S.2d 869, 2011 N.Y. Slip Op. 08890 (N.Y.A.D. 2 Dept. 2011). In *Sasidharan v. Piverger*, 145 A.D.3d 814, 44 N.Y.S.3d 85, 2016 N.Y. Slip Op. 08387 (N.Y.A.D. 2 Dept. 2016), the court quoted and followed the holdings of *Takayama* and *Baquerizo* that an escrowee "not only has a contractual duty to follow the escrow agreement, but additionally becomes a trustee of anyone with a beneficial interest in the trust [with] a duty not to deliver the property held in escrow to anyone except upon 'strict compliance with the conditions imposed' in the escrow agreement." See also *Thorpe Trucking, LLC v. Devit*, 2003 WL 22233905 (Conn.Super.) (unpublished) (escrowee is a fiduciary); *Knoll v. Butler*, 675 A.2d 1308, 1312 (Pa.Commw. 1996), aff'd 693 A.2d 198 (Pa. 1997) ("An ordinary escrow agreement creates a fiduciary relationship between the agent and the transferor"); *Frenkel v. Baker*, 2014 WL 5697449 (E.D.Pa.) (unpublished); *Posner v. Equity Title Ins. Agency, Inc.*, 222 P.3d 775, 2009 UT App 347 (Utah App. 2009) (escrowee is a fiduciary to all parties to the escrow, with a duty to act in good faith, with loyalty and due care, and to make disclosure). In *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., 2016 WL 7339150 (N.D.Ill.) (unpublished), the court refused to rule that an escrowee's fiduciary duty is limited to its duty to obey written instructions, but did not identify any way in which the fiduciary duty is broader than such obedience. Florida also says that an escrowee owes a fiduciary duty to the escrow principals. *Watkins v. NCNB Nat'l Bank of Fla., N.A.*, 622 So.2d 1063 (Fla.App. 1993). In *Maxfield v. Martin*, 217 Ariz. 312, 173 P.3d 476 (Ariz.App. 1 Div. 2007), rev.den. June 3, 2008, the court held that an Arizona escrowee "has a fiduciary relationship of trust and confidence to the parties to the escrow" that has two facets: "to comply strictly with the terms of the escrow agreement and to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow." The Arizona statement of an escrowee's fiduciary duties may also be found in *Maganas v. Northroup*, 135 Ariz. 573, 663 P.2d 565 (1983); *Burkons v. Ticor Title Ins. Co. of California*, 168 Ariz. 345, 813 P.2d 710 (1991); *Mur-Ray Management Corp. v. Founders Title Co*., 169 Ariz. 417, 819 P.2d 1003 (Ariz.App. 1991); and *Surowiec v. Capital Title Agency, Inc.*, 790 F.Supp.2d 997 (D.Ariz. 2011).

escrow.[53] Nor, in most cases, may the escrowee's knowledge be imputed to a principal to the escrow.[54] However, when the escrowee participates in fraud, its actions are imputed to its principal.[55]

The California escrowee is not a trustee, and does not have the powers and obligations given to trustees in that state.[56] Some states consider the escrowee a fiduciary.[57] In some states at least,

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[53] *Common Wealth Ins. Systems Ins. v. Kersten*, 40 Cal.App.3d 1014, 115 Cal.Rptr. 653 (Cal.App. 4 Dist. 1974), stating "[a]lthough for certain purposes an escrow holder has been termed an agent of the parties to the escrow (see Spaziani v. Millar, Supra, 215 Cal.App.2d 667, 682-683, 30 Cal.Rptr. 658), the relationship is not such that justifies imputation of contributory negligence. Imputed contributory negligence is a disfavored doctrine. (Prosser, Torts (4th ed.) § 74, p. 488; 2 Harper and James, Law of Torts, § 23, pp. 1264-1266.) A plaintiff will not be barred from recovery by the negligence of a third person unless the relation between them is such that plaintiff would be vicariously liable as a defendant to another who may be injured, such as the relationship between master and servant or persons engaged in a partnership or joint venture. (Prosser, Supra, p. 488; 28 Harper and James, Supra, p. 1273.) The relationship between a party to an escrow and the escrow holder is not that of master and servant. The former justification for the doctrine of respondent superior which was based on control has now been supplanted by the rationale of allocation of risk of loss. (Hinman v. Westinghouse Elec. Co., 2 Cal.3d 956, 959, 88 Cal.Rptr. 188, 471 P.2d 988.) Neither the rationale of control nor allocation of risk justifies making an innocent party to an escrow vicariously liable for torts of the escrow holder."

[54] "An agent's notice of matters which is outside the scope of the agency or not related to its purposes is not imputed to the principal. 3 C.J.S. Agency § 436, p. 301. Before notice or knowledge of an agent is imputed to his principal it must first be shown that the authority of such agent extended to the very matter about which and concerning which such knowledge or notice was acquired. … As escrow agent, the authority of the title company did not extend to the investigation of title. In this regard, the course and scope of the title company's authority was limited to the closing of the loan. Since the title company acquired no knowledge of the plaintiffs' claim while acting in the scope of its duties as escrow agent, no question arises with regard to imputed notice." *Tamburine v. Center Savings Ass'n*, 583 S.W.2d 942, 949 (Tex.App. 1979). In *Estates of Collins v. Dancy*, 205 Cal.App.4th 1238, 141 Cal.Rptr.3d 227 (Cal.App. 3 Dist. 2012), the court held that the escrow officer's knowledge would be imputed to the buyer, but the escrow officer did not know that a deed had been forged. The court said the knowledge of a title officer at the same company was *not* imputed to the buyer, however.

[55] See, for example, *GreenPoint Mortgage Funding, Inc. v. Stewart Title Guar. Co*., 49 A.D.3d 687, 854 N.Y.S.2d 185, 2008 N.Y. Slip Op. 02552 (N.Y.A.D. 2 Dept. 2008), in which the court held there were triable questions of fact as to whether or not the actions of a closing attorney should negate policy coverage, when the closer was accused of participating in a title fraud. The court followed the standard rubric that "[w]here a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed," citing *Fidelity Nat'l Title Ins. Co. of N.Y. v. Consumer Home Mortgage*, 272 A.D.2d 512, 514, 708 N.Y.S.2d 445 (N.Y.A.D. 2 Dept. 2000).

[56] *Hannon v. Western Title Ins. Co.*, 211 Cal.App.3d 1122, 260 Cal.Rptr. 21 (Cal.App. 1 Dist. 1989).

[57] *NGM Ins. Co. v. Secured Title & Abstract, Inc*., 2008 WL 4276932 (E.D.Va.) (unpublished), related decision, 2008 WL 4642957 (E.D.Va.) (unpublished); *Boatright v. Texas American Title Co*., 790 S.W.2d 722 (Tex. 1990); *Bell v. Safeco Title Ins. Co*., 830 S.W.2d 157 (Tex.App. 1992); *Tucson Title Ins. v. D'Ascoli*, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963); *Francis v. Eisenmayer*, 171 Cal.App.2d 221, 340 P.2d 54 (Cal.App. 2 Dist. 1959); *Karras v. Title Ins. & Guarantee Co*., 118 Cal.App.2d 659, 258 P.2d 866 (Cal.App. 1 Dist. 1953); *Chicago Title & Trust Co. v. Cleary*, 319 Ill.App. 83, 48 N.E.2d 576 (Ill.App. 1 Dist. 1943); *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973); *T.T.S.G., Inc. v. Kubic*, 226 A.D.2d 132, 639 N.Y.S.2d 825 (A.D. 1 Dept. 1996); *Solondz v. Barash*, 639 N.Y.S.2d 561 (A.D. 3 Dept. 1996); *Kaarela v. Birkhead*, 600 N.E.2d 608 (Mass.App. 1992); *Bakewell v. Heritage Nat'l Bank*, 890 S.W.2d 653 (Mo.App. 3 Dist. 1994); *National Building & Contracting Co., Inc. v. Alerion Bank & Trust*

however, the escrowee closing a loan on behalf of a lender does not owe a fiduciary duty to the borrower.[58] Florida classes the escrowee as a fiduciary when the escrow parties are not represented by counsel:

> [W]here neither the seller nor the purchaser is represented by attorneys at law, [the insurer-escrowee] acts as agent for both and in such capacity is acting in a fiduciary relationship.[59]

Other courts have ascribed different but similar roles and labels to the functions of the escrowee.[60] Texas imposes on an escrowee what it describes as the twin duties of loyalty and "full disclosure."[61]

The escrowee's position entitles it to seek legal relief in a dispute over the escrow,[62] rescind the accidental recording of a deed,[63] or recoup funds paid out of escrow.[64] See §13.14 regarding the escrowee's rights to recover against third parties.

On occasion, the escrowee is also the agent of or attorney for one of the principals. That dual

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Co., 772 So.2d 938 (La.App. 2000), reh.den., writ den. 787 So.2d 310, 317 (La. 2001) ("[c]ourts in this state have held that where a financial institution acts as a fiduciary and violates an escrow agreement, it is liable to make restitution and pay for all damages that are proximately caused by the violation."); *Tavenner v. The Talon Group*, 2012 WL 6022836 (W.D.Wash.) (unpublished) (escrowee's mark-up of recording and other charges violated its fiduciary duty to borrower on refinance loan closed for lender); *Thorpe Trucking, LLC v. Devit*, 2003 WL 22233905 (Conn.Super.) (unpublished) (escrowee is a fiduciary). See Coxon, *Successfully Defending Fiduciary Duty Claims*, For The Defense, August 2000, p. 14.

[58] *Richardson v. New Century Mortgage Corp.*, 2005 WL 1554026 (N.D.Miss. 2005) (unpublished), aff'd 202 Fed.Appx. 773, 2006 WL 2990260 (C.A.5 (Miss.)) (unpublished); *Central Bank v. Rowe Construction, Inc*., 2011 WL 1119872 (Minn.App.) (unpublished).

[59] *Gerson v. Broward County Title Co*., 116 So.2d 455, 457 (Fla. 1959).

[60] The court said that escrowed funds are held in "a trust-like arrangement," in *Pippin v. Kern-Ward Bldg. Co.*, 8 Ohio App. 3d 196, 198, 456 N.E.2d 1235, 8 O.B.R. 266 (Ohio App. 1982). "The depositary under an escrow agreement is an agent of both parties, as well as a paid trustee with respect to the purchase money funds placed in his hands." Id. [quoted with approval in *Shafron Enterprises Defined Benefit Pension Plan v. Midland Title Security Inc*., 602 N.E.2d 253 (Ohio App. 1992)]. One court found the escrowee to be the bailee of a deed, which bailment duty was violated when the deed was accidentally recorded against instruction. *Montano v. Land Title Guar. Co.*, 778 P.2d 328 (Colo.App. 1989).

[61] *City of Forth Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969); *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728 (Tex.App.-Houston 2006); *In re SMIC, Ltd*., 2013 WL 4078704 (Bkcy.N.D.Tex.) (unpublished); *Luppino v. York*, 2017 WL 4415661 (W.D.Tex.) (unpublished). This duty is further discussed at §13.9.3, in the context of the alleged duty to disclose facts suggesting that one party to the escrow is perpetrating a fraud.

[62] *Title Guaranty Escrow Service v. Powley*, 2 Haw.App. 265, 630 P.2d 642 (1981).

[63] *LaSalle National Bank v. Kissane*, 163 Ill.App.3d 534, 114 Ill.Dec. 635, 516 N.E.2d 790 (Ill.App. 1 Dist. 1987).

[64] *Julian W. Curtis Co. v. District-Realty Title Ins. Corp.*, 267 A.2d 830 (D.C. 1970).

role does not grant the person additional powers as escrowee, but may impose an additional burden of care on the escrowee as to the other parties to the escrow.[65] The nature of the agent's existing duties to one principal may preclude that person from acting as escrowee. In its deferred exchange regulations, the Internal Revenue Service prohibits a party from acting as intermediary if it is the agent or legal representative of the taxpayer.[66] Note, however, that the role of intermediary is not strictly that of escrowee. The subject of exchange intermediaries is fully discussed at §13.15. Some states hold that an attorney for one principal may act as escrowee,[67] but others do not permit the practice.[68] A Connecticut court ruled that an attorney for one of the principals was disqualified from acting as escrowee, because his status as to his client prevented him from acting as the limited agent of the other principal. Therefore, the funds held by the attorney were not held in escrow at all, even

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[65] In *Crosby v. Kendall*, 247 Ga.App. 843, 545 S.E.2d 385 (Ga.App. 2001) cert.den., an attorney-escrowee appealed from a judgment, complaining that the trial court erred in telling the jury "that an attorney acting as an escrow agent 'must meet the standards of the legal profession, including those set forth in the code of professional responsibility' and in instructing the jury on the State Bar of Georgia conduct standards governing attorneys." The appellate court did not decide if an attorney-escrowee has such a duty, because it found that Crosby violated the fiduciary duty applicable to all escrowees. In *Denton v. Good Way Oil 902 Corp*., 48 So.3d 103, 35 Fla. L. Weekly D2502 (Fla.App. 4 Dist. 2010), reh.den. Dec. 21, 2010, the court found that an escrowee did not have the power to speak for the seller in agreeing to extend the closing date, absent evidence that the seller delegated that authority, although the escrowee had served as the seller's attorney in other deals.

[66] 26 U.S.C. § 1031.

[67] In *Andrews v. Carmody*, 2001 WL 758735 (Ohio App. 11 Dist.) (unpublished), the court noted that, in Ohio, "in real estate transactions, an attorney may act as the attorney for one of the parties and the escrow agent for both parties." It relied on *Saad v. Rodriguez*, 30 Ohio App.3d 156 (1986). A Wisconsin court announced the rule that an attorney may serve as an escrowee, citing *Andrews v. Carmody* from Ohio. *Buena Vista Shores Marina, LLC v. Poston*, 2006 WL 1751349 (Wis.App. 2006) (unpublished). Florida takes the view that an attorney for one of the parties may act as an escrowee, but in doing so takes on duties to the other principal. See *The Florida Bar v. Joy*, 679 So.2d 1165 (1996), in which the court held that a lawyer for one of the parties was in fact an escrowee, but in becoming such he had taken on a new role and duties: "Regardless of the escrow agent's other relationships or duties to the principal parties (lawyers often hold funds in escrow where their client is one principal and some other non-client is another principal party) when principal parties agree upon an escrow agent, by undertaking to act as such, the escrow agent establishes a new legal relationship to the principal parties and by an expressed agreement or by agreement implied in law, agrees to certain basic inherent matters. The relationship established is that of principal and agent and involves the escrow agent being an agent of, and owing a fiduciary duty to, all of the principal parties." Id. at 1167 [quoting *United American Bank of Central Florida, Inc. v. Seligman*, 599 So.2d 1014, 1016 (Fla.App. 5 Dist. 1992)]. In *Joy*, the attorney failed this duty miserably, which may be an indication that the Florida position is not good public policy.

[68] See *Janson v. Cozen and O'Connor*, 450 Pa.Super. 415, 676 A.2d 242 (1996), in which the court ruled that an attorney could not have been holding funds as an escrowee because: "[A]s a general rule, an instrument or funds cannot be deposited as an escrow with an agent or attorney of the grantor or obligor, because the possession of the instrument by such agent or attorney is equivalent to possession of it by the grantor or obligor and is revocable by him. 30A C.J.S. *Escrows* § 7d 984." 676 A.2d at 247. Another example of an attorney acting as escrowee while representing one of the parties is found in *In re Discipline of Two Attorneys*, 421 Mass. 619, 660 N.E.2d 1093 (1996). Also see the cases in §13.9.2 analyzing the issue of the attorney's role in explaining documents to the non-client when the attorney is acting as an escrowee.

though that was the agreement of both parties.[69] The state legislature acted immediately to overturn the decision, passing a law saying that "[n]o escrow arrangement shall be ineffective, invalid or unenforceable because the escrow holder is the attorney-at-law, law firm or agent for one or more parties to the escrow... ."[70]

The instructions may define the nature of the relationship between the parties. If so, a principal may not later impose a standard of care on the escrowee that is contrary to the instructions. For example, in *Nichols v. Chicago Title Ins. Co.*,[71] the escrow agreement stated:

> The parties hereto agree ... that they are not nor does this agreement create ... a trust relationship ... or any other legal or juridical relationship other than that of independent, contracting parties ... .[72]

The court found that this acknowledgment precluded the assertion that the escrowee was the fiduciary of the escrow party.

The escrowee is not a general agent of, or an attorney, advisor or advocate for, any of the principals, and "has no duty to 'police' a transaction for the parties."[73] Such a role would conflict

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[69] *Galvanek v. Skibitcky*, 55 Conn.App. 254, 738 A.2d 1150 (Conn.App. 1999).

[70] Public Act 00-74, validating escrows in which "the escrow holder is the attorney ... for one or more of the parties to the escrow agreement." The statute was found to ratify the effectiveness of an attorney escrow established before the law's effective date, in *Rockwell v. Klein*, 2000 WL 1887846 (Conn.Super. 2000) (unpublished).

[71] 107 Ohio App.3d 684, 669 N.E.2d 323 (Ohio App. 8 Dist. 1995).

[72] 669 N.E.2d at 332.

[73] *State Bar v. Security Escrows. Inc*., 233 Or. 80, 377 P.2d 334 (1962); *Stanton v. Bank of Am, N.A*., 2010 WL 4176375 (D. Hawaii) (unpublished); *Atooi Aloha, LLC v. Gaurino*, 2018 WL 650194 (D. Hawaii 2018) (unpublished). The court said the escrowee does well to advise the parties that they should obtain counsel, in *Styrk v. Cornerstone Investments, Inc*., 61 Wash.App. 463, 810 P.2d 1366 (1991). An attorney who acts as an escrowee does not convert his or her work as escrowee into legal services. In *Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A*., 671 So.2d 805 (1996), the defendant had acted as both attorneys for the plaintiff and as escrowee. It defended a suit brought on its escrow obligations by asserting the two-year statute of limitations for professional malpractice. The court rejected the argument, holding: "The vocation of escrow agent does not qualify as a profession under the statute because a four-year college degree is not required for an escrow agent. [citation omitted] Regardless of the benefits defendants derived from their knowledge of the law in the fulfillment of their duties as escrow agent, they were not acting as plaintiffs' attorneys." Id. See also *Gonzales v. American Title Co. of Houston*, 104 S.W.3d 588 (Tex.App.-Houston (1 Dist.) 2003), reh.den. (May 16, 2003), rev.den.(Mar 05, 2004) (sloppy closing practices did not support a claim that escrowee participated in claimed fraud to deceive borrowers about the interest rate on their loan); *Schultz v. Rhode Island Hospital Trust Nat'l Bank, N.A.*, 94 F.3d 721 (5th Cir. 1996) (escrowee had no duty to add conditions to disbursement of money to protect principal); *Tesoro Coast, LLC v. United Escrow Co*., 2011 WL 3716985 (Cal.App. 2 Dist.) (unpublished) (escrow company not liable to customer for having recommended a 1031 company that stole the customer's money, because it had no duty to investigate company before making referral and the escrow officer had no reason to suspect problems with the company). In *Forbes v. Chicago Title Ins. Co.*, 2012 WL 541509 (Cal.App. 5 Dist.) (unpublished), the court held that the escrowee had no duty to determine whether or not the property description was accurate, following the long-standing rule in California that "the escrow holder has no general duty to police the affairs of its depositors." In *Mortensen v. First*

with the escrowee's proper role of neutral stakeholder in the transaction:

> An escrow holder, by definition, is a neutral party with no obligation to either party to the transaction except to carry out the terms of the escrow instructions. "They owe no duty to advise the parties on their legal rights ... [and] [t]hey have no reason to protect the rights of any one party as against another."[74]

The escrowee also is not charged with making the transaction happen or causing any of the principals to perform their contractual obligations, including to command them to make the deposits into escrow that are contemplated by the instructions, as is discussed at §13.8. The escrowee is not a tax advisor, and is not liable to a taxpayer for taxes and expenses resulting from the fact that an exchange of property does not qualify for tax deferral.[75] The escrowee is not the title company, and has a limited obligation to explain title information as necessary, and closing documents signed by parties, as discussed at §§13.9.1 and 13.9.2.

Further, the escrowee is not the messenger or mediator between the parties. Rather, as the court explained in *Bowles v. Key Title Co.*,[76] since the escrowee may not favor or influence any of the escrow principals, it was not the escrowee's "responsibility nor its prerogative" to advise one party of the other's statement that "the deal was off." The court explained:

> Indeed, it may well have been an improper intrusion into the parties' transaction if [escrowee] had done what plaintiff maintains it was required to do and had informed [buyer] of the [seller's] professed unwillingness to proceed. Such a disclosure potentially could have impeded or prevented subsequent efforts by the parties to revitalize their own transaction, had they otherwise had the interest and the desire to do so.
>
> In any event, in the absence of a contractual or other relationship beyond the usual escrow arrangement, it is not the function of an escrow agent to monitor, steward or salvage the business relationship of the principals. It is the principals' own responsibility to create, conduct and communicate with one another about their fundamental business and contractual dealings. In other words, it is normally the

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American Title Co., Inc., 2013 WL 1222566 (D. Idaho) (unpublished), the plaintiff argued that the escrowee should have warned her that her divorce property settlement agreement was a terrible bargain. The court found that First American "was not under any duty to act, give advice, or act on behalf of Ms. Mortensen," and thus it had not assumed a fiduciary duty to her. In *Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003 (8th Cir. (Minn.) 2015), the court held that an escrowee was not the agent of a developer-seller, and could not be sued for the alleged fraud of the developer under the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1703 or under state law.

[74] *McDonald v. Title Ins. Co. of Oregon*, 49 Or.App. 1055, 621 P.2d 654, 657 (1980) (quoting *State Bar v. Security Escrows, Inc*., 233 Or. 80, 82, 377 P.2d 334 (1962)).

[75] *Callicutt v. Professional Services of Potts Camp, Inc*., 974 So.2d 216 (Miss. 2007).

[76] 163 Or.App. 9, 986 P.2d 1236 (Or.App. 1999).

> responsibility of the parties rather than that of their escrow agent to stay informed about such fundamental aspects of their business relationship as whether they continue to have one.[77]

Several states take the view that performing a closing or escrow, or preparing documents incident to an escrow, is the practice of law.[78] In some states, escrowees are licensed, and their conduct regulated,[79] at least in part to overcome concerns about the unauthorized practice of law by

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[77] *Bowles v. Key Title Co.*, 163 Or.App. at 18, 986 P.2d at 1241 (Or.App. 1999).

[78] In Massachusetts, non-attorneys are not permitted to perform closings, because such services are considered to be the practice of law. *In the Matter of Mid-Atlantic Settlement Services, Inc.*, 755 A.2d 389 (2000). In *Massachusetts Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc.*, 13 Mass.L.Rptr. 633, 2001 WL 669280 (Mass.Super. 2001), a corporate title agency was found to have practiced law without a license by evaluating title, drafting documents and representing lenders as closing agent. A federal court found the Massachusetts definition of practice of law unconstitutional, in *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Information Services, Inc.*, 609 F.Supp.2d 135 (D.Mass. 2009). See also, *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Information Services, Inc.*, 642 F.Supp.2d 58 (D.Mass. 2009). In *The Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services*, 946 N.E.2d 665 (Mass. 2011), the court ruled that a person does not practice law by issuing a title insurance policy, ordering a title examination or filling out a HUD-1. However, an attorney must attend and do something worthwhile at closings, and opine on title. Other states also have banned lay persons from conducting closings or drafting documents. See *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. 1992); *Ohio State Bar Ass'n v. Dalton*, 124 Ohio St.3d 514, 924 N.E.2d 821, 2010-Ohio-619 (Ohio 2010); *GRECCA, Inc. v. Omni Title Services, Inc.*, 277 Ga. 312, 588 S.E.2d 709 (Ga. 2003); Supreme Court of Georgia Formal Advisory Opinion No. 13–1, No. S14U0705, issued September 22, 2014, found at 2014 WL 4669283 (non-lawyer may not conduct witness real estate closing); and *Dijkstra v. Carenbauer*, 2014 WL 791140 (N.D.W.Va. 2014) (unpublished) (non-lawyer may not conduct witness real estate closing). In 1987, the South Carolina Supreme Court announced that, for the safety of the public, "real estate and mortgage loan closings should be conducted only under the supervision of attorneys." *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). The court has been disciplining lawyers ever since then. See *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (S.C. 2003); *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (S.C. 2006); *In the Matter of Joseph Wendell Arsi*, 357 S.C. 8, 591 S.E.2d 627 (S.C. 2004); *In the Matter of Stephen M. Pstrak*, 357 S.C. 1, 591 S.E.2d 623 (S.C. 2004); *In re James*, 405 S.C. 17, 747 S.E.2d 169 (S.C. 2013) (lawyer disbarred for theft of closing money); *In re Breckenridge*, 416 S.C. 466, 787 S.E.2d 466 (S.C. 2016), reh.den. July 18, 2016 (South Carolina Supreme Court reprimanded attorney for allowing a non-lawyer to disbursing closing funds, which that state considers the practice of law). In *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 420 S.C. 452 (S.C. 2017), the South Carolina Supreme Court ruled that the procedures used by Quicken Loans' title agency did not cause it to commit the unauthorized practice of law, because attorneys licensed in the state performed all title-related tasks that are the practice of law. The court thus found that a proposed class of plaintiffs had no grounds to sue the lender and title agency.

[79] See Cal.Fin.Code § 17200 (West 1982): "It shall be unlawful for any person to engage in business as an escrow agent within this State except by means of a corporation duly organized for that purpose licensed by the commissioner as an escrow agent." Oregon, for example, requires a person to be licensed in order to be "engag[ed] in the business of an escrow agent" or to "act in the capacity of an escrow agent." ORS 696.511(1). See also: New Mexico rule 13.14.4 NMAC, effective 1/1/2001; Washington State rule Chapter 208-680 WAC, Escrow Agent Registration Act, filed 9/15/2000; Virginia's Consumer Real Estate Settlement Protection Act (CRESPA) permits non-lawyers to conduct real estate closings and regulates the licensing and oversight of real estate settlement agents, including lawyers, to allow them to perform escrow, closing, or settlement services as expressly defined under the Act. Va. Code Ann. §§ 6.1-2.19-2.29 (1950). CRESPA was interpreted in *Fears v. Virginia State Bar*, 2000 WL 249247 (Va.Cir.Ct.) (unpublished).

escrow or title companies or their non-attorney employees.[80] Other states hold that an escrowee does not practice law or assume the duties of an attorney by preparing closing documents.[81]

13.4 Duty Of Care And Parties To Whom Owed

An escrowee owes a duty of reasonable care to the escrow parties (known as principals), and that duty is owed only to the escrow parties.[82] The escrowee must comply strictly with the instructions of the principals. If it delivers the deposits contrary to instructions or otherwise breaches that duty, it is liable to the injured escrow principal for breach of contract.[83] The escrowee is not

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[80] In *Coast Security Mortgage Corp. v. Real Estate Agency,* 331 Or. 348, 15 P.3d 29 (Or. 2000), the Oregon Supreme Court held that a mortgage broker did not engage in the business of an escrow agent by going to homes to have documents and escrow instructions signed and notarized. The court accepted the mortgage broker's explanation that he was merely a messenger for the escrow company. It noted that the Oregon escrow law forbids an escrowee from giving legal advice. The court reversed a decision by the appeals court found at 155 Or.App. 579, 964 P.2d 306 (Or.App. 1998). In *Bishop v. Jefferson Title Co., Inc.*, 107 Wash.App. 833, 28 P.3d 802 (Wash.App. 2 Div. 2001), the court found that an escrow agent may be sued for malpractice because its non-attorney escrow officer prepared documents not on the approved list of fill-in-the-blank forms, and did not tell the customers about the limits of what type of document she was permitted to prepare. The court also found that she bungled the form, going beyond inserting "objective data" to preparing a document that "she did not understand." She wrote clauses "without knowing or understanding the legal impact of" what she had written. The court also found the escrow officer failed her duty to "advise the parties of the limitations of the services rendered" and disclose to them in writing using a five-page form. The parties got the form, but the escrow officer did not also orally inform them of the limits of her services.

[81] For example, in *Poferl v. National Title Co*., 2001 WL 267464 (Minn.App.) (unpublished), the court held: "[Lender] did not take the precaution of retaining counsel or other professionals to advise him about the legality of the loan agreement. Instead, appellant edited one of his previous loan agreements and instructed National Title to draft the promissory note in accordance with his instructions. Accordingly, appellant had neither a good-faith basis to rely on respondents' attorney, nor a good-faith basis to rely on National Title."

[82] A person is not a party to an escrow unless he delivers instructions, because escrow is a contract. *Noroian v. Fidelity Nat'l Title Ins. Co*., 2004 WL 308173 (Cal.App. 5 Dist. 2004) (unpublished). The escrowee owes no continuing duty to a person who has been substituted out as a party to the escrow. *Silver Spring Oasis, LLC v. Lawyers Title of Arizona, Inc*., 2014 WL 47342 (Ariz.App. Div. 1) (unpublished) (citing *Luce v. State Title Agency, Inc*., 190 Ariz. 500, 950 P.2d 159 (Ariz.App. Div. 1 1997)). A party suing over lender closing instructions must establish that it was the lender who gave the instructions and funded the loan; an admission of that alleged "fact" by the escrow officer, which she later recanted, was not proof that the plaintiff was the party to the loan closing instructions. *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., 2016 WL 7339150 (N.D.Ill.) (unpublished).

[83] *Tucson Title Ins. v. D'Ascoli*, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963); *Francis v. Eisenmayer*, 171 Cal.App.2d 221, 340 P.2d 54 (Cal.App. 2 Dist. 1959); *Karras v. Title Ins. & Guarantee Co*., 118 Cal.App.2d 659, 258 P.2d 866 (Cal.App. 1 Dist. 1953); *Chicago Title & Trust Co. v. Cleary*, 319 Ill.App. 83, 48 N.E.2d 576 (Ill.App. 1 Dist. 1943); *Banville v. Schmidt,* 37 Cal.App.3d 92, 112 Cal.Rptr. 126 (Cal.App. 3 Dist. 1974); *Amen v. Merced County Title Co.,* 58 Cal.2d 528, 25 Cal.Rptr. 65, 375 P.2d 33 (Cal.App. 4 Dist. 1962); *Common Wealth Ins. Systems, Inc. v. Kersten,* 40 Cal.App.3d 1014, 115 Cal.Rptr. 653 (Cal.App. 4 Dist. 1974); *Hannon v. Western Title Ins. Co*., 211 Cal.App.3d 1122, 260 Cal.Rptr. 21 (Cal.App. 1 Dist. 1989); *Shore Financial Services, Inc. v. Lakeside Title and Escrow Agency, Inc*., 2013 WL 2223781 (Mich.App.) (unpublished), rev.den. December 23, 2013, 495 Mich. 914, 840 N.W.2d 331 (Mem), 2013 WL 6800563 (Mich.) (loan closer not liable for borrower's failure to comply with loan condition when closer received no instruction on the subject).

liable to any of the principals if it obeys its instructions.[84]

The escrowee's standard of care is to exercise ordinary skill and diligence in performing the written escrow instructions.[85] If the escrowee does not carry out its instructions with ordinary skill and diligence, it is liable for loss proximately caused by such negligence.[86] An escrowee has an obligation to do all of the things normally done by an escrowee that are explicit or implicit in its instructions and not expressly excluded thereby.[87] However, the escrowee's duty of care may not be increased based on expert testimony about supposed industry customs suggesting some higher standard of care or a duty to take an action that is not recited in the escrow instructions.[88]

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[84] In *Dailey v. Thorpe*, 445 S.W.3d 785 (Tex.App.-Houston 2014), reh.den. (Oct 23, 2014), the court held that an escrow officer who obeyed all written instructions was not liable to the sellers for allegedly conspiring with the buyers to defraud the sellers, when the claimed instruments of that fraud were made part of the escrow instructions. In *Mazgani v. S.B.S. Trust Deed Network, Inc*., 2016 WL 379591 (Cal.App. 2 Dist.) (unpublished), the borrower sued the escrowee for allegedly breaching its instructions by allowing the sub-escrowee to return the loan money to the lender when the lender demanded the return of the money because "the loan had been improvidently funded." The court found that obedience to the lender's instruction was not a breach of the escrow instructions. The court also held that the escrowee did not violate a duty to the buyer under the escrow instructions by paying large loan fees, which the court noted were paid from the seller's proceeds and thus were not a charge against the buyer.

[85] *Biadi v. Lawyers Title Ins. Corp*., 374 So.2d 30 (Fla.App. 1979); *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990), citing *Common Wealth Ins. Systems, Inc. v. Kersten*, 40 Cal.App.3d 1014, 115 Cal.Rptr. 653 (Cal.App. 4 Dist. 1974), in turn citing *Amen v. Merced County Title Co*., 58 Cal.2d 528, 25 Cal.Rptr. 65, 375 P.2d 33 (Cal.App. 4 Dist. 1962); *Rianda v. San Benito Title Guar. Co*., 35 Cal.2d 173, 217 P.2d 25 (Cal. 1950).

[86] *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990), citing *Common Wealth Ins. Systems, Inc. v. Kersten*, 40 Cal.App.3d 1014, 1030-1031, 115 Cal.Rptr. 653 (Cal.App. 4 Dist. 1974), in turn citing *Amen v. Merced County Title Co.*, 58 Cal.2d 528, 532, 25 Cal.Rptr. 65, 375 P.2d 33 (Cal.App. 4 Dist. 1962); *Rianda v. San Benito Title Guar. Co*., 35 Cal.2d 173, 217 P.2d 25 (Cal. 1950); *Banville v. Schmidt*, 37 Cal.App.3d 92, 112 Cal.Rptr. 126 (Cal.App. 3 Dist. 1974); and *Spaziani v. Millar*, 215 Cal.App.2d 667, 30 Cal.Rptr. 658 (Cal.App. 4 Dist. 1963).

[87] *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990); *Bruckman v. Parliament Escrow Corp*., 190 Cal.App.3d 1051, 1056, 235 Cal.Rptr. 813 (Cal.App. 2 Dist. 1987); *Alliance Bank v. Dykes*, 2012 WL 6734457 (Minn.App.) (unpublished) (lender's instruction to secure a first lien was not an implicit instruction prohibiting subordinate financing obtained by borrowers, and borrowers had no claim against escrowee because it did not prevent them from closing on subordinate financing).

[88] In *Bianchi v. Ladjen*, 2018 WL 1901945 (N.J.A.D.) (unpublished), the court excluded the testimony of an expert witness who claimed to have closed several thousand residential real estate transactions and who said that the escrowee violated its "standard of care" by drafting "an inadequate escrow agreement" that failed to address the risk of loss due to property damage during the pendency of escrow. The court ruled that the escrowee had no authority to alter the terms of the purchase contract allocating the risk of loss between the parties as the expert had suggested. The court was "disinclined to endorse a novel theory of liability for title agents that could have a significant public policy impact, in the absence of the recognition of such proposed duties by the Supreme Court or regulatory authorities." In *Pyper v. Reil*, 2018 UT App 200, 437 P.3d 493 (Utah App. 2018), the court rejected the testimony of an escrow expert who opined that it was customary in the escrow business to halt a transaction when there were indications that one party might be attempting to defraud the other party. The court said that it would be bad public policy to create a new and novel legal

In some jurisdictions, a suit for breach of escrow duties sounds in tort rather than contract. However, the escrow agreement itself is a contract and, in some jurisdictions, an action may lie in contract for breach of the agreement.[89] Upon the escrowee's breach of an instruction or an implied promise arising out of the escrow agreement, the injured party acquires a cause of action for breach of contract.[90] This subject is further discussed in §13.11, which covers the damages payable for breach of escrow instructions.

The escrowee does not owe a duty of care to parties who are not principals to the escrow.[91] California has a well-developed body of case law holding that the escrowee has no duty of care to parties whose only relationship to the escrow is that they are to be paid through it.[92] The seminal

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duty for an escrowee based solely on what a witness claims to be industry custom.

[89] *Joe Keresztury Homes, Inc. v. Commerce Land Title of San Antonio, Inc.*, 1998 WL 130245 (Tex.App.-San Antonio) (unpublished) (escrowee sued in contract, not tort); *Country Title, L.L.C. v. Jaiyeoba*, 2016 WL 66616 (Tex.App.-Houston) (unpublished) (because escrow is contractual in Texas, customer was entitled to be paid her out-of-pocket losses caused by escrowee's errors, but not for alleged harm to her credit rating or punitive damages); *Bear Creek Planning Comm. v. Title Ins. & Trust Co*., 164 Cal.App.3d 1227, Cal.Rptr. 172 (Cal.App. 3 Dist. 1985) (escrowee stipulated that it was "contractually bound to record" a document); *A Good Time Rental, LLC v. First American Title Agency, Inc.*, 259 P.3d 534 (Colo.App. 2011) (escrow is a contract; tort claims on escrows are barred by economic loss rule); *IQ Holdings, Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861 (Tex.App.-Houston 2014); *Luppino v. York*, ___ F.Supp.3d ___, 2017 WL 4415661 (W.D.Tex. 2017) (permanent citation not yet available) (when escrow is performed under written instruction, the relationship is contractual and the parties may not sue the escrowee for negligence).

[90] *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990); *Rianda v. San Benito Title Guar. Co*., 35 Cal.2d 170, 173, 217 P.2d 25 (Cal. 1950); *Claussen v. First American Title Ins. Co*., 186 Cal.App.3d 429, 230 Cal.Rptr. 749 (Cal.App. 6 Dist. 1986).

[91] *Carter Development of Massachusetts, LLC v. Howard*, ___ So.3d ___, 2019 WL 6315009, 44 Fla. L. Weekly D2833 (Fla.App. 1 Dist. 2019) (escrowee owed no duty of care to a purchaser for supposed mishandling of earnest money, because escrow instructions were given solely by property owner and developer).

[92] *Markowitz v. Fidelity Nat'l Title Ins. Co.*, 142 Cal.App.4th 508, 48 Cal.Rptr.3d 217 (Cal.App. 2 Dist. 2006); *Aguilar v. Chang*, 2003 WL 22026591 (Cal.App. 2 Dist. 2003) (unpublished) (escrowee not liable for ignoring demand by real estate broker for commission she was allegedly owed, but which the seller refused to pay, because escrowee takes its instructions only from escrow principals); *TSF 53419, LLC v. Fidelity Nat'l Title Ins. Co*., 2013 WL 1750981 (Cal.App. 2 Dist.) (unpublished) (escrowee on sale escrows did not owe duty to holder of deed of trust to make payment to it, although lien holder gave notice that it expected to be paid from sale). The California courts rely on the non-escrow decision of *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16 (Cal. 1958), which announced the set of factors that must be balanced to determine if a person owes a duty to another with whom he has no contract. In *Business Advisors, Inc. v. Chicago Title Ins. Co*., 2013 WL 2325124 (Cal.App. 4 Dist.) (unpublished), the court found that a real estate brokerage was not entitled to collect from an escrowee that violated closing instructions by paying the broker commission to an individual rather than the brokerage, because the broker did not hold a license and thus had no legal right to the commission. The court said that, if it gave relief to the broker, it would be giving aid to an illegal transaction. In *Jafari v. Federal Deposit Ins. Corp*., 2 F.Supp.3d 1125 (S.D.Cal. 2014), the court held that the escrowee owed no duty of care to the FDIC because it was paid from escrow and did not deposit any instructions or money with the escrowee, citing *Markowitz* and *Summit*. In *Estate of Gaspar*, 2016 WL 1733626 (Cal.App. 1 Dist.) (unpublished), the court held that the seller's attorney had no standing to sue the escrowee for alleged breach of instructions, which the lawyer said caused him personally to incur expenses and spend time for his client's sake, because the attorney was not a third party beneficiary of the escrow. The court also noted that the attorney never asked his client to pay his fees. In *Alereza v. Chicago Title Co.*, 6

California decision on the subject is *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*,[93] in which the California Supreme Court ruled that a lender claiming the right to be paid from an escrow may not sue the escrowee for negligence, because the lender was not a party to the escrow. The *Summit* court overturned *Kirby v. Palos Verdes Escrow Co.*,[94] which had held that a recorded assignment of a deed of trust effected a modification of the escrow instruction, and obligated the escrowee to pay the assignee rather than the assignor. *Kirby*, the court said, had stretched too far the earlier case of *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co.*[95] The *Summit* court said:

Cal.App.5th 551, 211 Cal.Rptr.3d 469 (Cal.App. 3 Dist. 2016), the court held that an escrowee owed no duty of care to a person who was not a party to the escrow or mentioned in the instructions as a person benefited by the escrow, citing *Summit* and using the *Biakanja* factors. In *Ruvalcaba v. Ocwen Loan Servicing, LLC*, 2017 WL 2985121 (S.D.Cal.) (unpublished), the court used the same analysis as in *Biakanja* and *Alereza*, and concluded that a sub-escrow did not owe a duty to the borrower to obtain the most current payoff information before making payment to the existing lender.

States other than California follow the same principle. In *Aurora Loan Services, LLC v. Security Title Agency, Inc*., 2014 WL 458133 (Ariz.App. Div. 1) (unpublished), the court found that a loan servicer that claimed that the loan had been assigned before it was paid off, and the owner of the loan did not receive the money, had no right to sue the escrowee for its claimed negligence in making the payoff. In *Torbet v. Torres*, 2002 WL 10651 (Wash.App. 2 Div.) (unpublished), a Washington court held that, although the decedent's children were to be paid from the proceeds of a sale of estate property, under the terms of an estate planning agreement, the escrowee who conducted the sale was not liable to the heirs, because the escrowee had no knowledge of the agreement or instruction from the heirs, and had no duty to investigate. In *P.E.M. Construction & Development Co., Inc. v. EnCap Gold Holdings, LLC*, 2011 WL 3802244 (N.J.Super.A.D.) (unpublished), the court found that a subcontractor was not an intended third-party beneficiary of a construction project escrow, and was not entitled to be paid from it, particularly when the conditions for disbursement had not been met. In *Kaplan v. Valley Nat'l Bank*, 52 Misc.3d 1210(A), 2016 N.Y. Slip Op. 51108(U), 41 N.Y.S.3d 719 (Table), 2016 WL 3939922 (Table) (N.Y. Suffolk Cty. 2016) (unpublished), an escrow company retained by the buyer property was found not to have owed a duty to a beneficiary of the seller trust. In *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wash.2d 58, 375 P.3d 651 (Wash. 2016), the Washington Supreme Court resolved the question certified to it, ruling in a resounding and well-supported opinion that a title insurer does not owe a duty of care to the property owner in recording a document. The court said: "[p]laintiffs urge us to hold that justice requires title insurance companies to look behind the signatures on the document and police the parties' agreements against conflicting corporate documents or loan agreements. This is not a just result, and placing this burden on title insurance companies increases their costs, slows the recording process, and frustrates public policy, with no appreciable benefit." Subsequently, the Ninth Circuit Court of Appeals affirmed the dismissal of the claims against the escrowee, in *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 668 Fed.Appx. 760, 2016 WL 4572391 (9th Cir. (Wash.) 2016) (unpublished). In *Cadence Bank, N.A. v. DLO Title, LLC*, 2018 WL 1399584 (M.D.Tenn 2018) (unpublished), the court held that title company that closed a sale transaction owed no duty to a lender that expected to have its loan paid off at closing. In *Carter Development of Massachusetts, LLC v. Howard*, ___ So.3d ___, 2019 WL 6315009, 44 Fla. L. Weekly D2833 (Fla.App. 1 Dist. 2019), a Florida court held that the escrowee owed no duty of care to a purchaser for its supposed mishandling of the buyer's earnest money, because the escrow instructions were given solely by the property owner and developer.

[93] 27 Cal.4th 705, 41 P.3d 548, 117 Cal.Rptr.2d 541 (2002).

[94] 183 Cal.App.3d 57, 227 Cal.Rptr. 785 (Cal.App. 1 Dist. 1986).

[95] 205 Cal.App.2d 68, 22 Cal.Rptr. 712 (Cal.App. 1 Dist. 1962).

> We agree with the Court of Appeals here that '*Kirby* misread *Builders' Control Service. Builders' Control Service* holds only that an agent's knowledge of an assignment by its principal obligates the agent to honor the principal's assignment; *Kirby* transformed that obligation, which is founded in the law of agency, into a duty owed to honor contracts made by creditors of the principal even though the escrow holder had no agency relationship with the creditor. … The *Builders' Control Service* court did say that 'receipt of notice [of an assignment] is tantamount to new instructions.' … However, under the facts of that case, the statement meant no more than that a party to an escrow may issue new instructions to the escrow holder in the form of an assignment. As the Court of Appeal here observed: '… In the context of *Builders' Control Service,* the agent's receipt of notice of the assignment could be deemed the equivalent of a new instruction regarding the party to be paid because the assignment was made by the owner-builder, a party to the escrow entitled to give instructions to the escrow holder. However, *Kirby* transmuted that agency concept into a holding that transactions by strangers to an escrow can supersede and amend the instructions given by the parties to the escrow. Nothing in *Builders' Control Service* supports that remarkable conclusion.[96]

Nonetheless, one California court gave the federal government special deference, contrary to the general rule.[97]

The escrowee also does not owe a duty of care to other people who are not parties to the escrow.[98] The escrowee owes no duty to a party who deposits money under escrow instructions

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[96] *Kirby* had also been criticized in *Braemer v. Kuntz*, 2001 WL 1660044 (Cal.App. 4 Dist.) (unpublished), decided shortly before *Summit*. In *Chen v. Dynasty Escrow, Inc.*, 2002 WL 1227478 (Cal.App. 2 Dist.) (unpublished), rev.den. August 14, 2002, the court further defined the very limited remaining vitality of *Kirby* after *Summit*: "Thus, to the extent that Kirby has not been disapproved of by Summit, the only principle that it continues to stand for is that an escrow holder must follow the instructions of the parties to the escrow, and, to the extent the escrow holder is an agent of the parties and has knowledge of an assignment by one of the parties, to disburse proceeds held by it for such party, to the same extent that such party is obligated to disburse those proceeds to the party's assignee."

[97] In *Bedrock Financial, Inc. v. United States*, 2014 WL 1600452 (E.D.Cal.) (unpublished), a California federal court ruled that an escrowee that did not pay the government from closing to satisfy its tax lien must pay the tax debt in full, because it "converted" the government's money. The court rejected the argument that the government had any duty to collect the taxes by foreclosing on the taxpayer's property. It rejected all of the prior California cases holding that the escrowee does not owe a duty to a party to be paid from escrow, on the slender theory that the money was the government's property.

[98] *Sherman v. First American Title Ins. Co.*, 201 Ariz. 564, 38 P.3d 1229 (Ariz.App. 2002); *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (Idaho 2008) (title company that insured mortgage owed no duty to former spouse of owner as to her claim that spouse connived to wipe out her equity in property); *Dorsett Bros. v. Safeco Title Ins. Co.*, 880 S.W.2d 417 (Tex.App.-Houston [14th Dist.] 1993) (subcontractor not a third party beneficiary of escrow just because a check deposited with escrowee had subcontractor's name in remarks line); *Black v. Metro Title, Inc.*, 290 Wis.2d 213, 712 N.W.2d 395, 2006 WI App 52 (Wis.App. 2 Dist. 2006) (divorcing spouse who delivered quit claim deed to closing was not party to loan escrow and had no cause of action against escrowee for failing to pay her half of equity drained from homestead by loan, citing *Summit* as support). Also, when closing documents are faked to make it appear that a title

signed by others.[99] The escrowee also owes no duty to a party that has an interest in the real estate

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insurer has acted as settlement agent when it was not, and the insurer did not attend closing, disburse funds or perform any other closing or escrow act, the title insurer did not have a fiduciary duty to either lender or borrower. *Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc*., 194 F.3d 1089 (10th Cir. (Okla.) 1999). However, an Arkansas court, in an unpublished decision, refused to rule on summary judgment that there could be no "contract" between the escrowee and the party being paid. In that case, the party to the escrow instructed the escrowee to obtain payoff information, a release of lien was prepared, and the creditor fully expected to be paid. After closing, the escrow principal changed its instruction and told the escrowee not to make the payment. The creditor claimed that the communication before closing resulted in a contract to make payment. The court remanded for trial. *Fleming Companies, Inc. v. Tucker Abstract Co*., 2002 WL 819602 (Ark.App.) (unpublished). In *Yavapai Title Agency, Inc. v. Pace Preparatory Academy*, 2013 WL 3368935 (Ariz.App. Div. 1) (unpublished), the court held that a title company owed no duty to a former owner of property to locate a deed of trust in his favor in its title search in order to cause it to be paid off with through subsequent sale. The court referred to escrow rather than title cases in its ruling. In *Sweeting v. Chicago Title Co.*, 2017 WL 1153354 (Cal.App. 3 Dist.) (unpublished), the court cited *Summit* in holding that a loan closing agent owed no duty to the borrower. In *Nevarez Law Firm, P.C. v. Dona Ana Title Co.*, 708 Fed.Appx. 186 (5th Cir. (Tex.)) (Mem.) (unpublished), the court held that an attorney had no standing to sue an escrowee for alleged breaches of escrow instructions given by his clients. However, in *Tafea v. Gateway Title Co*., 2017 WL 5843239 (Cal.App. 4 Dist.) (unpublished), an escrowee who was found to have assisted a rehab flipper in misusing investors' money owed a duty to the investors not to work a fraud on them. The fact that the investors were not parties to written escrow instructions did not insulate the escrowee from liability for the fraud in which it participated.

[99] *Ramos Oil Co., Inc. v. Fidelity Nat'l Title Agency of Nevada, Inc*., 2004 WL 1987083 (Cal.App. 3 Dist. 2004) (unpublished) (escrowee not required to obtain escrow instructions from third party who deposits funds into escrow without instructions; escrowee's sole duty is to obey instructions given); *Weule v. Transnation Title Ins. Co*., 2005 WL 1140009 (Cal.App. 2 Dist.) (unpublished) (escrowee that received wire transfer from investor and mortgage to be recorded giving investor a lien, but no escrow instructions from investor, not required to protect investor from flim-flam operator, determine what lien priority investor expected to receive, or advise him how escrowed funds were disbursed). In *Edelman v. Belco Title & Escrow, L.L.C*., 754 F.3d 389 (7th Cir. (Ill.) 2014), the court held that an escrowee had no duty to investors who deposited money into an escrow in which they were not parties, particularly not to protect them from the fraud of the person who induced their investments. The escrowee had no duty to seek written instructions from the depositors. In *Rove v. First American Title Ins. Co.*, 1998 WL 696880 (Tex.App.-Dallas) (unpublished), a consortium contributed earnest money used by a housing coalition to purchase property. The earnest money group was not a party to the escrow agreement. The deal stalled, and the individuals notified the escrowee that they wanted their money back. The coalition and the RTC instructed the escrowee not to return it, and then entered into a restated purchase agreement. The transaction closed. The earnest money group then sued the escrowee on numerous causes of action for failure to return the money. The trial court granted the escrowee summary judgment because the plaintiffs were not parties to the escrow. On appeal, the earnest money group tried to leap that hurdle by pointing out that the escrow account was opened in the name "First American Title Insurance Company Escrow Agent for Stephen Moses Interests." The court held that the name of the account "does not, standing alone, give rise to a duty of reasonable care... ." It also noted, however, that the escrowee had a duty of care as to the buyer and seller, both of whom had given contrary instructions. "First American would have breached both its duty to exercise a high degree of care in holding the earnest money and its duty to carry out the terms of the real estate contract if it had released the funds to the [Stephen Moses group] over the objections of RTC and the Coalition." In *Muller v. Stewart Title Guar. Co.*, 525 S.W.3d 859 (Tex.App.-Houston 2017), the court held that, when escrow instructions were signed by a company as buyer, the escrowee owed no duties to a member of that company who contributed some of the purchase money, and specifically did not owe that person a fiduciary duty. In *Stewart Title of Louisiana v. Chevron, U.S.A., Inc.*, 216 So.3d 869 (La.App. 4 Cir. 2015), writ den. 176 So.3d 406 (Mem) (August 28, 2015), when an individual sent money to an escrow company in the amount of the buyer's down payment and told the escrowee he was acting for the buyer, the escrowee properly treated the money as a deposit into escrow on behalf of the buyer, and did not violate a duty to the third party depositor by delivering the money to the seller per the escrow instructions. In *Armenta v. First American Fund Control, Inc*., 2015 WL 1933186 (Cal.App. 4 Dist. 2015)

but is not a party to the escrow.[100] When an escrow principal is an entity, the members of that entity do not have standing to sue the escrowee in their own names.[101] The escrowee owes no duty to a person competing to purchase the property for the escrow was formed.[102] The escrowee also has no duty of care to the assignee of a loan that was closed through the escrow,[103] or the funding lender that took an immediate assignment of the loan closed in the escrow.[104]

A sub-escrowee owes a duty only to the principal of the sub-escrow. The sub-escrowee owes no duty to the principals of the main escrow.[105] Sub-escrows are further described at §13.2.

(unpublished), an escrow company that held condominium presale deposits, which it disbursed according to instructions and as it made inspections of the project, was found not liable to the unit buyers for the developer's failure to complete the project, because the unit buyers were not parties to the escrow instructions.

[100] *Rooftop Mgmt. & Consulting v. Washington Mutual Bank, FA*, 2003 WL 21101479 (Cal.App. 2 Dist.) (unpublished) (lender whose trustee's sale of property was unwound due to simultaneous sale of property by owner not entitled to sue escrowee for interfering with sale); *Best v. Security Title Agency, Inc*., 2012 WL 5923806 (Ariz.App. Div. 1) (unpublished) (escrowee handling sale of property owed no duty to holder of option and was not liable to option holder when sellers ignored him at time of sale); *Iglesias v. Pentagon Title and Escrow, LLC*, 206 Md.App. 624, 51 A.3d 51 (Md.App. 2012) (lender's settlement agent owed no duty to person whose identity was stolen by borrower to detect and stop identity theft, or to verify authenticity of power of attorney given to closer); *JBME Co., LLC v. First American Title Ins. Co.*, 2013 WL 1908051 (Ariz.App. Div. 1) (unpublished) (escrowee that rerecorded deed of trust to correct its legal description, but accidentally included a parcel not owned by borrower, was not liable to true owner of parcel for clouding or slandering its title); *Mortensen v. First American Title Co., Inc*., 2013 WL 1222566 (D. Idaho) (unpublished) (escrowee had no duty to woman who gave her husband a power of attorney to verify with her that she had authorized him to sign documents on her behalf; power was valid and had not been revoked as of closing); *Brassell v. Harbourview Abstract, Inc*., 163 A.D.3d 908, 82 N.Y.S.3d 483, 2018 N.Y. Slip Op. 05439 (N.Y.A.D. 2 Dept. 2018) (escrow between one owner of property and attorney did not benefit other property owner, and non-party had no claim against escrowee).

[101] *Home Title Co. of Maryland, Inc. v. LaSalla*, 257 So.3d 640 (Fla.App. 2 Dist. 2018) (when limited liability company was principal of escrow, its member had no standing to sue escrowee for alleged breach of instructions).

[102] *I-20 Corridor Properties, LLC v. Mahony Title Services, LLC*, 986 So.2d 821 (La.App. 2 Cir. 2008) (title company hired to close the sale of property to one buyer was not a fiduciary as to a competing buyer, and the losing buyer may not sue the title company for its alleged damages). However, in *In re SMIC, Ltd*., 2013 WL 4078704 (Bkcy.N.D.Tex.) (unpublished), the court found that a Texas escrowee that had already opened an escrow for the sale of property to one buyer violated its duty of loyalty to that buyer by serving as escrowee on a second sale the seller arranged for the same property. The seller decided that the first buyer was unable or unwilling to close, but the first escrow was not formally terminated. The court found that the escrowee was unable to be a neutral third party in the second escrow.

[103] *U.S. Bank, N.A. v. National Lenders, Inc.*, 2008 WL 1869754 (Mass.Super.) (unpublished).

[104] *Gateway Bank, FSB v. Ticor Title Ins. Co. of Calif.*, 2009 WL 4190455 (Cal.App. 1 Dist.) (unpublished).

[105] See *Siegel v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 1181, 54 Cal.Rptr.2d 84 (Cal.App. 2 Dist. 1996); *Markowitz v. Fidelity Nat'l Title Ins. Co.*, 142 Cal.App.4th 508, 48 Cal.Rptr.3d 217 (Cal.App. 2 Dist. 2006); *First AFG Financial Corp. v. Security Union Title Ins. Co*., 2010 WL 4975501 (Cal.App. 4 Dist.) (unpublished) (sub-escrowee hired to record documents and issue title insurance policy not directly liable to lender escrow principal for accidental release of two parcels from deed of trust); *Flagstar Bank, FSB v. Lawyers Title Co*., 2014 WL 1725746 (Cal.App. 2 Dist.) (unpublished) (title agency and its underwriter not required to repay lender money stolen by its escrow company

An escrowee has no fiduciary duty to non-parties. However, an escrow agent may be liable to a non-party for negligent performance of contractual obligations where the non-party's reliance upon proper performance is known and anticipated.[106]

A lender's closing agent is not a dual agent in that capacity, and owes no duty of care to the borrower unless the closing agent is also serving in an additional capacity under a separate contract.[107] Also, when the borrowers authorized the escrowee to accept instructions from the buyers' lender, and the escrowee acknowledged receipt of such instructions, the lender became a principal to the escrow.[108] One court found that the FDIC, as the receiver for a lender, was entitled to assert a

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although money was sent by lender to title agency, but neither lender nor escrow company appointed agency as sub-escrow); *Sweeting v. Chicago Title Co.*, 2017 WL 1153354 (Cal.App. 3 Dist.) (unpublished) (borrower had no standing to sue title insurer sub-escrow that handled escrowed loan money, and sub-escrow's duties in handling of money were not related to borrower's claim about defective signatures on closing documents); *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished) (sub-escrow owed no duties to buyer of real estate); *Ruvalcaba v. Ocwen Loan Servicing, LLC*, 2017 WL 2985121 (S.D.Cal.) (unpublished) (sub-escrow owed no duty to borrower to obtain most current payoff information before making payment to existing lender). Conversely, a loan broker that insisted on closing the loan at the borrowers' residence was not a sub-escrowee, and the escrowee was not liable for his alleged TILA violations. *Residential Mortgage Capital v. Chicago Title Ins. Co.,* 2010 WL 3621871 (Cal.App. 1 Dist.) (unpublished). In *Mazgani v. S.B.S. Trust Deed Network, Inc*., 2016 WL 379591 (Cal.App. 2 Dist.) (unpublished), the court held that an escrowee did not control the acts of a title insurer that disbursed funds as a sub-escrowee for the lender, and that the sub-escrow did not create an agency relationship between the escrow company and the title insurer. The suit was brought by a borrower, who alleged that the escrowee breached its instructions by allowing the sub-escrowee to return the loan money to the lender when it asked that its money be returned because "the loan had been improvidently funded." The court also found that obedience to that instruction was not a breach of the escrow instructions.

[106] 30A C.J.S. *Escrows* §10.

[107] *Rankin v. Dault*, 396 B.R. 203 (E.D.Mich. 2008) (buyers in failed purchase not entitled to sue title company loan closer for failing to make purchase happen); *Askenaizer v. Moate*, 406 B.R. 444, 2009 DNH 073 (D.N.H. 2009) (title company closer was lender's agent and owed no duty to borrower as to disbursement of funds); *Fantino v. Lenders Title and Guar. Co*., 303 Ill.App.3d 204, 707 N.E.2d 756, 236 Ill.Dec. 629 (Ill.App. 2 Dist. 1999); *Pippin v. Kern-Ward Bldg. Co*., 8 Ohio App.3d 196, 456 N.E.2d 1235 (Ohio App. 8th Dist. 1982) (borrower could not countermand lender's closing instructions because borrowers were not parties to those instructions); *Richardson v. New Century Mortgage Corp*., 2005 WL 1554026 (N.D.Miss. 2005) (unpublished), aff'd 202 Fed.Appx. 773, 2006 WL 2990260 (C.A.5 (Miss.)) (unpublished); *Dietrich Family Irrevocable Trust v. Philip F. Greco Title Co*., 2008 WL 509845 (Mich.App.) (unpublished); *Burton v. Sure Title*, 2007 WL 4322269 (Mich.App.) (unpublished); *Sarnecky v. Fidelity Nat'l Title Co*., 2015 WL 6438635 (Cal.App. 4 Dist.) (unpublished), reh.den. (Nov. 12, 2015), rev.den. (Jan. 13, 2016) (borrower may not sue loan closer for alleged breach of loan closing instructions). In *Fantino v. Lenders Title and Guar. Co.*, 303 Ill.App.3d 204, 707 N.E.2d 756, 236 Ill.Dec. 629 (Ill.App. 2 Dist. 1999), the court held that, when the escrow agreement stated that the escrowee was acting solely for the benefit of the lender, the borrowers' signatures on the agreement was their assent that the escrowee owes them no duty. The borrowers were not permitted to circumvent that fact by claiming to be third party beneficiaries of the escrow. The court further held that the escrowee is not the fiduciary of the borrowers in disbursing the loan funds, since a fiduciary duty is owed only to the party who makes the deposit. In *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017), however, the court concluded that the borrower *was* a third party beneficiary of a lender's closing instructions, notwithstanding the prior Ohio decision of *Pippin v. Kern-Ward Bldg. Co*. to the contrary (cited above).

[108] *Money Store Investment Corp. v. Southern Calif. Bank*, 98 Cal.App.4th 722, 120 Cal.Rptr.2d 58 (Cal.App. 4 Dist.

claim against the failed lender's closing agent for the closer's role in claimed bank fraud.[109] If the lender's closing agent is also a title insurance agent, the two agency relationships have different scopes and the principal of the closing agent depends on the nature of the act being performed.[110]

However, in Rhode Island, when an attorney closes a loan, the borrowers are his clients; while the lender is a direct beneficiary of his services, it is *not* his client.[111] Further, when the borrower was hustled into a scheme to have the loan proceeds delivered to a contractor arranged by the loan broker, who failed to perform the intended home repairs, the court ruled that the lender's closing attorney also served as escrowee for the borrower and breached a duty to her by assisting in the apparent sham.[112]

2002).

[109] *F.D.I.C. v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994) (FDIC, as successor to failed lender, not precluded from recovery on claimed reliance on escrowee's acts in fostering bank fraud).

[110] In *Northwest Savings Bank v. Fidelity Nat'l Title Ins. Co.,* 2017 WL 253080 (Pa.Super.) (unpublished), the court found that The Closing Company of Pennsylvania served as both the bank's closing agent and the title insurer's policy-issuing agent. It "misappropriated" loan money that it was supposed to have sent to pay off loans from a refinance closing. The court held that The Closing Company was a dual agent, but the loss should rest with the innocent principal under whose agency scope the payoff malfeasance occurred. The court determined that the theft occurred while the company was acting as the lender's agent, barring the bank's claims against the title insurer.

[111] *Credit Union Central Falls v. Groff*, 966 A.2d 1262 (R.I. 2009). However, in *Pineda v. Chase Bank USA, N.A.*, 186 A.3d 1054 (R.I. 2018), the court held that a lender was not liable to its borrower for the theft of the loan money by the closing attorney because, even if the lawyer was the lender's agent, his theft was not within the scope of that agency and could not invoke the doctrine of respondeat superior.

[112] *Russell v. Demandville Mortgage Corp*., 11 Misc.3d 1056(A), 815 N.Y.S.2d 496, 2006 N.Y. Slip Op. 50231(U) (N.Y.Sup. 2006).

13.5 Duties Regarding Funds

The escrow instructions typically charge the escrowee with closing escrow after the deposit of all required money into a bank or investment account, as specified by the instructions.[113] The escrowee does not have a duty to deposit funds in an interest-bearing account, as would a trustee.[114] An escrow agreement may be written to allow the escrowee to earn interest on funds held.[115]

An escrowee is not liable to a party seeking to wire money to the escrowee whose money is diverted to the wrong bank account by a party who issues fake wiring instructions for the escrowee's account.[116]

The escrowee is typically required by law to maintain a separate escrow account, and is prohibited from commingling escrowed funds with the escrowee's own money. Until 2011, an escrowee was not permitted to earn interest on money held in escrow, because that money is not the property of the escrowee.[117] The ban on interest has been codified in some states by statute.[118] In

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[113] See *Spalla v. Fransen*, 188 Ohio App. 3d 666, 936 N.E.2d 559, 2010-Ohio-3461 (Ohio App. 11 Dist. 2010), in which a check was not deposited immediately, and then bounced. The court held that the escrowee was not liable to the principal for more than the check amount on the principal's theory that the escrowee's failure to act more quickly deprived him of the opportunity to cancel the sale and get a new buyer. In *Plaza Leyenda, L.P. v. Lawyers Title of Arizona, Inc*., 2011 WL 1203655 (Ariz.App. Div. 1) (unpublished), an escrowee did not promptly tell the property owner that a check had been returned NSF and the owner was forced to rebid a construction job and pay substantially more for the work. The escrowee was found liable for the project cost increase. In *Capcor at KirbyMain, L.L.C. v. Moody Nat'l Kirby Houston S, L.L.C.*, 509 S.W.3d 379 (Tex.App.-Houston 2014), the escrow officer did not tortiously interfere with the buyer's performance under the purchase contract by informing him on the day before closing that he must deposit the purchase money by wire transfer, which he said he could not do in time to close escrow.

[114] *Hannon v. Western Title Ins. Co*., 211 Cal.App.3d 1122, 260 Cal.Rptr. 21, 25 (Cal.App. 1 Dist. 1989).

[115] *Marshall v. New York City Health and Hospitals Corp*., 186 A.D.2d 542, 588 N.Y.S.2d 364 (N.Y.A.D. 2 Dept. 1992).

[116] See *White v. Citywide Title Corp*., ___ F.Supp.3d ___, 2018 WL 5013571 (N.D.Ill. 2018) (permanent citation not yet available), in which the court has dismissed some but not all claims brought against a title agency by a buyer who delivered a down payment to a fraudster's bank account based on phony wiring instructions. This type of fraud is often referred to as the spoofing of an email account. An FBI website explains the scam this way: "Phishing and spoofing are somewhat synonymous in that they refer to forged or faked electronic documents. Spoofing generally refers to the dissemination of email which is forged to appear as though it was sent by someone other than the actual source. Phishing, often utilized in conjunction with a spoofed email, is the act of sending an email falsely claiming to be an established legitimate business in an attempt to dupe the unsuspecting recipient into divulging personal, sensitive information such as passwords, credit card numbers, and bank account information after directing the user to visit a specified website. The website, however, is not genuine and was set up only as an attempt to steal the user's information."

[117] Until 2011, the Federal Reserve Act prohibited Federal Reserve banks from directly or indirectly paying any interest on demand deposits such as escrow accounts. 12 U.S.C. § 371a; see also 12 C.F.R. § 217.1 et seq. (2004) (Regulation Q). That regulation, adopted in 1933 under Section 19(i) of the Federal Reserve Act (12 U.S.C. 371a), was repealed by section 627 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, effective July 21, 2011.

[118] See, for example, California Insurance Code section 12413.5; Va. Code § 6.1-2.23(a) (requiring closing agents to

some states, banks give earnings credits or similar non-cash setoffs to escrowees, which are typically applied to offset fees incurred on the escrow accounts.[119] A sweep of the escrow account has been found to violate laws prohibiting the commingling of escrowed funds.[120]

In the State of Washington, escrowees are considered limited officers of the court. The Supreme Court claims jurisdiction over escrowees under the novel title of "limited practice officers." Lawyers in Washington are required to put client trust account money in accounts earning interest for a foundation that distributes the money for legal care of the poor. Washington escrowees have the same obligation to deliver interest earned on their accounts to the foundation, but are not liable to escrow parties for interest or earnings credits earned, or that allegedly should have been earned, on escrow deposits.[121]

The escrowee must deposit checks received within a reasonable time or risk being liable if the checks are not good when finally deposited.[122] However, when a check was sent by a broker with

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segregate and maintain closing funds and pay money as instructed).

[119] Until July 21, 2011, the Federal Reserve Act prohibited Federal Reserve banks from directly or indirectly paying any interest on demand deposits such as escrow accounts. 12 U.S.C. § 371a; see also 12 C.F.R. § 217.1 et seq. (2004) (Regulation Q). That regulation was repealed by section 627 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. See Federal Register, Vol. 76, No. 137, Monday, July 18, 2011, at pp. 42015-42020. Regulation Q formerly defined interest as "any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit." However, "[a] member bank's absorption of expenses incident to providing a normal banking function or its forbearance from charging a fee in connection with such a service is not considered a payment of interest." 12 C.F.R. § 217.2(d). The Federal Reserve Board has issued a number of rulings and opinion letters holding that various bank charges may be absorbed by the bank without being considered the payment of interest. The Board had opined that banks do not pay interest by offering loans at favorable rates for the purchase of investment instruments pledged as security for the loans to customers who maintain large demand deposit balances, in which the amount of credit extended is tied to the historical average account balance. 1988 Fed. Reserve Bd. Interpretive Letter, Fed. Reserve Reg. Service 2-545.1 (June 28, 1988). In *Hirsch v. Bank of America, N.A.*, 107 Cal.App.4th 708, 132 Cal.Rptr.2d 220 (Cal.App. 1 Dist. 2003), a court dismissed claims against banks for paying earnings credits to title companies, reasoning that the plaintiffs themselves would not have been entitled to earn interest on the funds, and therefore were not out anything. Also see later decisions at 2006 WL 182953 (Cal.App. 1 Dist.) (unpublished), and *State v. PricewaterhouseCoopers*, 125 Cal.App.4th 1219, 23 Cal.Rptr.3d 529 (Cal.App. 1 Dist. 2005).

[120] *In re Crocker Companies, Inc.*, 2007 WL 3333274 (D. Utah) (unpublished).

[121] The Ninth Circuit ruled that the earnings credits were "nothing but incentive payments to repeat customers [of the banks]"--i.e., the escrow companies--which are "never the property of the escrow companies' customers," in *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (9th Cir. (Wash.) 2001), reversing prior op. 236 F.3d 1097 (9th Cir. (Wash.) 2001). The earnings credits granted to the title insurers by their banks were found not to be the property of the depositors into escrow, and thus they had no standing to sue for the money value of those credits, in three decisions issued on identical class action suits filed against different insurers, *Cornelius v. Fidelity Nat'l Title Co.*, 2009 WL 596585 (W.D.Wash.) (unpublished); *Jankanish v. First American Title Ins. Co.*, 2009 WL 779330 (W.D.Wash.) (unpublished), later decision 2009 WL 1919117 (W.D.Wash.) (unpublished); and *Sypolt v. The Talon Group*, 2009 WL 497133 (W.D.Wash) (unpublished).

[122] *Wade v. Lake County Title Ins. Co.*, 6 Cal.App.3d 824, 86 Cal.Rptr. 182 (Cal.App. 1 Dist. 1970); *Chilton v. Pioneer Nat'l Title Ins. Co.*, 554 S.W.2d 246 (Tex.App. 1977); *Katleman v. U.S. Communities, Inc.*, 197 Neb. 443, 249 N.W.2d 898 (1977); *Countrywide Realty Corp. v. Alboni*, 420 A.2d 1181 (Del.Super.Ct. 1980). In the above cases, the

no written instructions, it was not a violation of implicit instructions to keep the check in the file rather than deposit it.[123] If a money deposit is not received by the specified deadline, the escrowee must tell the other parties that the money has not been deposited, and obtain their instructions on how to proceed.[124] The escrowee must inform the other parties if it receives a check that bounces, causing the required deposit not to be made.[125] The escrowee may be liable if it incorrectly represents to one principal that another principal has made a required money deposit into escrow, or if the escrow officer allows escrow to close under the mistaken belief that all money deposits have been made.[126]

An escrowee may be liable if it intentionally gives the seller the impression that an instrument deposited into escrow by the buyer in lieu of cash is as good as legal tender.[127] However, the escrowee has no liability for statements that are truthful, or recommendations or referrals made in good faith.[128]

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checks became worthless because of the payor's insolvency after delivery to the escrowee. The escrowee may have a defense to liability if the check was not good on the day it was delivered to the escrowee, because in such a case the escrowee's failure to deposit does not cause the dishonoring of the check. See *Capital Title Co. v. Mahone*, 619 S.W.2d 204 (Tex.App. 1981).

[123] *Rianda v. San Benito Title Guarantee Co.*, 35 Cal.2d 170, 217 P.2d 25 (Cal. 1950).

[124] *Chilton v. Pioneer Nat'l Title Ins. Co*., 554 S.W.2d 246 (Tex.App. 1977).

[125] In *Burman v. Richmond Homes Ltd*., 821 P.2d 913 (Colo.App.1991), the court held that the escrowee had an affirmative duty to inform the seller that the buyer's earnest money check had bounced because it was issued on a closed account, and thus the escrow deposit had not been made. That error was aggravated by the escrowee/broker's apparent intentional failure to inform the seller in an apparent attempt to protect its right to a commission. Had the seller been aware of the earnest money deficiency, the seller would have let the purchase contract expire, and would have been free to accept a later offer for more money. The broker/escrowee would not have received a commission on the later offer.

[126] *BCV Colonnade v. United Realty Companies, LLC*, 2009 WL 2974768 (Mich.App.) (unpublished) (escrowee grossly negligent for confirming to escrow principal the receipt of earnest money deposit that had not been made); *Commercial Escrow Co. v. Rockport Rebel, Inc.*, 778 S.W.2d 532 (Tex.App.-Corpus Christi 1989) (escrowee liable when it closed escrow in reliance on a receipt for deposit of funds which listed wrong party as depositor); *Rivermont Village, Inc. v. Preferred Land Title, Inc*., 371 S.W.3d 858 (Mo.App. S.D. 2012) (escrowee who promised to deposit earnest money check on day of receipt was liable to seller for obeying buyer's counter-instruction not to deposit check).

[127] The escrowee also represented to various sellers that the purchaser was "an honorable and wealthy man." *Bowling v. Founders Title Co*., 773 F.2d 1175 (11th Cir. 1985). The escrowee was found liable to the sellers for the money they lost in their transactions with the buyer, who was perpetrating a fraud. The court found the escrow officer to be a willing, if gullible, instrument of that fraud. Based on the pattern of misrepresentation to various sellers, the court upheld a verdict against the insurer based on the Racketeer Influenced and Corrupt Organizations Act (RICO).

[128] In *Jefmor, Inc. v. Chicago Title Ins. Co*., 839 S.W.2d 161 (Tex.App. 1992), an escrowee was not liable to a mortgage loan assignee for having "represented" that the loan was funded, when the escrowee's only representation was the HUD-1 certification that funds had been disbursed. The court held that the escrowee's "legal duty regarding the truth of the statement that the funds had been disbursed extended no further than to Amerifirst, the party to whom the statement was made." In *Tesoro Coast, LLC v. United Escrow Co*., 2011 WL 3716985 (Cal.App. 2 Dist.) (unpublished), the escrowee was found not liable for having referred a customer to a 1031 company that stole the customer's money,

The escrowee has no independent duty to confirm that funds have been transferred outside of escrow as represented to the escrowee. Thus, when the escrowee received a HUD-1 showing that earnest money had been transmitted outside of escrow, the seller and buyer both presented affidavits swearing that the money had changed hands, and the escrowee had been given no specific responsibility to confirm the truth of the affidavits, it was not liable when in fact no money had changed hands.[129] Also, when the purchaser handed the seller an earnest money check before an escrow was set up, and the escrow was later opened but the check not deposited, the escrowee was not obligated to inform the purchaser of that fact "absent an inquiry with respect thereto."[130]

The escrowee is required to obey the parties' instructions as to the disbursement of money from escrow.[131] No deposits may be released until escrow closes, unless instructions specifically so provide.[132] When a check was deposited containing an endorsement stating that the money was for purchase of land, the endorsement created an implied instruction not to disburse funds until the land was conveyed.[133] The escrowee is not liable for returning earnest money to the buyer if the contract is terminated and the buyer is entitled to the return of the money.[134] However, the escrowee may be required to reimburse a party if it disburses earnest money improperly.[135] When the joint instructions told the escrowee to "release" the buyer's deposited money to the seller, the escrowee accurately

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when the escrowee had no reason to believe there was a problem with the company.

[129] *Kansa Reinsurance Co., Ltd., et al. v. Stewart Title Co.*, 20 F.3d 1362 (5th Cir. 1994). The court also held that the escrow officer's notarization of the signatures on the fraudulent HUD-1 did not make it liable to the lender.

[130] *Kraft v. Bartholomew*, 620 P.2d 755, 759 (Hawaii App. 1980).

[131] *Freegard v. First Western Nat'l Bank*, 738 P.2d 614 (Utah 1987). In California, Financial Code section 17414 prohibits knowingly or reckless disbursement of escrow funds "otherwise than in accordance with escrow instructions."

[132] *Karras v. Title Ins. & Guarantee Co.*, 118 Cal.App.2d 659, 258 P.2d 866 (Cal.App. 1 Dist. 1953); *Broussard v. Hill*, 100 Nev. 325, 682 P.2d 1376 (1984); *Commercial Escrow Co. v. Rockport Rebel, Inc.*, 778 S.W.2d 532 (Tex.App.-Corpus Christi 1989) (escrowee liable when it closed escrow in reliance on a receipt for deposit of funds which listed wrong party as depositor). In *Inmobiliaria Buenaventuras S.A. de C.V. v. Chicago Title Co.*, 2019 WL 6167404 (Cal.App. 2 Dist.) (unpublished), the escrow did not close. The escrowee and seller read the escrow instructions to mean that the earnest money could be delivered to the seller immediately on receipt, and the escrowee delivered the money on the seller's request. The court later read the instructions to mean that no deposits were to be released until close of escrow, and entered a judgment against the escrowee for the amount of the earnest money it had disbursed to the seller. In *Streambend Properties II, LLC v. Ivy Tower Minneapolis LLC*, 2019 WL 2332409 (Minn.App.) (unpublished), petition filed December 23, 2019, the escrowee title insurer did not violate its escrow instructions or state law in delivering earnest money and other deposits to the developer immediately on receipt, to be used in construction of the condominium building, without the consent of the buyers, because the escrow instructions authorized that disbursement.

[133] *Wieland v. Ticor Title Ins. Co.*, 755 S.W.2d 659 (Mo.App. 1988).

[134] *Second Ave. Realty LLC v. 1355 Second Owner LLC*, 164 A.D.3d 1153, 84 N.Y.S.3d 121, 2018 N.Y. Slip Op. 06191 (N.Y.A.D. 1 Dept. 2018).

[135] *Durish v. Panan International N.V.*, 808 S.W.2d 175 (Tex.App. 1991).

obeyed that instruction by delivering the money to the seller before close of escrow.[136]

When a court instructs the parties that money is to be held in escrow until a final order is issued determining whose is entitled to receive the money, the money may not be disbursed until there is such a final order and any appeal therefrom has been decided.[137] A court order instructing the escrowee to disburse deposited funds in a particular fashion supersedes the escrow instructions.[138]

On the close of escrow, the escrowee delivers the seller's net proceeds of sale according to the seller's instructions. When there are two sellers under the escrow instructions, the proceeds check is typically made payable to both of them, unless otherwise directed.[139] However, the escrowee is not responsible for loss caused by one seller's forgery of the other's signature on a check properly payable to both of them but delivered just to one.[140] The seller may make a payment direction, instructing the escrowee to pay all or a portion of the seller's money to a third party.[141] The escrowee is required to obey such a payment direction, whether received before or after the break of escrow.[142]

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[136] *Lin v. Central Escrow, Inc*., 2015 WL 7777609 (Cal.App. 2 Dist.) (unpublished).

[137] In *Flandreau Santee Sioux Tribe v. Terwilliger*, ___ F.Supp.3d ___, 2019 WL 4452246 (D.S.D. 2019) (not yet released for publication), when an interim court order mandated that money for payment of disputed taxes be placed in escrow until a final order determined if the taxes were owed, then an order was entered but an appeal was filed, the escrowee acted properly in refusing to disburse the money before the order was affirmed or reversed on appeal. In *Securities and Exchange Commission v. Champion-Cain*, ___ F.Supp.3d ___, 2019 WL 4686938 (S.D.Cal. 2019) (not yet released for publication), a title insurer escrowee was found to have breached a duty to the court by not having immediately turned over escrowed money on receipt of a court order instructing that all property of an entity was to be paid to the entity's receiver, despite the fact that many people whose money was part of the escrow pool told the escrowee they did not want the receiver to take control of their money.

[138] *Kramer v. Chicago Title & Trust Co*., 69 Ill.App .3d 1015, 26 Ill.Dec. 275, 387 N.E.2d 1105 (Ill.App. 1 Dist. 1979).

[139] *Gordon v. D & G Escrow Corp.*, 48 Cal.App.3d 616, 621-623, 122 Cal.Rptr. 150 (Cal.App. 2 Dist. 1975); *Bakewell v. Heritage Nat'l Bank*, 890 S.W.2d 653 (Mo.App. 3 Dist. 1994); *Adorno v. Delgado*, 2004-Ohio-5559, 2004 WL 2348158 (Ohio App. 9 Dist.) (unpublished) (escrowee had no duty to ex-husband to make sure that he received money in exchange for the quit claim deed he delivered to escrowee, because escrowee had limited duties, and its only principal was the wife's lender).

[140] In *Gerson v. Broward County Title Co*., 116 So.2d 455 (Fla. 1959), a husband forged his wife's signature on the check, which had been delivered to him by the escrowee. In finding for the escrowee, the Florida court rested its decision on the fact that husband and wife hold title as tenants by the entireties. As such, they "are regarded as one person." Thus, "[t]he law is well settled that the husband may accept payment in discharging a note held by the entireties, since tenancy by the entireties is an indivisible tenancy and possession by the husband is in law possession by the wife [citation omitted]." Id. at 456, 457.

[141] *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co.*, 205 Cal.App.2d 68, 22 Cal.Rptr. 712 (Cal.App. 1 Dist. 1962).

[142] *Contemporary Investments, Inc. v. Safeco Title Ins. Co*., 145 Cal.App.3d 999, 193 Cal.Rptr. 822 (Cal.App. 4 Dist. 1983). The *Contemporary Investments* decision overturned the earlier case of *Ogdahl v. Title Ins. & Trust Co*., 72

An escrowee is required to obey a seller payment direction despite a lender's assertion that such a direction could be used as a device when a loan is obtained by fraud.[143] When a court order declared that one party was to be paid from the escrow, but that party instructed the escrowee to pay a third party, the instruction was an assignment of the escrowed money, and the escrowee erred in paying per the court order rather than the instruction.[144] The escrow principal may revoke a payment direction, and the escrowee is not liable to the party who was to be paid when it obeys the modified instruction from the escrow principal.[145] The person who is paid pursuant to a seller payment direction does not become a party to the escrow, however. See §13.4.

The escrowee also has a duty to disburse the balance of the escrowed money according to the instructions it receives from the parties.[146] It should not disburse funds without the parties'

Cal.App.3d Supp. 41, 140 Cal.Rptr. 148 (1977), which had held that the principal to the escrow was not authorized to change his own instructions to pay a creditor from the escrow, after escrow broke. In reversing *Ogdahl's* holding, the court Contemporary Investments court stated: "The unwarranted significance the *Ogdahl* court placed on the closing of escrow has led to much confusion in the law applicable to escrow holders. If the escrow holder has no notice of assignment [of proceeds to another party], it is his duty to comply strictly with the instructions of his principal. If he disposes of his principal's property in violation of those instructions, he is liable for any loss occasioned thereby. (Spaziani v. Millar (1963) 215 Cal.App.2d 667, 682, 30 Cal.Rptr. 658.) This applies before or after the close of escrow." 193 Cal.Rptr. at 825.

[143] In *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728, 731 (Tex.App.-Houston 2006), the court noted that the escrowee is obligated to obey a seller payment direction, and the lender's claim that such a direction was used to further a fraudulent loan does not alter the escrowee's duties to the escrow principals. In *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., 2016 WL 7339150 (N.D.Ill.) (unpublished), an Illinois court has refused to accept the FDIC's conclusory assertion that payments of seller proceeds made from closing at the sellers' direction were third party payments that the escrowee was required to disclose to the lender, as indicators of loan fraud.

[144] *Wood v. Chicago Title Agency of Las Vegas, Inc.*, 109 Nev. 70, 847 P.2d 738 (1993). The court stated that the escrowee "would not have been subject to contempt had it sought guidance from the district court or filed an interpleader." 847 P.2d at 740.

[145] In *Brandt v. Sande, d/b/a Land Title Services*, 299 Mont. 256, 1 P.3d 929, 2000 MT 98 (Mont. 2000), the direction to pay the third party was revoked by the principal, leaving the escrowee with no duty to the payee; the court also held that the escrowee was not required to chase the party to verify whether or not he held a direct assignment of escrow proceeds, which might have been irrevocable.

[146] *NGM Ins. Co. v. Secured Title & Abstract, Inc*., 2008 WL 4276932 (E.D.Va.) (unpublished), related decision, 2008 WL 4642957 (E.D.Va.) (unpublished) (title agent closer liable to seller for sale proceeds not delivered from closing, despite agent's protest that money was wired to wrong account by mistake, which may not even have been true); *Jarvis v. K & E RE One, LLC*, 390 S.W.3d 631 (Tex.App.-Dallas 2012) (escrowee's delivery of loan payoff to loan broker and servicer not a violation of duty, and servicer found to have authority to accept payoff funds). In *DeFehr v. E-Escrows, Inc*., 2012 WL 956511 (Cal.App. 2 Dist.) (unpublished), when an escrowee distributed money to a judgment debtor years before a creditor got a judgment against the debtor, the creditor had no claim against the escrowee for its alleged disbursement to an unauthorized party. In *Edwards v. First American Title Ins. Co*., 2017 WL 222243 (Cal.App. 2 Dist.) (unpublished), the court found that refinancing borrowers had no claims against the escrowee for not paying off some of their tax debts when the escrowee followed its instructions as to what tax debt was to be paid, particularly since the borrowers took steps to pay the least amount possible to the IRS from escrow.

approval.[147] One court synopsized the escrowee's duties in handling funds thusly:

> In managing monies deposited in escrow, the escrow agent is required to conduct his affairs with scrupulous honesty, skill and diligence. Webster v. U.S. Life Title Co., 598 P.2d 108 (Ariz.Ct.App. 1979). The escrow agent must strictly comply with the terms of the escrow agreement and may not use the proceeds in any manner that is not authorized by contract or deposit. Colonial Savings and Loan Ass'n v. Redwood Empire Title Co., 46 Cal.Rptr. 16 (Ct.App. 1965).[148]

The escrowee is responsible for following the instructions of the parties as to the disbursement of money to third parties. When the escrow instructions do not itemize how funds are to be disbursed, the parties' signed closing statement or HUD-1 typically provide the payment instructions to the escrowee.[149] An authorization form telling the escrowee to pay according to a HUD-1 provides a specific instruction and an acknowledgment that the borrower has reviewed the figures.[150] The

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[147] *Commercial Escrow Co. v. Rockport Rebel, Inc*., 778 S.W.2d 532 (Tex.App.-Corpus Christi 1989). An attorney-escrowee violates this duty by delivering escrowed funds to his client without instruction from or notice to the non-client principal of the escrow. *In re Discipline of Two Attorneys*, 421 Mass. 619, 660 N.E.2d 1093 (1996). In *Brantley v. Boyd*, 2009 WL 4052682 (N.D.Cal.) (unpublished), an escrowee that accepted telephone instruction to send loan proceeds to a party other than the borrower was liable to the lender for the full amount of the loan, despite evidence that the person to whom the money was delivered was the intended ultimate recipient. In *Samra v. Johal*, 2010 WL 3715347 (W.D.Wash.) (unpublished), an escrowee that received documents saying that an LLC member had broad authority to act was permitted to take that member's instructions on the disbursement of proceeds to other members without verification from the other members. In *Rose v. Stewart Title & Trust of Phoenix, Inc*., 2011 WL 2366808 (Ariz.App. Div. 1) (unpublished), an escrowee was found to have violated its instructions by disbursing an investor's deposited money to a third party without his knowledge or consent, contrary to the instructions; its liability was not negated by the later termination of the escrow. In *Texas Capital Bank, N.A. v. First American Title Ins. Co*., 822 F.Supp.2d 678 (W.D.Ky. 2011), the court refused to dismiss an action brought by a funding lender against an escrowee for having forwarded loan money received for closings without obtaining the approval of the funding lender. The instructions to forward the money came from the loan originator, who said the account was for a different escrowee whom he had selected. In fact, the account to which the money was forwarded was controlled by the originator, who stole the money. In *Drury v. Poblocki Holdings, LLC*, 388 Wis.2d 256, 932 N.W.2d 183 (Table), 2019 WL 2608708 (Wis.App. 2 Dist.) (unpublished), In a corporate sale holdback escrow, the seller demanded the return of the money and the escrowee complied. The buyer sent notice to the escrowee forbidding it to disburse, but that notice was sent one day past the deadline set by the escrow instructions. The court found the escrowee not liable to the buyer because the late notice was ineffective and it would have been wrong to obey it.

[148] *Broussard v. Hill*, 100 Nev. 325, 682 P.2d 1376 (1984).

[149] See Beasley, *Escrows and Closings*, in Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders, Practicing Law Institute N-448 1999, p. 107; *Richardson v. New Century Mortgage Corp*., 2005 WL 1554026 (N.D.Miss. 2005) (unpublished), aff'd 202 Fed.Appx. 773, 2006 WL 2990260 (5th Cir. (Miss.)) (unpublished). However, in *Richardson*, the escrowee was justified in using the net cash to borrower to obtain the release of a lien, when the HUD-1 had been prepared on the false assumption that the borrower would use money outside of closing to obtain that release.

[150] *In re Staggie*, 255 B.R. 48 (Bkcy.D. Idaho 2000), involved an acknowledgment signed by the borrowers at closing

escrowee is responsible for properly pro-rating taxes and distributing funds accordingly.[151] A seller may sue the escrowee for paying off the wrong loan at closing, as a result of which the mortgage against the property was not released.[152]

Instructions to use the funds "to clear title" before disbursing the balance to the seller were found to require clearing of even those liens which might be junior to the title conveyed.[153] Similarly, an escrowee was negligent in not obtaining a sales tax clearance certificate, on the sale of a tavern, when all the debts of the business were to be paid out of closing.[154] When an escrow was formed for the deposit of money to be used by an insurer to protect against a title defect, and the instructions permitted the insurer-escrowee to pay attorney fees incurred in defending the insured against a title defect, the insurer was found not to be permitted to use the funds to defend any party other than the insured who was the object of the escrow.[155]

In general, the escrowee may not unilaterally alter the disbursement instructions, and should bring a mistake to the parties' attention and seek joint modification of the instructions.[156] However,

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that said they had "carefully reviewed the HUD-1" and found it accurate. The agreement said that borrowers "hereby authorize the Settlement Agent to make expenditures and disbursements as shown above and approve the same for payment." This agreement was found not to be a waiver of the borrower's right to contest fees in a lawsuit with the lender. Rather, the court said, the statements "were intended to protect the title company from any later challenge concerning its disbursement of the proceeds from the sale."

[151] *Farkas v. Chicago Title Ins. Co.*, 71 Ohio App.3d 633, 594 N.E.2d 1140 (Ohio App. 1991); *B & H Resources, L.L.C. v. 28925 Lorain Inc*., 2017 -Ohio- 7248, 2017 WL 3531469 (Ohio App. 8 Dist.) (unpublished) (closer did not err in prorating real estate taxes based on amount listed in tax records, although as of closing seller had appealed assessed value).

[152] *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 2000 PA Super 117 (Pa.Super. 2000). The opinion is couched in terms of the seller's rights under the title insurance policy, but clearly the title insurer's actions were as an escrowee rather than under the policy.

[153] *First Montana Title Co. of Billings v. North Point Square Assoc*., 240 Mont. 33, 782 P.2d 376 (Mont. 1989).

[154] *Amen v. Merced County Title Co.*, 58 Cal.2d 528, 25 Cal.Rptr. 65, 375 P.2d 33 (Cal.App. 4 Dist. 1962).

[155] *Mehlman v. Dollinger*, 674 N.Y.S.2d 37 (N.Y.A.D. 1 Dept. 1998). The case is a further illustration of the fact that secured indemnities accepted by title insurers to induce them to provide insurance coverages should not be drafted as escrows. What the court characterized as an escrow in this case was really an indemnity secured by funds. Recoupment on indemnities, and disputes regarding same, are discussed at §5.10.

[156] In *Splash Design, Inc. v. Lee*, 103 Wash.App. 1036, rev.den. 144 Wash.2d 1009, 31 P.3d 1185 (Wash. 2001), attorney-title agent-escrowee Karl Park had failed to search the correct seller's name for liens. He stopped payment on his escrow check when he searched the correct name and discovered a federal tax lien that might attach. The parties agreed to hold back a portion of the purchase price until the seller could obtain a certificate of non-attachment from the IRS. Park, the escrowee, refused to release the balance of the funds, however, and the seller sued him. When the certificate of non-attachment was obtained, Park released the balance but would not pay the holdback amount, because he had incurred the expense of being sued. The court found Park guilty of a negligent search and breach of fiduciary duty in refusing to release the funds. He argued that there was a dispute about the money, and the instructions permitted him to hold the funds until a dispute was resolved. The court disagreed, saying: "But there was not a dispute between the parties here. And Park did more than merely preserve the status quo. He actively intervened in the transaction when he

when a loan closing statement is prepared predicated on the release of a lien outside of escrow, which the borrower does not accomplish, the escrowee was entitled to apply the borrower's net cash from closing to obtain that release. [157] Also, in keeping with the general rule that an escrowee has no duty to "police" the transaction (see §13.3), it is not obligated to add conditions to its instructions before disbursing funds, for the protection of a principal.[158]

An escrowee is not obligated to release funds on a certain date unless the instructions create that unambiguous duty. When the escrow instructions create a clear drop-dead date on which funds are to be released to one party, absent an event that would cause them to be delivered to another party, the funds are to be delivered on the drop-dead date.[159] If the escrow fails to close, or the conditions to close of escrow are not met, the escrowee is to return all deposits to the depositors, unless the escrow instructions provide otherwise.[160] If money is deposited by a party other than the

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returned the purchase price to the buyer, Lee, without returning the business to the seller. Nothing in the escrow documents gave Park the authority to step out of the advisory capacity created by the instructions and intervene in the transaction. The evidence in the record supports only one conclusion: Park's conduct breached his fiduciary duty."

[157] *Richardson v. New Century Mortgage Corp*., 2005 WL 1554026 (N.D.Miss. 2005) (unpublished), aff'd 202 Fed.Appx. 773, 2006 WL 2990260 (C.A.5 (Miss.)) (unpublished). The borrower sued the lender's closing agent, alleging fraud and other causes of action. The court held that the loan closer, Hunt, did not owe Richardson, the borrower, a fiduciary duty, and rejected Richardson's claims, saying: "Viewing the facts most favorable to Richardson, the establishment of the first seven fraud elements is reasonably possible. The problem, however, comes in meeting the last two. Did Richardson have a right to rely on the representation that he would receive the $11,396 himself without using it to satisfy the tax lien? Further, did satisfaction of the $19,000 tax lien using the $11,396 create consequent and proximate injury to the plaintiff? A sober review of the record in this case, even viewed in a light most favorable to the plaintiff, manifestly establishes that the answer to both questions is no. Richardson admits that he knew at all relevant time that he owed the IRS $19,000 on the property he was seeking to refinance. He knew that it would be necessary to deal with that tax lien before he could get the loan. Even if he believed Hunt would 'handle' the lien, he had to know that handling it would require some fraction of the $19,000 owed. Given his apparent dearth of funds, the court fails to see what money he planned to use to satisfy the tax lien. Essentially, the plaintiff did not have a right to believe that he could get the surplus of the new loan without paying the tax lien since such a belief is patently unreasonable."

[158] *Schultz v. Rhode Island Hospital Trust Nat'l Bank, N.A.*, 94 F.3d 721 (5th Cir. 1996).

[159] In *Marcuson v. Clifton*, 571 S.E.2d 599 (N.C.App. 2002), a sewer assessment was pending but not yet final as of closing. The parties escrowed money with instructions to pay it to the buyers "upon the rendering of billing from Wake County to the record owner." However, the instructions said, " [i]f an assessment is made such that there is no cost to either the buyers or sellers within 16 months of closing, the escrow will be returned to sellers in full." An assessment roll was confirmed, and a bill sent to the owners, well past the sixteenth month after closing. The escrowee paid the bill, and the sellers recovered from escrowee, with the court finding that the money should have been returned to them when the 16 months had elapsed. In *Felger v. Financial Title Co.*, 2004 WL 1756191 (Cal.App. 5 Dist. 2004) (unpublished), the escrowee held money to protect against a judgment. The escrow instructions called for the money to be held for 90 days while the judgment debtor tried to obtain a release of the judgment. The creditor learned of the escrow and made a demand for the money within the 90 days. The escrowee paid the money and obtained a release of the judgment. The court found that the debtor was not harmed by this technical breach of instructions, because the money would have been properly released to the creditor a month later.

[160] *Wiczer v. Wojciak*, 30 N.E.3d 670, 391 Ill.Dec. 400, 2015 IL App (1st) 123753 (Ill.App. 1 Dist. 2015) ("if the

single party to the escrow instructions, and the conditions for close of escrow are not met, the escrowee properly obeys the instruction of the depositor to return the money to it.[161] Release of money under a "punchlist" or construction completion escrow is discussed at §10.2.8.

The escrowee does not have a duty to advise the other parties to the escrow when it is releasing funds, unless the instructions so state.[162] However, an escrowee was found to have a duty to notify the buyer that the seller had filed a declaratory judgment lawsuit to obtain the earnest money held in escrow, when the buyer was from out of state and had received no notice of the suit.[163]

An escrowee generally has no duties about money to persons who are not parties to the escrow, as is further discussed at §13.4. The escrowee has no duty to a party named by one of the principals to the escrow to receive funds.[164] The escrowee is not liable for payment out of escrow to parties for whom the escrowee has no payment instructions.[165] A New York case, however, raised the suggestion that an escrowee could owe a fiduciary duty to a mortgagee that delivered its satisfaction to the escrowee on the representation that it would be paid when escrow broke.[166]

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conditions of the escrow are not met, the escrowee must return the subject matter to the depositor," quoting *Columbia Homes, Inc. v. Sirois*, 115 Ill.App.3d 651, 653, 71 Ill.Dec. 518, 451 N.E.2d 6 (1983)); *In re L & R Development & Investment Corp*., 2017 WL 4863013 (Bkcy.P.R. 2017) (unpublished) (escrowee not negligent in returning down payment to buyer on its unilateral instruction when transaction failed); *Appel v. Boston Nat'l Title Agency, LLC*, ___ F.Supp.3d ___, 2019 WL 3858888 (S.D.Cal. 2019) (not yet released for publication) (when escrow failed to close because the sellers refused to complete the auction sale, the escrowee was required to return the purchase price to the buyer and was sued for having delayed in the return of the money).

[161] *Tribeca Companies, LLC v. First American Title Ins. Co*., 239 Cal.App.4th 1088, 192 Cal.Rptr.3d 354 (Cal.App. 1 Dist. 2015). The court said that an important factor in its reasoning was that the sole party to the escrow did not make any deposits into escrow, and thus the deposit by the non-principal was not merely one element of a larger transaction. The court said that fact distinguished the case from *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co*., 27 Cal.4th 705, 711, 117 Cal.Rptr.2d 541, 41 P.3d 548 (2002) and its holding that a depositor is not a principal to the escrow and the escrowee must treat the instructions it receives from the escrow principals as paramount.

[162] In *Madison Square Development Partnership of Arizona v. Chicago Title Ins. Co*., 2015 WL 3501556 (Ariz.App. 1 Div.) (unpublished), the escrow instructions said that the escrowee was to disburse the deposited money when it received instructions to do so from the party that was to receive the money. The escrowee received that instruction and disbursed the money. It was not also required to verify that the party seeking the money had given the required notice to the other party, or to verify that the other party agreed that the money should be disbursed, when the instructions did not say that the escrowee had either such duty.

[163] *Fisher v. Comer Plantation, Inc.*, 772 So.2d 455 (Ala. 2000).

[164] In *Brandt v. Sande, d/b/a Land Title Services*, 299 Mont. 256, 1 P.3d 929, 2000 MT 98 (Mont. 2000), the direction to pay the third party was revoked by the principal, leaving the escrowee with no duty to the payee; the court also held that the escrowee was not required to chase the party to verify whether or not he held a direct assignment of escrow proceeds, which might have given the payee standing as a party.

[165] *T.T.S.G., Inc. v. Kubic*, 226 A.D.2d 132, 639 N.Y.S.2d 825 (N.Y.A.D. 1 Dept. 1996).

[166] In *T.T.S.G., Inc. v. Kubic*, 226 A.D.2d 132, 639 N.Y.S.2d 825 (N.Y.A.D. 1 Dept. 1996), the court stated: "As escrow agent, defendant owes a fiduciary duty to the parties to the transaction [citation omitted], and there exists a

Another New York case held an escrowee responsible to a mechanic lien claimant for "failing to follow closing instructions received from" the claimant at closing on a sale, as a result of which the lien claimant did not get paid.[167]

When there is a dispute about the release of funds, the escrowee may wish to obtain all parties' consent before disbursing. However, the escrowee should avoid adding conditions to its performance of the escrow that, when not met, will cause it not to perform clear instructions.[168]

When the escrowee also serves as title insurer and fails to discover a lien, the escrowee may not unilaterally disobey its instructions to pay off the lien,[169] but may seek a modification of the instructions from the principals. The obligor on a lien should not be permitted to avoid paying its just obligation based solely on the title insurer-escrowee's failure to discover the lien. An Ohio court found, without analysis, that search negligence precluded a title agent from recovering money paid to a borrower at closing that should have been used to pay off a missed mortgage. However, that negligence did not preclude the title agent's foreclosure of the mortgage against the borrower after it purchased the loan.[170]

In certain situations, the escrowee desires or is required to deliver the funds to a court of competent jurisdiction as full satisfaction of its obligations. This may be done by an interpleader action. See the full discussion of interpleader at §13.11.

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question of fact whether defendant assumed a fiduciary duty to plaintiff [mortgagee]. Defendant's payment of the escrow funds to others, including the sponsor and himself, rather than meeting his obligation to plaintiff, would thus constitute a breach of fiduciary duty." Id. at 826. Similarly, in *Takayama v. Schaefer*, 669 N.Y.S.2d 656 (N.Y.A.D. 2 Dept. 1998), the court found that an escrowee is "a trustee of anyone with a beneficial interest in the trust."

[167] *F & C General Contractors Corp. v. Atlantic Mutual Mortgage Corp.*, 268 A.D.2d 556, 703 N.Y.S.2d 196 (N.Y.A.D. 2 Dept. 2000).

[168] In *Securities and Exchange Commission v. Champion-Cain*, ___ F.Supp.3d ___, 2019 WL 4686938 (S.D.Cal. 2019) (not yet released for publication), a title insurer escrowee was found to have breached a duty to the court by not having immediately turned over escrowed money on receipt of a court order instructing that all property of an entity was to be paid to the entity's receiver, despite the fact that many people whose money was part of the escrow pool told the escrowee they did not want the receiver to take control of their money.

[169] In *Splash Design, Inc. v. Lee*, 103 Wash.App. 1036, rev.den. 144 Wash.2d 1009, 31 P.3d 1185 (Wash. 2001), attorney-title agent-escrowee Karl Park had failed to search the correct seller's name for liens. He stopped payment on his escrow check when he searched the correct name and discovered a federal tax lien that might attach. The parties agreed to hold back a portion of the purchase price until the seller could obtain a certificate of non-attachment from the IRS. Park, the escrowee, refused to release the balance of the funds, however, and the seller sued him. When the certificate of non-attachment was obtained, Park released the balance but would not pay the holdback amount, because he had incurred the expense of being sued. The court found Park guilty of a negligent search and breach of fiduciary duty in refusing to release the funds. He argued that there was a dispute about the money, and the instructions permitted him to hold the funds until a dispute was resolved. The court disagreed: "But there was not a dispute between the parties here. And Park did more than merely preserve the status quo. He actively intervened in the transaction when he returned the purchase price to the buyer, Lee, without returning the business to the seller. Nothing in the escrow documents gave Park the authority to step out of the advisory capacity created by the instructions and intervene in the transaction… . The evidence in the record supports only one conclusion: Park's conduct breached his fiduciary duty."

[170] *Nicholson v. Colson*, 2000 WL 193231 (Ohio App. 8 Dist.) (unpublished).

The date on which escrow is considered to break may be dictated by state law, if the state has a law regulating closing funds. For example, Utah has a law requiring that an escrowee have collected funds before it issues funds from the escrow.[171] In that state, an escrow closes on the day prescribed by the closing funds statute, which in most cases is the day after the funds are deposited.[172] Closing funds laws are further discussed at §13.13.

In some states, title companies act as the loan servicer for a lender, collecting payments from the borrower and distributing them to the lender or otherwise as directed by the lender. In an escrow for collection of land contract payments, the escrowee did not violate a duty by accepting a late payment, or one lesser in amount than was due and payable.[173] The loan servicing escrowee also receives instructions and authority to release the loan collateral under the terms of the instructions and the debt instrument.[174]

An escrowee who absconds with deposited money is generally liable to the principals. Defalcation by title agents is discussed at §17.8.3. Difficult issues can arise as to the relative rights of the various parties whose money was deposited in the escrow account.[175] When an escrowee was instructed to draw on a letter of credit, but failed to do so before it expired, the escrowee was liable to the seller who would have been entitled to the funds.[176]

A seller who is mistakenly paid too much money at closing must return the overpayment when sued for unjust enrichment.[177] The seller's signing of a "compliance" agreement at closing has

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[171] Utah Code Ann. § 31A-23-307(2) states: "(c) No check may be drawn, executed, or dated unless the segregated escrow account against which it is drawn contains a sufficient credit balance consisting of collected or cleared funds, at the time the check is drawn, executed, or dated. … (d)(iii) [C]ashier's checks, certified checks, teller's checks, U.S. Postal Service money orders, and check s drawn on a Federal Reserve Home Loan Bank may be disbursed on the day following the date of deposit... ."

[172] *Schuhman v. Green River Motel*, 835 P.2d 992 (Utah App. 1992).

[173] *Malta v. Phoenix Title & Trust Co.,* 76 Ariz. 116, 259 P.2d 554 (1953).

[174] In *Aldabbagh v. First American Title Ins. Co*., 2008 WL 4069204 (Ariz.App. Div. 1) (unpublished), a title insurer performing under an account servicing agreement for the collection of loan payments was found not to have mistakenly released both deeds of trust that secured the debt, and therefore was not liable to the lender for the balance of the loan.

[175] *Deer Creek, Inc. v. Section 1031 Services, Inc*., 235 Ga.App. 891, 510 S.E.2d 853 (1999) involved 1031 Services, Inc., a Georgia company formed by a man who assumed the name and social security number of a dead person. Once he got some exchange money, the man withdrew more than $2 million from the account and left the country. The first two exchange parties to seek their money, Miller and Burdine, got arbitration awards, confirmed by the court, ordering the bank to turn over the amount of their deposits from the money remaining in the account. A group of other exchange parties then sought to block the turnover of funds. The court upheld the orders turning over funds to Miller and Burdine. On appeal, the court upheld the delivery of the money to Miller and Burdine. The court refused to impose a constructive trust, since that remedy is intended to prevent unjust enrichment but none of the depositors were unjustly enriched by the return of their own money. The court also said that Miller and Burdine were not the fiduciaries of the other exchangers.

[176] *Lacy v. Ticor Title Ins. Co.*, 794 S.W.2d 781 (Tex.App.-Dallas 1990).

[177] In *Lawyers Title Ins. Corp. v. Wetzel*, Ill.App. 5 Dist., Appeal No. 5-98-0429 (May 28, 1999) (unpublished), Larry

been found a significant factor in obligating a seller to disgorge overpayment.[178]

When the escrowee makes a mistake in the handling of funds, it has a right to recover from the party in whose favor the mistake was made. For example, when the escrowee prepared the closing statement and listed the sale price as $2,000 too little, the escrowee reimbursed the seller for the mistake. The buyer was then obligated to pay the escrowee. The court rejected the buyer's claim that the payment to the seller was a "compromise settlement" or a "voluntary payment."[179] Title insurers who made mortgage payoffs to a mortgage broker which had arranged the loans and which had accepted the monthly payments from the borrowers were entitled to an injunction against the foreclosure of the mortgages. The court found that the mortgage broker had been the dual agent of borrowers and mortgagees.[180]

13.5.1 Loan Payoff Disputes

FORM 83, Appendix A
Lender bound by payoff letter

The accurate payoff of loans secured by real estate is a persistent source of problems for escrowees. As to the borrower, the lender is not obligated to consider the loan paid off until payment is received in full. However, buyers and refinancing lenders must rely on payoff figures given by the lender in making payments to clear title of the existing mortgage or deed of trust.

An escrowee is liable to the escrow principals if it violates its instruction to pay off a loan.[181]

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and Lori Wetzel were paid $30,000 too much in their seller proceeds check. The title insurer was forced to sue as subrogee for unjust enrichment. The Wetzels argued that the insurer was precluded from recovering because of negligence. The court said: "We will give this case all the analysis it deserves. The Wetzels are attempting to perpetrate a fraud. They have been unjustly enriched. The Wetzels' arguments to the contrary represent legal nit-picking and double-talk. Lawyers Title is subrogated to Magna Bank's claim and was properly awarded summary judgment. See *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill.2d 314, 597 N.E.2d 622 (1992). We will not aid the Wetzels in this chicanery."

[178] For example, in *Charter Title Agency, Inc. v. Hosfelt Investment Co.*, 1999 WL 1221527 (Ohio App. 10 Dist.) (unpublished), the seller signed an agreement "to fully cooperate and adjust for clerical errors on any or all documents deemed necessary in the reasonable discretion of" the settlement agent. The court found that this obligated the seller to reimburse the closer for taxes that were incorrectly prorated on the closing statement. See a further discussion of compliance agreements at §13.14.

[179] *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 728 (Mo.App.S.D. 1994). The court stated: "The payor should be allowed to recover for payments made for others in good faith where, because of the relationship, he had reason to believe it would be reimbursed [and escrowee] had reason to believe that defendant would reimburse it for costs associated with the purchase."

[180] *Young v. Nevada Title Co.*, 744 P.2d 902, 103 Nev. 436 (1987).

[181] See *Faerber v. Troutman & Troutman, P.C.*, 2017 WL 2691264 (Tenn.App.) (unpublished), in which the court found an attorney closing agent liable to the escrow principal for having delivered the loan payoff check to a party other than the lender, contrary to instruction as evidenced by the closing statement. However, in *McMahon v. Bouchal*, 2017 WL 4862454 (Md.App. 2017) (unpublished), a title agency was not liable to the borrowers for failing to pay off their

An escrowee/closing attorney was liable to a title insurer when he instructed the insurer to delete a deed of trust from its policy based on his payment at closing, after which he paid off the wrong loan.[182]

However, an escrowee that obeys its instructions and pays off a prior mortgage loan in full is not liable to the escrow principals if the lender fails to perform its obligation to release the mortgage.[183] When an escrowee was instructed to send funds to pay off a mortgage, it did not have the additional duty to verify its later discharge.[184]

There is a growing body of law, both statutory and by precedent, to the effect that third parties are entitled to the release of the real estate on payment of the amount recited in a payoff statement, even if that sum is not sufficient to pay off the loan.[185] Part of this emerging consensus is

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loan after the borrowers induced the title company to give them the loan money instead.

182 *Chicago Title Ins. Co. v. Landry*, 1999 WL 307220 (Wash.App. 1 Div.) (unpublished).

183 *Wells Fargo Bank, N.A. v. Bowman*, 2012 WL 474167, 2012 -Ohio- 576 (Ohio App. 5 Dist.) (unpublished) (escrowee not liable to owner for seller's lender's failure to release paid-off mortgage).

184 *Hooper v. Commonwealth Land Title Ins. Co*., 285 Pa.Super. 265, 427 A.2d 215 (1981).

185 California Civil Code Section 2943, subdivision (a)(5), for example, defines "payoff demand statement" as: "a written statement prepared in response to a written demand made by an entitled person or authorized agent, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement. The written statement shall include information reasonably necessary to calculate the payoff amount …, [and that such a letter] may be relied upon … in accordance with its terms, including … for the purpose of establishing the amount necessary to pay the obligation in full." Under that code section, an "entitled person" includes the borrower, a subsequent owner of the encumbered property, a party holding a subordinate lien or "the escrowholder licensed as an agent pursuant to Division 6 (commencing with Section 17000) of the Financial Code." However, in *Rubie's LLC v. First American Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 2546585 (E.D.Cal. 2019) (not yet released for publication), a title insurer sued the lender that was paid off and the SBA, alleging that Wells Fargo demanded payment, First American paid the loan, and therefore the lender was required to release the deed of trust, based on the terms of the deed of trust instrument. The insurer did not allege that a request for payoff demand had been made, or a payoff statement issued, under Civil Code Section 2943. The court ruled that the insurer had not alleged the formation of a contract between Wells Fargo and First American that would support the claim. The Uniform Residential Mortgage Satisfaction Act was promulgated by the National Conference of Commissioners on State Laws in 2004. That law has been adopted in Alabama, North Carolina, Virginia and Wisconsin, with variants adopted in Indiana and a number of other states. That model law, which makes payoff letters binding and imposes real penalties for the failure to release a mortgage, is discussed in *A First Look At An Interesting Act*, by Jim Stewart, in Servicing Management (July 2005). The model law and its progress in state legislatures may be viewed at www.nccusl.org. In *Sutton Funding, LLC v. Jaworski*, 945 N.E.2d 705 (Ind.App. 2011), the court relied on the Indiana law, which compels lenders to honor payoff statements because other parties rely on them, to find a lender obligated to release its mortgage on payment of the amount stated in its letter even if it was inaccurate. Indiana Code section 32-29-6-13 says: "A creditor or mortgage servicer may not withhold the release of a mortgage if the written mortgage payoff statement misstates the amount of the payoff and the written payoff is relied upon in good faith by an independent closing agent without knowledge of the misstatement...." Similarly, in *American First Nat'l Bank v. Jordan-Lewis Development, L.P*., 2011 WL 2732779 (Tex.App.-Houston (1 Dist.)) (unpublished), the Texas release law, Texas Property Code § 12.017(c), was used to uphold the release of a deed of trust recorded by the title company based on a payoff letter issued by the bank. The payoff letter had the unusual provision that the lien would be released on delivery of a certificate of deposit. The CD was delivered, but the borrower did not sign a pledge agreement. In *Stommel v. LNV Corp*., 2015 WL 417883 (D. Utah)

the principle that a third party buyer or lender has a right to obtain a release of the real estate when it has relied on a payoff statement, whether or not the letter is accurate. A Virginia statute on payoff letters was found to create a duty on the lender's part to promptly notify the closer that a payoff letter was inaccurate. By waiting more than two months after it accepted the payoff money, the lender had lost the right to demand additional funds in exchange for the release of the property.[186]

Every state has a statute requiring a lender to release its lien within a certain period of time after having received payment in full.[187] However, not every state has adopted a law that gives an escrowee standing to sue a lender for its failure to release its mortgage after receiving payment in full, or for its failure to honor the terms of its payoff statement.[188]

A number of states have adopted laws that permit a title insurer or agent to release a mortgage of record when the company has paid off the loan.[189] A lender may have a claim against the title insurer or agent if its lien was improperly released.[190]

(unpublished), recons.den. 2015 WL 2255055 (May 13, 2015), which concerned a "split" closing conducted jointly by two escrow companies, the court held that a lender's promise to release a deed of trust without payment could be asserted by both escrowees as a defense to that lender's foreclosure threat. The court enjoined foreclosure of the deed of trust and awarded attorneys' fees to the property owner.

[186] *Sovereign Title Co. v. First Union Nat'l Bank*, 2000 WL 511798 (Va.Cir.Ct.) (unpublished). Virginia has a law, Va. Code § 6.1-330.82(A), obligating lenders to honor payoff letters within a specified period of time. That law was an important factor in the Sovereign decision.

[187] Those laws are discussed in the paper entitled *The Uniform Residential Mortgage Satisfaction Act with Prefatory Note and Comments*, published and promulgated by the National Conference of Commissioners on State Laws, available at uniformlaws.org. The case of *A Pro Realty Service, Ltd. v. Fulton Bank, NA*, 2019 WL 2121502 (Pa.) (unpublished), concerned Pennsylvania's lien release statute, Title 21 P.S. Deeds and Mortgages § 721-6, which says that, if the lender fails to record the satisfaction within 60 days of receipt of payment in full, "the mortgagee shall forfeit and pay to the mortgagor a penalty in a sum not exceeding the original loan amount." The court found that the borrower made a premature demand on the lender and therefore could not collect the penalty.

[188] Louisiana has no statute relating to loan payoffs, and the code acknowledges a contractual relationship only between the lender and the borrower. In *Accent Title, LLC v. Ocwen Loan Servicing, LLC*, 2015 WL 3862904 (M.D. La.) (unpublished), a title company sued a lender for refusing to release its lien on payment in full, and issuing subsequent payoff statements that demanded increased amounts of money. The court found the title company had no standing to bring that action. In *Title Solution Services, Inc. v. Carrington Mortgage Services, LLC*, 2019 WL 1469397 (E.D.La.) (unpublished), the facts were nearly identical to those in *Accent Title*. The title agent advanced $11,000 of its own money to the lender to get a release, after the lender issued a payoff statement after closing demanding a larger amount of money. The court said that the title company had standing to sue only because it had advanced its own money to the lender, distinguishing *Accent Title*. However, it also held that the amount advanced by the title agent was less than the $75,000 required for federal jurisdiction over the case.

[189] See, for example, California Civil Code §2941; Del. Code Ann. tit. 25, § 2120(a); and Texas Property Code § 12.017(c). The law, first adopted in Minnesota, became so popular that it spurred the Uniform Residential Mortgage Satisfaction Act, drafted by the National Conference of Commissioners on Uniform State Laws, which is discussed above, this section.

[190] See *Cathay Bank v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 266, 53 Cal.Rptr.2d 595 (Cal.App. 2 Dist. 1996); *SMS Financial XXIII, LLC v. Cornerstone Title Co*., 19 Cal.App.5th 1092, 228 Cal.Rptr.3d 562 (Cal.App. 1 Dist. 2018)

Most cases hold that equity loan accounts are not considered closed, and post-closing advances obtain priority, unless there is some evidence that the borrower closed the account, or gave an implied instruction to that effect, as discussed further below. However, the escrowee's failure to observe reasonable terms concerning the manner prescribed by the lender for delivery of the payoff is a basis for the lender to reject a payoff.[191]

Most lenders take the position that payoff figures are not binding unless given in writing. However, lenders frequently amend written payoff statements orally. In *Smith v. Woodwind Homes, Inc.*,[192] the court allowed an action against a bank that issued an oral modification. The action was based on equitable estoppel, promissory estoppel and performance of an oral agreement. In *Smith*, the lender issued a payoff letter showing the full principal and interest due to satisfy the debt. The closing was short on proceeds. The loan officer allegedly told the escrow officer over the telephone that he would release the property from the mortgage on receipt of the net proceeds of sale. The money was sent with a mortgage satisfaction. The lender did not sign the satisfaction, but the bank's internal receipt was marked "loan payoff in full." Its ledger for the loan was changed to zero. About three months later, the bank had the borrower sign a new note for the balance of the debt. Only after that loan went into default did the bank bring a foreclosure action. The title agency was not allowed to sue the bank for negligent misrepresentation.[193]

(buyer of loan may sue title agency for wrongfully releasing deed of trust under lien release law); *M & T Bank v. Mallinckrodt*, 43 N.E.3d 1039, 2015 IL App (2d) 141233, 398 Ill.Dec. 129 (Ill.App. 2 Dist. 2015) (certificate of release issued by insurer based on fake payoff letter and payment to wrong party, due to borrower's fraud); *In re Allman*, 2010 WL 3366405 (Bkcy.D.Or.) (unpublished) (lender bound by the lien release signed by the title company for line of credit loan because borrowers signed written instruction to freeze account, loan paid off in full and title company sent letters warning lender that it would use Oregon's release statute to release lien unless lender objected); *American First Nat'l Bank v. Jordan-Lewis Development, L.P.*, 2011 WL 2732779 (Tex.App.-Houston (1 Dist.)) (unpublished) (Texas release law used to uphold release of deed of trust recorded by title company based on payoff letter issued by bank).

[191] See *Hondroulis v. Homecomings Financial, Inc.*, 2007 WL 4482213 (M.D.Fla.) (unpublished), subs. order 2008 WL 312807 (M.D.Fla.), in which the court sanctioned the lender's rejection of a payoff wire transfer because the loan number was not contained in the reference line, even though a fax was sent to the lender at the same time attaching the payoff statement and giving the loan number. The court noted that the lender received 200 wires per day, and "could not definitively determine that the wire transfer and faxed information related to the same loan by simply comparing the faxed documents to the wire transfer." In *Atlantic Nat’l Servicing Co., Inc. v. Anderson*, 2007 WL 583329 (D. Utah) (unpublished), an offer to pay off a loan by check delivered in person, rather than by wire, was held insufficient when the payoff letter specified payment by wire transfer. The lender was held entitled to assess a substantial late-payment penalty.

[192] 605 N.W.2d 418 (Minn.App. 2000).

[193] The agency premised this proposed cause of action on Restatement (Second) of Torts § 552. The court said: "[a]n essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information. [citation omitted] A duty of care arises when one making representations is 'supplying information for the guidance of others in the course of a transaction in which one has a pecuniary interest, or in the course of one's business, profession or employment.' ... But, where 'adversarial parties negotiate at arm's length, there is no duty imposed such that a party could be liable for negligent misrepresentations.' ... Here, the bank was not supplying guidance or advice to CCTG; rather, it was engaged in an arm's-length commercial transaction. The bank and CCTG were negotiating the terms for closing on the sale of the home and repaying the outstanding construction

A lender may seek to disavow a payoff letter issued by a loan servicer, on the theory that it did not have authority to bind the lender. However, most loan servicing agents have the actual authority to issue payoff letters, receive payoffs and issue releases of the collateral.[194] In dealing with loan servicers, industry custom plays a role in determining the apparent authority of the servicer. Thus, when a lender appoints a servicing agent with authority to collect loan payoffs, an escrowee may deal with the servicing agent until it receives notice that the servicing contract has been terminated, or facts that put the escrowee on inquiry notice as to the agent's authority. When the servicing agent gives a payoff letter, and no notice of termination is given to the escrowee, the lender is obligated to discharge its mortgage lien on payment of the loan balance to the servicer, even if after the payoff letter is issued the servicing agreement has been revoked and the lender did not receive the funds.[195]

A lender may also assert lack of authority to bind as a defense to an incorrect payoff statement issued by the lender's attorney. An attorney may or may not have authority to bind the client to a payoff amount by issuing a payoff letter.[196]

When the parties rely on what is later proven to have been a fake or forged payoff letter, and absent a statute that identifies which party bears the burden of that type of fraud, this ancient equitable principle applies:

> Where one of two innocent persons must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong.[197]

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mortgage and subcontractors' liens. Both parties were experienced at closing real-estate transactions and CCTG has not demonstrated any special relationship between them indicating they were anything other than sophisticated equals negotiating a business transaction. Thus, we conclude as a matter of law that CCTG has not demonstrated that the bank owed it a duty of care and CCTG's motion to amend its complaint to include a claim of negligent misrepresentation was properly denied."

[194] *Jarvis v. K & E RE One, LLC*, 390 S.W.3d 631 (Tex.App.-Dallas 2012) (loan broker who also acted as servicer had apparent authority to accept loan payoff money, and lien release was owed to borrower; decision contains scholarly discussion of the issue).

[195] *Banco Santander Puerto Rico v. Select Title Service Inc.*, 692 So.2d 950 (Fla.App. 3 Dist. 1997); *Citywide Banks v. Armijo*, 313 P.3d 647 (Colo.App. 2011).

[196] In *Bacich v. Uzzell*, 2000 WL 760440 (Minn.App.) (unpublished), an attorney was found to have authority to issue a payoff statement, but not to negotiate a reduction in the payoff amount. The lender clients were private individuals holding a purchase money mortgage rather than an institution, which the court considered a significant factor. In *CHD, Inc. v. Taggart*, 167 Wash.App. 1035, 2012 WL 1263501 (Wash.App. Div. 3) (unpublished), however, a lender gave its law firm authority to issue a payoff statement by escrowing the note and deed of trust with the firm, and was obligated to release the deed of trust on receipt of the amount recited in the payoff statement even if it was incorrect.

[197] *M & T Bank v. Mallinckrodt*, 43 N.E.3d 1039, 2015 IL App (2d) 141233, 398 Ill.Dec. 129 (Ill.App. 2 Dist. 2015), quoting *Connor v. Wahl*, 330 Ill. 136, 146, 161 N.E. 306 (1928).

However, it is not always easy to determine which party gave the borrower the power to forge the payoff letter, and who should thus suffer the loss.[198]

The lender may also assert that terms for the lien release other than the dollar amount to be paid have not been met, and therefore the lien release is not owed. When the lender agrees to a short payoff, but conditioned on receipt of other collateral or valuable consideration, the failure to obtain and deliver the additional collateral may justify the lender in refusing to release the mortgage or deed of trust.[199] An escrowee may sue a lender for failing to honor its agreement to subordinate its lien to the mortgage held by the lender that is the escrow principal.[200]

A payoff statement must reflect only the debt legally owed by the borrower as of the date of the letter's issuance. A lender may not condition its release of collateral on payment of an additional sum designed to cover potential future litigation costs to the lender in defending itself in counterclaims by the borrower.[201]

Some payoff disputes occur because the payoff statement issued by the bank is as to a loan with the same borrower but not the one that is to be paid off at closing. The lender will in most cases be obligated to honor the payoff letter and release the lien if it made a mistake in issuing a payoff statement on the wrong loan, or the closer provided unambiguous information with the payoff

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[198] In *M & T Bank v. Mallinckrodt*, 43 N.E.3d 1039, 2015 IL App (2d) 141233, 398 Ill.Dec. 129 (Ill.App. 2 Dist. 2015), the borrower was the president of the mortgage banker that made the loan to himself as an individual. His company sold the loan to M & T Bank, which did not record a mortgage assignment but did register the loan in the MERS system. The borrower delivered the fake payoff letter on behalf of his mortgage banking company, which was the record holder of the mortgage. First American was the escrow company for the refinance lender, U.S. Bank. The title company issued a certificate of release after making the payoff. The appeals court said that, at trial, the judge would have to balance the actions of M & T in not giving public notice that it owned the loan with U.S. Bank's failure to check the MERS registry to verify that Mallinckrodt's company still held the loan, to decide which of them put Mallinckrodt in the position to work the fraud.

[199] In *Alpha Title Agency, Inc. v. Peoples State Bank*, 2004 WL 576663 (Mich.App.) (unpublished), the lender agreed to discharge a mortgage on receipt of part of the money and a consent judgment for the balance. The lender was not required to issue the discharge on receipt of the money without the consent judgment.

[200] *WFG Nat'l Title Ins. Co. v. Kavac Holding Company, LLC*, 2019 WL 636722 (S.D.Tex. (Houston) 2019) (unpublished), recommendations adopted 2019 WL 632754 (S.D.Tex. (Houston) 2019) (permanent citation not yet available) (title insurer entitled to sue holder of blanket deed of trust based on oral promise to subordinate lien to subsequent construction deeds of trust on individual lots, and for other claims based on lender's actions seeking to wipe out lot buyer and lender).

[201] In *Crown Bank v. Crowder Mortgage Corp.*, 5 P.3d 954 (Colo.App. 2000), the loan was in foreclosure and the lender was concerned about ongoing expenses if the lawsuit was not dismissed as part of the payoff. After reviewing Colorado's statute on payoff obligations, the court said: "We conclude that a lender cannot place conditions on its release of a deed of trust other than the satisfaction of the indebtedness secured by that deed of trust. This conclusion is consistent with the apparent purpose of the statute, which is to permit the owners of real property to obtain the release of liens by the payment of the full amount secured by the lien and thereby permit the owner to sell, pledge, or otherwise deal with the property free of the lien. If a lien holder were permitted further to condition the release of the lien, it could use that ability to coerce settlement of other disputes or accounts a result which the statute clearly intended to prevent."

indicating what loan was to be paid off and what lien was to be released.[202] However, if the person who ordered the payoff statement made a mistake as to which loan was to be paid off, the liability for the error will typically fall on that party.[203]

A lender that receives money with the instruction that it is to be used for the payoff of a mortgage loan is liable to the parties if it fails to properly apply the funds. In *Chicago Title Ins. Co. v. Allfirst Bank*,[204] a borrower was entrusted with two checks from closing, one to himself as the cash-out portion of the new loan and the other payable to his bank as the payoff of the existing line of credit. The borrower did not deliver the close-my-account letter to the bank. He asked the teller to deposit both checks in his personal account. The teller noted that the bank had several open loan accounts, one with a balance matching the check payable to the bank, and that a payoff letter had been issued a short time before. Nonetheless, she deposited the check in the borrower's personal account. The court held that the bank was obligated to release the mortgage, because the new lender relied on the bank to apply the check to pay off the loan.

On subdivision and other blanket mortgages, payoffs are often made based on partial release agreements made by lenders and borrowers. If the partial release agreement does not establish the price to be paid on each lot sale, that price may be determined based on the course of conduct.[205] The lender may keep bad records on such a loan, complicating the later determination of whether or not the lender was obligated to release a particular parcel. However, the lender is not entitled to a presumption that its money had been stolen before being paid based on the fact that it did not issue releases, had no record of receiving payment, and a person who performed some of the closings was later found to have stolen money from his escrow account.[206]

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[202] In *Stewart Title Guar. Co. v. F.D.I.C.*, 936 S.W.2d 266 (Tenn.App. 1996), the insurer-closer called for a payoff amount, giving the borrower's name and the address of the property. The lender gave a payoff figure for a different loan to the same borrower. That amount was sent to the lender after closing, with reference to the property on the check. The lender deposited the check, but the deed of trust was never released. Later, the lender was taken over by the F.D.I.C., which sought to foreclose. The court declared the deed of trust released, on the grounds that the lender was bound by its payoff figure. The court held that this was "a classic case for the application of the doctrine of equitable estoppel." In *First American Title Ins. Co. v. Cumberland County Bank*, 633 F.Supp.2d 566 (M.D.Tenn. 2009), the lender that issued payoff letter covering only one loan and not both mortgage loans was not entitled to summary judgment on the misrepresentation claim brought by the insurer-closer, with the insurer contending that the bank "could have prevented the mistake in this case by following sound practices and employing a computer system that provided more than just partial information on its loans."

[203] In *EvaBank v. Traditions Bank*, 258 So.3d 1119 (Ala. 2018), a bank that issued a payoff letter for the wrong borrower was not required to release its mortgages on payment of the amount shown on the payoff letter, because the court held that the title company that requested the letter had a duty to notice the fact that the borrower and loan number listed on the letter were not correct.

[204] 394 Md. 270, 905 A.2d 366 (Md. 2006).

[205] *Jim Carpenter Co. v. Potts*, 495 S.E.2d 828 (Va. 1998).

[206] *Knapp v. Smethurst*, 139 Md.App. 676, 779 A.2d 970 (Md.App. 2001). As to the closer, Goldberg, the court said: "[m]ere surmise that these funds were among the monies stolen by Goldberg and LTR does not make it so." Rather, the court said the bank could not use its own bad records against the admittedly innocent purchasers: "[a]s a regulated

The payoff of revolving credit home equity loans creates special issues. A payoff of the full balance owing does not, by itself, close the loan account or instruct the lender to release the real estate. However, a court may find the lender obligated to release the mortgage even without conclusive evidence that a close-my-account letter was delivered.[207] The lender may be entitled to priority for advances made after the account was reduced to zero at closing, if the borrower does not close the account in writing.[208] Such a letter written by the escrowee may be sufficient, but only if the borrower authorized the closer to write on his or her behalf.[209] A closer may also assert equitable arguments including equitable subrogation, equitable estoppel, and unjust enrichment, if the evidence is reasonably clear that acceptance of the payoff check was conditioned on the closing of the account and release of the real estate. For example, a court noted favorably that the payoff check was marked "for mortgage payoff."[210] However, when the lender received adequate notice that the account was to be closed, and third parties relied on the payoff to prompt the satisfaction of the lien,

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financial institution, albeit an unsuccessful one, it is reasonable to infer that the Bank would not have ignored a failure by LTR to remit funds that the Bank anticipated with regard to a troubled loan. Moreover, the settlement statement of LTR shows that the net proceeds were to be paid to the Bank, and there is no correspondence from the Bank to LTR, subsequent to the settlement, inquiring about the proceeds. Because it is hard to conceive of how the Bank could forget to collect some $27,000 in loan proceeds, the plausible inference is that the monies were received."

[207] In *Deutsche Bank Nat'l Trust Co. v. E*Trade Bank*, 2018 WL 5023611 (Cal.App. 1 Dist.) (unpublished), the court held that the lender was required to reconvey the deed of trust when it received payment, because the deed of trust did not say that the release obligation was dependent on receipt of a close-my-account letter, nor do California Civil Code sections 2941 and 2943 condition release on receipt of such a letter. The court also held that the lender had the burden of proof to show that the letter signed by the borrowers had not been delivered to the lender. The court also tossed the lender's far-fetched argument that federal Truth In Lending law does not permit a lender to release a HELOC deed of trust on payment in full. However, the court said that California's law permitting a title insurer to release a deed of trust was a remedy available to the senior lender, and might prevent it from suing the HELOC lender for its failure to record a release.

[208] *Bank of New York v. Fifth Third Bank of Central Ohio*, 2002 WL 121925 (Ohio App. 5 Dist.) (unpublished); *Dreibelbiss Title Co., Inc. v. Fifth Third Bank*, 806 N.E.2d 345 (Ind.App. 2004), reh.den. July 2, 2004 (letter given to lender with payoff in full, but did not contain magic language "close my account," permitting lender to make additional advances with priority later); *Washington Mutual Bank, F.A. v. ORNL Federal Credit Union*, 300 S.W.3d 665 (Tenn.App. 2008) (reversing judgment against lender requiring it to release deed of trust without close-my-account letter because its payoff statement mistakenly did not include that requirement despite the bank's usual custom; court found that deed of trust itself stated that it would not be released until the borrower had requested that the line of credit be cancelled, and therefore lender that made payoff was on notice and not entitled to equitable estoppel).

[209] In *Bank of New York v. Fifth Third Bank of Central Ohio*, 2002 WL 121925 (Ohio App. 5 Dist.) (unpublished), the court did not reject the proxy argument, but said that there was no proof in the record on the issue: "Without a copy of the written escrow agreement, neither the trial court nor this Court can determine whether the parties in this matter intended Express Title Services to act as the Laymons' agent in requesting termination of the equity line account. Furthermore, … there is no indication in the record that appellee Fifth Third Bank knew … that the parties intended for Express Title Services to act as the Laymons' agent ... Express Title Services … never indicated that it was acting as the Laymons' agent in terminating the equity line account or that the Laymons wanted to close their equity line account."

[210] *First American Title Ins. Co. v. TCF Bank, F.A.*, 286 Ill.App.3d 268, 676 N.E.2d 1003, 222 Ill.Dec. 39 (Ill.App. 2 Dist. 1997).

a lender is bound to release the mortgage even if it has made new advances to the borrower.[211]

Some courts have not obligated the lender to release an equity loans mortgage based on letters issued by the lender to the borrower stating that the equity loan has been paid off, and implying that the mortgage lien will be released. A letter from the bank to the borrower announcing that the loan was closed, and implying that it had been paid in full, was found not to be a payoff letter that obligated the lender to satisfy the mortgage. The letter was issued automatically, due to a software glitch, and the escrowee did not confirm the payoff with the lender.[212] Likewise, a letter that announced that the equity loan had been paid off was found by an Ohio court not to obligate the lender to release the mortgage, although the letter was faxed directly to the title company at its request. [213] Similarly, in *California Nat'l Bank v. Havis*,[214] a letter stating that "payoff funds" had been received did not obligate the lender to release its deed of trust, when the payoff check later bounced.

The payoff of loans in foreclosure also presents special problems and potential liability for the escrowee. When the property is being sold by the borrowers shortly before a scheduled foreclosure sale, the prompt and accurate payoff of the loan is imperative to call off the sheriff's or trustee's sale and thus avoid the possibility that a bidder at that sale will claim paramount title to the property. [215] When an escrowee is aware that a foreclosure sale has been scheduled, prudence dictates that the escrowee obtain clear instructions from the lender as to how the payoff is to be made, that those instructions be followed, and that the escrowee confirm after closing or break of

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[211] In *In re Allman*, 2010 WL 3366405 (Bkcy.D.Or.) (unpublished), the borrowers' written instruction before closing to freeze the account, followed by the payoff in full and two letters from the title insurer warning that it would use Oregon's release statute to release the lien unless the lender objected, formed a sufficient basis to find the lender bound by the lien release signed by the title company.

[212] *Barrows v. Firstar Bank*, 103 S.W.3d 386 (Mo.App. W.D. 2003).

[213] *Sky Bank-Ohio Bank Region v. Sabbagh*, 161 Ohio App.3d 133, 829 N.E.2d 743, 2005-Ohio-2517 (Ohio App. 2 Dist. 2005). The letter issued by the lender was not an accident or part of an automatically-generated batch mailing, was faxed directly to the title agent at its request, and said "Sam Sabbagh loan was paid off on Feb. 25 99." This would seem to make a strong case for reliance. However, the court was swayed by a note in the title agent's file saying that the borrower wished to keep the line of credit open, and that the lender never directly committed to release the mortgage.

[214] 120 Cal.App.4th 1122, 16 Cal.Rptr.3d 245 (Cal.App. 2 Dist. 2004). In *Havis*, a lender issued a statutory payoff demand statement. A few days later, in advance of the closing of escrow that would have provided a legitimate payoff check, the borrowers delivered a check to the bank in the correct amount. The bank issued a letter saying: "[t]his letter is to verify that California National Bank received payoff funds for the above referenced loan on July 24, 2002, in the amount of $1,175,247.14. It is our policy to issue the Full Reconveyance, 10 days after receipt of the pay off check. Therefore, a Full Reconveyance will be sent to the County Recorders on or about August 5, 2002." The predictable occurred: the check was returned as NSF. The escrowee was tricked by the second letter into not paying off the loan at closing, however. The court ruled that the payoff receipt letter was conditioned on the clearing of the check, and that the lender was not obligated to release its deed of trust, because the parties did not reasonably rely on it.

[215] See *Mathes v. Coast Cities Escrow*, 2006 WL 122451 (Cal.App. 4 Dist.) (unpublished), in which payment was received by the lender shortly after the sale was conducted, the bidder at sale was found to have the better claim to own the property, and the people who bought from the borrowers sued the escrowee for claimed negligence.

escrow that the foreclosure sale has been cancelled due to the payoff. The escrowee is not liable for the effect of a late payoff if it is not aware of the pending foreclosure sale, or is misinformed as to the sale date, however.[216]

Escrowees and title insurers sometimes fail to pay off loans because they are tricked into relying on mortgage releases that they later learn were forged by the borrower or someone acting on the borrower's behalf. A forged lien release or reconveyance is void, and is not binding on the lender unless there is strong evidence that the lender knew that third parties would rely on it, and the lender failed to take action to expunge the release.[217]

An insurer may seek reimbursement from a settlement attorney or agent who negligently fails to close an equity loan account and obtain a release of the real estate. One insurer was found to have waived its subrogation rights by giving a full release to the borrowers.[218] Another insurer was barred from suing the attorney by the statute of limitations.[219]

An escrowee may seek reimbursement from the borrower when the escrowee is forced to pay part of the loan debt from its own money in order to obtain a lien release. However, in one such case, because the insurer had issued a policy to the seller for a purchase-money mortgage, the court denied recovery against the seller on the premise that an insurer may not seek subrogation against its insured.[220] The result would presumably have been different if the insurer had premised its claim on unjust enrichment instead.

13.6 Duties Regarding Documents And Recordings

The escrowee may be liable if it fails to obtain a party's signature on an instrument, the

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[216] *Mathes v. Coast Cities Escrow*, 2006 WL 122451 (Cal.App. 4 Dist.) (unpublished) (escrowee's potential liability for late payoff dependent on the facts known by the escrowee as to the impending foreclosure sale; case not ripe for summary judgment because its knowledge was disputed).

[217] In *CitiMortgage, Inc. v. Porter*, ___ So.3d ___, 2018 WL 6626609, 44 Fla.L. Weekly D16 (Fla.App. 3 Dist. 2018) (permanent citation not yet available), the court held that, because a forged mortgage release is void, a later lender did not automatically take priority over a mortgage released by a forged instrument. In *De Hoog v. Wells Fargo Bank, N.A.*, 2019 WL 1856751 (Cal.App. 4 Dist.) (unpublished), borrowers whose attorney recorded a fraudulent reconveyance of their deed of trust were not entitled to quiet title against the lender based on the notion that the lender was required to expunge the reconveyance within a certain period of time. In *Chicago Title Ins. Co. v. Union Avenue Holding, LLC*, 2019 WL 149534 (N.J.A.D.) (unpublished), a title insurer that paid a claim based on a forged mortgage discharge received a $1.3 million judgment against the seller company and its two members, though neither member admitted the forgery.

[218] In *Chemical Bank of N.J. v. Bailey*, 296 N.J.Super. 515, 687 A.2d 316 (N.J.Super.A.D. 1997), a closing attorney paid off a revolving credit loan but did not obtain a release of the lien. The attorney was found negligent in failing to obtain a borrower instruction to close the account, or include the lender's fee for closing the account and release the lien. However, the insurer that paid off the loan to obtain a release of the lien was found not permitted to recover against the attorney because, in settling the dispute, the insurer gave a full release to the borrowers.

[219] *Commonwealth Land Title Ins. Co. v. Kurnos*, 340 N.J. Super. 25, 773 A.2d 726 (N.J.Super.A.D. 2001).

[220] *Castania v. Ticor Title Ins. Co. of California*, 200 Ga.App. 633, 409 S.E.2d 286 (Ga.App. 1991).

granting and recording of which is a condition to the escrow.[221] The escrowee is not obligated to personally witness the signing of all documents delivered into escrow, or to verify that signatures on documents signed outside of the escrow officer's presence are genuine.[222] However, when documents are signed before the escrow officer, the escrow officer must make a reasonable verification of the signing parties' identities, which standard of care is also set by or tied to state notary law if the signature is acknowledged by the escrow officer.[223] In the "witness closing" or mobile notary

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[221] *Sprague v. Chicago Title Co.*, 2009 WL 2960864 (Cal.App. 2 Dist.) (unpublished) (measure of damages payable by escrowee for failure to obtain and record easement was lost profit on sale that failed due to lack of easement grant).

[222] *Reyes v. Stewart Title of California*, 2011 WL 3305974 (Cal.App. 2 Dist.) (unpublished). The lender's settlement agent had no duty to the person whose identity was stolen to detect and stop the identity theft, or to verify the authenticity of the power of attorney given to the closer, in *Iglesias v. Pentagon Title and Escrow, LLC*, 206 Md.App. 624, 51 A.3d 51 (Md.App. 2012). In *Tabatabai v. Emerald Estate Escrow, Inc.*, 2011 WL 4434926 (Cal.App. 2 Dist.) (unpublished), the court held that an escrowee was not required to do detective work to uncover the fact that a power of attorney had been forged, when the document appeared to be regular and was presented in a routine manner. Similarly, in *Mortensen v. First American Title Co., Inc.*, 2013 WL 1222566 (D. Idaho) (unpublished), an escrowee was found not to owe a duty to a woman who had given her husband a power of attorney to verify that she had authorized him to sign documents under that power, which was valid and had not been revoked. In *Summit Diamond Bridge Lenders, LLC v. Philip R. Seaver Title Co., Inc.*, 2019 WL 4668596 (Mich.App.) (unpublished), the escrow instructions stated that the original of a letter of credit was to be deposited with the escrowee. All of the parties later questioned the authenticity of the letter deposited with the escrow company but nonetheless authorized the escrow to close. The court held that the escrowee was not liable for proceeding with the escrow, when the letter of credit was later proven to be a forgery.

[223] In *Countrywide Home Loans, Inc. v. United General Title Ins. Co.*, 109 A.D.3d 953, 972 N.Y.S.2d 296 (N.Y.A.D. 2 Dept. 2013), 2013 N.Y. Slip Op. 05982, the court found that a lender had no cause of action against its closing agent for the fact that the loan was obtained by impersonation, when the closer accepted as identification from the impersonator a driver's license that was not an obvious fake. The court noted that Countrywide's closing instructions did not require the closer to verify the signer's identity. In *Lee v. Escrow Consultants, Inc.*, 210 Cal.App.3d 915, 259 Cal.Rptr. 117 (Cal.App. 2 Dist. 1989), the court held that an escrowee has a duty to make a reasonable verification of identity, and thus refused to dismiss a complaint alleging that the escrowee failed in that duty by accepting a forged amendment to the escrow instructions. In *Dushey v. Fidelity Nat'l Title Group*, 2011 WL 2315168 (Wash.App. Div. 3) (unpublished), a Washington court ruled against a borrower who claimed her signature had been forged at closing because she failed to rebut the affidavit by the closer saying that she never lets loan documents leave the room and makes copies of driver's licenses as evidence that the borrowers attended closing and proved their identities. In *Home Loan Center, Inc. v. Flanagan*, 2012 WL 1108132 (N.D.Ill.) (unpublished), the court found that an escrowee has a duty to inform the lender of possible impersonation, when the person appearing before the closer looked nothing like the (genuine) driver's license presented for identification, and the loan closing instructions read: "[e]ach Borrower must sign all documents exactly as his or her name appears on the blank line provided for his or her signature." The escrowee proceeded with the loan closing without informing the lender of his suspicions about the man's identity. The court said that the closer "owed LendingTree a duty of ordinary care in supervising the closing and verifying identities and notifying LendingTree of circumstances indicating fraud." In *Ultimate Title, LLC v. Ladd*, 2018 WL 3388407 (Md.App.) (unpublished), a title company that closed a sale was liable to the purchaser because it failed to detect that the owner's son had impersonated the seller at closing, even though the settlement agent did make the impersonator produce a driver's license as proof of his identity. The court distinguished *Iglesias v. Pentagon Title and Escrow, LLC*, 206 Md.App. 624, 51 A.3d 51 (Md.App. 2012), discussed above, because in that case the settlement agent was found to have no obligation to independently verify the genuineness of signatures affixed outside her presence. However, in *Atooi Aloha, LLC v. Gaurino*, 2018 WL 650194 (D. Hawaii 2018) (unpublished), the court found that the escrowee had no duty to verify the authenticity of signatures, because the escrow instructions said that the escrowee had no duty to determine

closing, an individual, who is akin to a sub-escrowee, has as his or her sole or primary duty to obtain signatures on the closing documents, often in the customer's home or office, as further described at §13.2. The witness closer assumes the standard of care of a closer or escrow officer who witnesses the signing of conveyance and closing documents.[224]

In escrow, the purchaser receives title when the conditions for close of escrow have occurred. The escrowee delivers the deed out of escrow, either to the grantee or to the recorder as instructed by the grantee.[225] The escrowee may not deliver a conveyance instrument from escrow to the grantee until the conditions of the escrow have been met. When the escrowee records a conveyance instrument before those conditions are met, or if they cannot be met, the deed is a nullity and may be voided, and the escrowee may be liable for violation of its instructions.[226]

An escrowee is liable to the principal if it violates an instruction to record a deposited instrument within a reasonable time after receipt of that instruction.[227] The escrowee does not breach

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"the sufficiency or correctness as to form, manner of execution, or validity of any instrument deposited in this escrow," or to determine "the identity, authority or rights of any person executing the same."

[224] *DiRenzo v. Katchen*, 2017 WL 3255237 (N.J.A.D.) (unpublished) (loan closer who signs HUD-1 settlement statement certification has legal duties to buyer that go beyond role of mere notary or witness, but he or she is not automatically a fiduciary and is required to perform only those duties that are found in the written loan closing instructions).

[225] See, for example, *Flores Camac v. 550 Realty Heights, LLC*, 130 A.D.3d 556, 14 N.Y.S.3d 51, 2015 N.Y. Slip Op. 05631 (N.Y.A.D. 2 Dept. 2015), which stated the familiar principle that, "[w]hen a deed is delivered to be held in escrow, the actual transfer of the property does not occur until the condition of the escrow is satisfied and the deed is subsequently delivered to the grantee by the escrow agent," citing *Scartozzi v. Scartozzi*, 50 A.D.3d 662, 663, 856 N.Y.S.2d 154.

[226] In *Osborn v. Osborn*, 42 Cal.2d 358, 267 P.2d 333 (Cal. 1954), the court said: "Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. If he does not comply with the conditions when required, or refuses to comply, the escrow-holder cannot make a valid delivery of the deed to him." Thus, if the escrow holder does deliver the deed before the buyer complies with the seller's instructions to the escrow, such purported delivery conveys no title to the buyer. See also *Montgomery v. Bank of America*, 85 Cal.App.2d 559, 193 P.2d 475 (Cal.App. 2 Dist. 1948); *Laolagi v. First American Title Ins. Co*., 2009 WL 2351607 (Cal.App. 6 Dist.) (unpublished); Miller & Starr, *California Real Estate*, §§ 8:36-8:42.

[227] *Boatright v. Texas American Title Ins. Co*., 790 S.W.2d 722 (Tex. 1990); *Allen and Title Ins. and Trust Co. v. Webb*, 87 Nev. 266, 485 P.2d 677 (1971); *Bear Creek Planning Comm. v. Title Ins. & Trust Co*., 164 Cal.App.3d 1227, 211 Cal.Rptr. 172 (Cal.App. 3 Dist. 1985); *Anderson v. Northwest Bonded Escrows, Inc.*, 4 Wash.App. 754, 484 P.2d 488 (1971); *Harding v. Atlas Title Ins. Agency, Inc.*, 285 P.3d 1260, 2012 UT App 236 (Utah App. 2012) (recording of trust deed ten months late, which allowed two liens to be recorded in gap); *Cruz v. Commonwealth Land Title Ins. Co*., 157 A.D.2d 333, 556 N.Y.S.2d 270 (N.Y.A.D. 1 Dept. 1990) (no written escrow instructions; HUD-1 settlement statement describing mortgage as a "2ND MTG" considered instruction to record mortgage in second position); *Choudhary v. First Option Title Agency*, 107 A.D.3d 657, 967 N.Y.S.2d 86 (N.Y.A.D. 2 Dept. 2013); *In re Ocwen Financial Services, Inc*., 649 N.W.2d 854, 2002 WL 1902578 (Minn.App. 2002). However, in *OC Property Management, L.L.C. v. Gerner & Kearns Co., L.P.A*., 2008 WL 4263563, 2008 Ohio 4709 (Ohio App. 8 Dist. 2008) (unpublished), no damage flowed from the failure to record a mortgage, because the unrecorded but valid mortgage was

its escrow instructions by not recording an instrument if the escrow does not break, or the conditions for recording are not satisfied.[228]

The escrowee may be liable for its failure to deliver documents to the recorder in the order in which the escrowee has been instructed to record them,[229] or if it receives conflicting instructions about the recording order without clarifying the instructions to make them consistent.[230] Conversely, the escrowee is not liable if it records the instruments in the order as instructed, even if one of the principals later disagrees with the recording order.[231] The escrowee is also not responsible if the recorder mixes up the order of the documents after they have been delivered to the recorder. An escrowee is not responsible for recording the same instrument in two different counties, unless it receives explicit instructions to do so.[232] An escrowee is not liable for failing to record an instrument if the violation of that instruction does not cause harm, or the party claiming the negligent act was not the beneficiary of the recording instruction.[233]

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still enforceable by foreclosure against the borrowers. As between the parties, a conveyance is effective on delivery. In *Chase Manhattan Mortgage Co. v. Lane*, 2010 WL 2738266 (W.D.N.C.) (unpublished), a title agent that lost a deed and deed of trust and did not solve the problem for years was found liable for actual and punitive damages. In *Silver Spring Oasis, LLC v. Lawyers Title of Arizona, Inc*., 2014 WL 47342 (Ariz.App. Div. 1) (unpublished), the court held that the escrowee's sole duty, to person who was not a party to the escrow and who delivered a deed of trust into escrow for recording, was to record the instrument, which it did. However, in *Donnell v. Fidelity Nat'l Title Agency of Nevada, Inc*., 2012 WL 1669421 (D.Nev.) (unpublished), the escrowee was not liable to investors in a real estate fund for not recording an escrowed deed of trust, when the party who had given the escrow instructions, the manager of the fund, had instructed the escrowee *not* to record the instrument. In *Muco v. Sadiku*, 63 Misc.3d 1225(A), 2019 N.Y. Slip Op. 50709(U), 2019 WL 2064012 (Table) (Queens Cty.Sup.Ct.) (unpublished), a title agent that was allegedly instructed to record a parking easement may be liable to the buyer of the benefited parcel for not having recorded the instrument before the burdened property was sold, which rendered the easement ineffective.

[228] *Spring Gardens Inc. v. Security Title Ins. Agency of Utah Inc*., 2016 UT App 113, 374 P.3d 1073 (Utah App. 2016), cert.den. 384 P.3d 567, Utah, Sep. 14, 2016 (escrowee did not violate instruction to record a deed of trust on close of escrow because escrow never closed).

[229] *Sanders v. Park Towne, Ltd*., 2 Kan. 212, 596 P.2d 1233 (1979).

[230] In *Commonwealth Land Title Ins. Co. v. Funk*, 2015 WL 1870287 (Del.Super. 2015) (unpublished), the instructions said that the sellers would receive a first priority purchase money mortgage. The buyers also agreed to give a first lien to a different party that funded part of the purchase price. The seller mortgage was declared to have priority. The escrowee paid the party that did not receive the first lien as promised, and had no recourse against the seller.

[231] *Dalejo Farm, Inc. v. Approved Statewide Title Agency Corp*., 2006-Ohio-6351, 2006 WL 3478346 (Ohio App. 11 Dist.) (unpublished) (escrowee not liable because two mortgages were recorded in correct order, per instructions which referred to them as "first" and "subordinate").

[232] In *State Resources Corp. v. Lawyers Title Ins. Corp.*, 224 S.W.3d 39 (Mo.App. S.D. 2007), a deed of trust covered land in two counties, and title was searched by two different companies. An employee of one company attended closing, took possession of the single deed of trust that recited both parcels, and recorded it in one county. The company received no instruction to record in the other county. The court found that neither title company had such a duty.

[233] In *Estate of Myrman v. U.S. Bank, N.A.*, 2016 WL 3264120 (Ariz.App. 1 Div.) (unpublished), the borrower claimed that it was damaged by the title insurer's failure to immediately record a deed transferring title from a trustee to

The escrowee may also be liable if it fails to record the instrument altogether, contrary to a recording instruction.[234] Similarly, an escrowee may be liable for damage proximately caused by its unreasonable delay in delivering the instrument to the recorder,[235] but is not responsible for the

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the individual borrowers, and also because it later recorded a copy of that deed. The court ruled that the insured deed of trust was not invalid because the deed was not recorded, because a conveyance is effective on delivery. Further, the title insurer's electronic recording of a copy of the deed did not violate its trusted-submitter agreement with the recorder or amount to the recording of a sham conveyance in violation of an Arizona statute. Further, the borrower's claim of negligence was really just posturing, since the borrower had committed to grant a valid deed of trust and the title insurer's actions did not harm the borrower. Finally, the title insurer was not serving as an escrowee, although its actions would not have violated any duty had it been the escrowee. Similarly, in *East Coast Athletic Club, Inc. v. Chicago Title Ins. Co*., 39 A.D.3d 461, 833 N.Y.S.2d 585, 2007 N.Y. Slip Op. 02878 (N.Y.A.D. 2 Dept. 2007), the court held that a title insurer owed no duty to a borrower to record its mortgage, when the insurer's sole role was to issue a policy to the lender. In *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wash.2d 58, 375 P.3d 651 (Wash. 2016), the Washington Supreme Court resolved the question certified to it, ruling in a resounding and well-supported opinion that a title insurer does not owe a duty of care to the property owner in recording a lien instrument. Subsequently, the Ninth Circuit Court of Appeals affirmed the dismissal of the claims against the escrowee, in *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 668 Fed.Appx. 760, 2016 WL 4572391 (9th Cir. (Wash.) 2016) (unpublished). In *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 386 P.3d 496 (Idaho 2016), the Idaho Supreme Court held that a junior deed of trust holder was not harmed by a title company's reconveyance of that security instrument, although the escrowee apparently violated its escrow instructions in recording the release, because the junior lien did not attach to any equity in the property. The land's value was less than the amount owed to the senior lender. The lender sued the escrowee under Idaho Code section 45-1205, which provides a cause of action for the negligent reconveyance of a deed of trust. In *Hooper v. Ticor Title Ins. Co*., 2014 WL 7434789 (Cal.App. 4 Dist.) (unpublished), reh.den. January 16, 2015, the court ruled that a title company's re-recording of a deed of trust containing a handwritten correction of the lot number did not work a fraud on the borrower or make the title company liable to the borrower. The court noted that the borrower intended to borrow the money, got the benefit of the loan, and that the lender could have imposed an equitable lien against the correct parcel if the borrower had disputed the validity of the deed of trust.

[234] *Robinson v. Carney*, 632 A.2d 106 (D.C.App. 1993). See also *Crupi v. Newell and Talarico Title Agency, Inc.*, 14 Misc.3d 1225(A), 2007 WL 292296 (N.Y.Sup.), 2007 N.Y. Slip Op. 50171(U) (unpublished), in which a title agent failed to record a mortgage "spreader" agreement and the court found that there may be liability despite the fact that the agreement was not insured under the policy. Also, in *1st State Title v. LP Recordings LLC*, 2015 WL 7750297 (Mich.App. 2015) (unpublished), a company that conducted title searches and recorded documents for another title company was found liable for having failed to record 31 of the 750 or so deeds it got, despite its argument that the other title company did not deliver enough money to pay all of the recording fees and transfer taxes owed.

[235] In *Lawyers Title Co. of Houston v. Authur*, 569 S.W.2d 578 (Tex. 1978), the failure to record a release of a mortgage for about a year was found a breach of duty, especially given the fact that the escrowee's senior officer assured the party that "everything necessary to the closing had been accomplished." The delay cost the party a premium for a bond that had to remain in place until the lien was removed. Similarly, in *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244 (Ind. 1992), the insurer-escrowee breached its duties by covenanting with the buyer not to record the seller's purchase-money mortgage for 90 days after closing. In the meantime, the purchaser obtained additional financing which primed the seller's mortgage. The court said the escrowee's actions were not malicious, however, and it struck an award of punitive damages. In *Meerhoff v. Huntington Mortgage Co*., 103 Ohio App.3d 164, 658 N.E.2d 1109 (Ohio App. 3 Dist. 1995), the escrowee took six days to record a deed and mortgage, which in some locales would be considered prompt. However, a divorce lien was recorded in the gap period. The court considered testimony that recordings are sometimes done immediately, and ruled the six-day delay to be negligence. It held that "reasonable minds could come to only one conclusion regarding appellant's duty and breach thereof." Id. at 1112. The failure to record promptly may create policy liability also. In *Banco Popular De Puerto Rico v. First American Title Ins. Co*., 1997 WL 586156 (D.C.

recorder's own delay in accepting the instrument or completing the recording process.

It is standard for a lender to instruct the escrowee to close only when it can assure the lender that its mortgage or deed of trust will be in first position. The largest risk in accepting this instruction is the possibility of a gap lien. The risk is greater still when the escrowee does not search and examine title itself. The first-lien instruction has been found to cause the escrowee to be liable nonetheless.[236]

The escrowee may be liable for damage caused by its failure to obey an instruction not to record an instrument.[237] An escrowee may mitigate damages by unwinding the transaction when it has recorded a deed by accident and contrary to instructions.[238]

When the escrow instructions premise recording or delivery of a conveyance on the happening of an event, the escrowee is authorized to record or deliver immediately on the occurrence of the triggering event, and if delivery is unconditional the escrowee may record on receipt.[239] The escrow parties do not have the right to prevent delivery of the documents for recording by giving a "contradicting instruction," unless the instructions so provide. Also, the escrow parties do not have a grace period for objecting to recording after the triggering event simply because the instructions do not state that time is of the essence.[240]

The escrowee has a duty of reasonable care to deliver as instructed those documents

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Puerto Rico) (unpublished), an insurer was found liable on its policy for a judgment which obtained priority over the insured mortgage because of a delay in the recording of the mortgage by the insurer's agent-escrowee. One may presume that the insurer would not have considered itself obligated to issue the mortgage policy assuring priority, had its policy-issuing agent not agreed to record the instrument.

[236] In *Old West Annuity and Life Ins. Co. v. Progressive Closing & Escrows, Inc.*, 2003 WL 21872555 (10th Cir.) (unpublished), the court ruled that "the risk of a competing lien was precisely the type of foreseeable event contemplated by the parties, and precisely why Old West instructed Progressive not to close or fund the loan unless Old West's loan would be recorded in a first lien position… ."

[237] *Zang v. Northwestern Title Co.*, 135 Cal.App.3d 159, 185 Cal.Rptr. 176 (Cal.App. 1 Dist. 1982). In *Alamo Lumber Co. v. Lawyers Title Ins. Corp*., 439 S.W.2d 423 (Tex.App.Civ. 1969), the insurer-escrowee recorded releases of lumber company's liens, delivered in escrow, without authority and without having paid the lumber company the amounts instructed. The court held that the lumber company had the right to recover from the insurer-escrowee the damage proximately caused, except that it was found to have elected to ratify the unauthorized act.

[238] *LaSalle National Bank v. Kissane*, 163 Ill.App.3d 534, 114 Ill.Dec. 635, 516 N.E.2d 790 (Ill.App. 1 Dist. 1987).

[239] *JYS Investments, L.L.C. v. Fisher*, 2011 WL 2462568 (N.J.Super.A.D.) (unpublished) (because discharge of mortgage to escrowee was not delivered with an instruction conditioning its recording on payoff of loan, escrowee did not err by failing to return the instrument to the lender); *Stonich v. First American Title Ins. Co*., 2011 WL 3906733 (Cal.App. 2 Dist.) (unpublished) (when an experienced real estate investor delivered reconveyance of junior deed of trust on his children's house, which they needed to refinance first loan, without any instruction to escrowee that recording was contingent on payment, escrowee was not required to pay investor before recording).

[240] *Baiting Hollow Acquisitions, LLC v. Estates of Baiting Hollow, Inc.*, 266A.D.2d 490, 698 N.Y.S.2d 731, 1999 N.Y.Slip Op. 10006 (N.Y.A.D. 2 Dept. 1999).

deposited into escrow that are not conveyance documents to be recorded.[241] The escrowee also has a duty to obtain a sufficient and enforceable instrument of the type that is described in the escrow instructions.[242] For example, when instructions called for deposit of an affidavit, it was a breach to accept an unsworn statement (which turned out to be a forgery).[243] The escrowee may not alter the instrument after it has been signed and deposited into escrow, without the permission of the parties.[244] The escrowee's acceptance of a deed of trust in which part of the subdivision name was missing from the legal description was found to be a breach of the instruction.[245] An escrowee was held liable to a title insurer for damage caused by its acceptance of a judgment release that was not effective.[246] However, the escrowee was not required to verify that consideration had been paid for a deed delivered to escrowee for recording.[247]

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[241] In *Lee v. Dublin Manor Corp.*, 2007 WL 2259190 (S.D. Ohio) (unpublished), the buyer sued the insurer, alleging that the escrowee title agent failed to deliver a promised final certificate of occupancy. The court assumed as true the allegation that the underwriter was liable for the title agent employee's closing acts because the decision was issued at the preliminary stage of a motion to dismiss.

[242] In *Tison v. First American Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 2775512 (W.D.Wash. 2019) (permanent citation not yet available), an escrowee that served as closing agent for a loan prepared a deed conveying the property to the borrowers, but that deed was incomplete. The escrowee then had the borrowers sign a corrective deed, the sufficiency of which was later disputed. The court refused to grant the escrowee's motion to dismiss claims brought by the borrower's family alleging that the corrective deed was defective and failed to divest the grantors of their interest in the property.

[243] *Common Wealth Ins. Systems, Inc. v. Kersten*, 40 Cal.App.3d 1014, 115 Cal.Rptr. 653 (Cal.App. 4 Dist. 1974).

[244] In *Yanez v. Kler*, 2018 WL 4140947 (Cal.App. 4 Dist.) (unpublished), the escrowee altered a deed after the seller signed it to add a second parcel, albeit because the escrowee believed it was correcting an omission. The court found that the change created rather than fixed and error, and held that the deed was void as to the added parcel, and that a bona fide purchaser had no power to enforce the title conveyed. In *Hancock v. Kulana Partners, LLC*, 145 Hawai'i 374, 452 P.3d 371 (Hawaii 2019), the escrowee altered the deed after it was signed by the grantor without the grantor's permission. The state supreme court held that the grantor was entitled to assume that the deed would be recorded as signed, and held that the statute of limitations on the grantor's fraud claim against the escrowee began running when the grantor discovered the alteration.

[245] *Marsh v. Commonwealth Land Title Ins. Co*., 57 Wash.App. 610, 789 P.2d 792 (Wash.App. 1990). However, such a breach must still cause damage. In *Marsh*, the deed of trust was rerecorded to correct the description, but the borrower filed bankruptcy within the preference period after the rerecording. The court held that the escrowee was not responsible for the claimed settlement damages. See §13.11 regarding escrow damages and §13.10 regarding the effect of bankruptcy.

[246] In *Stewart Title Ins. Co. v. Equitable Land Service, Inc*., 616 N.Y.S.2d 650 (A.D. 2 Dept. 1994), the agent marked a judgment "omit" at closing on receipt of a release which did not include the legal description of the insured property. After closing, the judgment creditor foreclosed and got a $120,000 judgment, which the agent's underwriter was forced to pay off. The underwriter sued the agent, and judgment in its favor was upheld on appeal.

[247] *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Idaho App. 1985).

Seeley v. Seymour[248] held that a title insurer that records an instrument as an accommodation may be liable to the owner if the document slanders title. The court said that, by recording the instrument, the insurer "gave the appearance that Safeco had given its imprimatur to the document." The court relied heavily on the fact that the insurer had special recording privileges in the county, and the manner of recording suggested that the instrument was being insured.

Seeley has been consistently distinguished rather than followed. It was distinguished in *Luce v. State Title Agency, Inc.*,[249] because in *Luce* the insurer-escrowee did not hold the quasi-governmental status of deputy recorder of deeds. Further, unlike *Seeley* the deed of trust was not void on its face. A District of Columbia court rejected a very similar argument that a title insurer had slandered title by recording a deed including the disputed land on a form with the title insurer's name on it, and by including the land in its title insurance policy. Other states' courts have also rejected the *Seeley* analysis as lacking any foundation in good public policy.[250] However, an Illinois court found that a title company slandered title by recording a deed signed by members of an LLC who did not have authority to convey the property.[251]

An escrowee that records an instrument as an accommodation to the party who seeks to have

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[248] 190 Cal.App.3d 844, 237 Cal.Rptr. 282 (Cal.App. 1 Dist. 1987).

[249] 190 Ariz. 500, 950 P.2d 159 (Ariz.App.Div. 1 1997). The court said: "[a] title insurance policy, however, is not a representation that the title is in any particular condition, and, therefore, defendant Lawyers Title's name on the deed is only a reference to the presence of a contract between Lawyers Title and defendant Butcavage. The name of Lawyers Title did not communicate to a third party any type of falsehood because the only representation made by Lawyers Title was that they were insuring defendant Butcavage against a potential claim regarding the title."

[250] In *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 186 Wash.2d 58, 375 P.3d 651 (Wash. 2016), the Washington Supreme Court resolved the question certified to it, ruling in a resounding and well-supported opinion that a title insurer does not owe a duty of care to the property owner in recording a document. The court said: "[p]laintiffs urge us to hold that justice requires title insurance companies to look behind the signatures on the document and police the parties' agreements against conflicting corporate documents or loan agreements. This is not a just result, and placing this burden on title insurance companies increases their costs, slows the recording process, and frustrates public policy, with no appreciable benefit." The court presented a lengthy explanation of public policy and other arguments refuting the type of duty enunciated in *Seeley*. It relied heavily on the Arizona rationale in the *Luce* decision as a basis for rejecting the *Seeley* analysis. Further, it said that "the Seeley court expressly denied that it was recognizing a 'tort of "negligent slander of title"' or that liability arose 'solely from the recordation of the document.' 190 Cal.App.3d at 862 n. 8, 237 Cal.Rptr. 282." Subsequently, the Ninth Circuit Court of Appeals affirmed the dismissal of the claims against the escrowee, in *Centurion Properties III, LLC v. Chicago Title Ins. Co.*, 668 Fed.Appx. 760, 2016 WL 4572391 (9th Cir. (Wash.) 2016) (unpublished). See also, *Parchment v. Universal Title, LLC*, June 23, 2005, D.C. Sup.Ct. Case No. 05-CA-212 (2005); and *Brown v. CMG Escrow Co.*, 2010 WL 93228 (Cal.App. 2 Dist.) (unpublished), which dismissed a claim against an escrowee accusing it of slandering title by closing an escrow and recording a deed of trust based on what the borrower said were forged documents. The court said that the plaintiff's damages were the result of the perpetrator's fraud, not the actions of the title company.

[251] *McClain v. Chicago Title Ins. Co.*, 2015 WL 1515263, 2015 IL App (1st) 133971-U (Ill.App. 1 Dist. 2015) (unpublished). Unfortunately, because the title insurer was forced to appeal from the entry of a default judgment, the court and plaintiff were excused from addressing the merits of the claim.

it recorded undertakes a very limited role.[252] When an escrowee accepts an accommodation recording under oral instructions, the escrow principal must prove the exact instruction given in order to claim a breach of the instruction.[253] The escrowee does not assume a fiduciary duty by accepting the document for recording, and therefore does not undertake an implied duty to protect the escrow principal by assuring that the document is recorded in a particular order or priority position. In *Culbertson v. Wigley Title Agency, Inc.*,[254] the escrow principal handed the closer a mortgage for recording. It was not the first lien on the property. Years later, the principal sued the escrowee, claiming that the closer promised that he would have a first lien. The closer recalled only that he said the principal would have "a lien." The court found no fiduciary duty to assure that the principal would have the first lien on the property.

Perhaps in response to the onerous burden of the *Seeley* case, insurer-escrowees sometimes make it a policy not to perform accommodation recordings unless the requesting party releases the escrowee from liability or indemnifies the escrowee as to any claim regarding the recording. Such an indemnity and hold harmless agreement precludes recovery against the escrowee even as to a claim that the escrowee was negligent in failing to record the document promptly.[255]

A person who prepares or records a document is also not responsible in tort as if the person had damaged the property, trespassed, or stolen from it. Thus, in *Barringer Land, Ltd. v.*

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[252] In *Kipperman v. First American Title Co.*, 2015 WL 301730 (Cal.App. 4 Dist. 2015) (unpublished), a title insurer that was given a partial release of a deed of trust to be recorded as an accommodation was found not to be liable to the lender for the loss it claimed to have suffered due to an alteration to the legal description in the instrument that was allegedly made by the title company. The court held that, because the recording was done at no charge and strictly as an accommodation, First American did not have the duties of an escrowee in its handling of the instrument. Instead, its duty was limited to recording the instrument. The court said that the recording was done as an accommodation despite the fact that the instrument was not stamped as such, there was no accommodation recording exculpatory agreement, and First American had previously conducted an escrow for the third deed of trust when it was granted. The court noted that Dynamic's own witness admitted at trial that this was an accommodation recording, and that he gave the instrument to First American rather than record it himself simply because it was easier. All of these factors militated toward a finding of the narrowest possible legal duty.

[253] In *Omega Healthcare Investors v. First American Title Ins. Co*., 2003 WL 118006 (D.Mass. 2003) (unpublished), personal property financing statements were held under oral instructions. The escrowee claimed that it was told not to file; the law firm said it had instructed the escrowee to file. The financing statements were filed late, and set aside in bankruptcy. In the ensuing escrow lawsuit, the court dismissed a claim by the escrowee for indemnity, ruling that the filing was done "'[s]trictly as an accommodation, and without a signed escrow contract or any other agreement regarding further compensation... .' That, without more, does not show the requisite special relationship with Dykema to imply an obligation to indemnify First American."

[254] 2002 WL 219570 (Ohio App. 9 Dist.) (unpublished).

[255] *Rooz v. Kimmel*, 55 Cal.App.4th 573, 64 Cal.Rptr.2d 177 (Cal.App. 1 Dist. 1997). The *Rooz* court held that the factors considered in *Tunkl v. Regents of Univ. of California*, 60 Cal.2d 92, 383 P.2d 441 (1963) and *Akin v. Business Title Corp*., 264 Cal.App.2d 153, 70 Cal.Rptr. 287 (Cal.App. 2 Dist. 1968) which would void any attempted exculpatory clause in an escrow agreement, do not apply to all transactions conducted by title insurers. As to accommodation recordings, the court found there was no evidence that the conduct was "a service of great importance to the public," and the escrowee had no particular advantage in bargaining strength. Therefore, the exculpatory clause was enforceable.

Barringer,[256] the person who prepared and notarized a deed that allowed the illegal cutting of trees was found not liable for taking the trees, because he "did not engage in any acts of cutting, felling, destroying or removing trees."

Recording laws can present a threat to the efficacy of a recorded instrument. In Ohio, the law formerly required two witnesses on recorded documents, and deemed the conveyance void if the parties were unable to prove that the witnesses were present at signing. The law became popular with bankruptcy trustees, who used it to void mortgages.[257] The courts were openly skeptical about whether or not busy closing departments would send two witnesses to each home closing.[258] The equivocal testimony of the borrowers was found not sufficient to overturn the mortgage in one case.[259] The court seemed persuaded partly because the title agency had adopted a written two-witness rule before the time the mortgage was signed. The lack of a written rule, conversely, was considered probative in a case when the second witness also could not recall being in the home.[260] Rather than repeal the witness requirement, the state legislature adopted a revision which prohibits the impeachment of a witnessing of a facially valid mortgage except in cases of actual fraud, and declaring that a facially valid mortgage is constructive notice to all bona fide purchasers for value (including bankruptcy trustees).[261] The law became effective June 30, 1999. This law has been held not to be retroactive, however, so that it does not apply to mortgages executed before that date.[262]

Along with the responsibility for recording the documents on break of escrow, the escrowee is typically expected to determine the correct amount to be collected for the recording fees charged by the recorder. This seemingly minor task can be complicated when it is difficult to determine in advance of close of escrow the amount of the recording fees. Some escrowees collect a uniform recording fee that, when averaged over a number of transactions, equals the actual cost of recordings. Courts have permitted classes of borrowers to sue escrowees for allegedly failing to refund excess recording fees collected at closing.[263] However, the practice of charging a uniform

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[256] 761 So.2d 720 (La.App. 1 Cir. 2000).

[257] See, for example, *In re Williams*, 240 B.R. 884, 35 Bkcy.Ct.Dec. 175 (Bkcy.N.D. Ohio 1999) and *In re Krueger*, 2000 WL 895601 (Bkcy.N.D. Ohio), disagreed with in *In re Carpenter*, 266 B.R. 671 (Bkcy.E.D.Tenn. 2001) and disagreement noted in *In re Burns*, 269 B.R. 20, 38 Bkcy.Ct.Dec. 164 (6th Cir. BAP (Ohio) 2001).

[258] See *In re Krueger*, 2000 WL 895601 (Bkcy.N.D. Ohio).

[259] *In re Williams*, 240 B.R. 884, 35 Bkcy.Ct.Dec. 175 (Bkcy.N.D. Ohio 1999).

[260] *In re Krueger*, 2000 WL 895601 (Bkcy.N.D. Ohio).

[261] Ohio Rev. Code § 5301.234.

[262] *In re Williams*, 240 B.R. 884, 35 Bkcy.Ct.Dec. 175, footnote 720.

[263] In *Drozeck v. Lawyers Title Ins. Corp.*, 140 Ohio App.3d 816, 749 N.E.2d 775 (Ohio App. 8 Dist. 2000), on recons. 2001 WL 106652 (Ohio App. 8 Dist.), the plaintiff "contended that [the amount charged] exceeded the actual charge accessed [sic] by the county recorder to Lawyers Title and that over one million people also were similarly overcharged." The court refused to dismiss the plaintiff's breach of escrow cause of action. In *CitiMortgage, Inc. v.*

recording fee has been found not to be a violation of the Real Estate Settlement Procedures Act.[264]

Transfer or mortgage taxes are payable in many transactions. The parties must instruct the escrowee if they believe that the transfer or mortgage is exempt from taxation, and the parties must calculate and declare the value on which the tax is pad. An escrowee is not responsible for determining whether or not the parties may claim an exemption from a transfer tax, and is not liable to the parties for the amount of a tax they paid that arguably was not owed.[265]

13.7 Duties Regarding Drafting Of Instruments

When an escrowee prepares a conveyance or related instrument at the instruction of its principals, it has a duty to draft the instrument in compliance with a standard of care, which varies somewhat from state to state.[266] One Nevada case said that the escrowee's expertise in "the minutiae of real estate closings" gave it the knowledge of a lawyer, and some of the same professional responsibilities.[267] However, an escrowee is not a lawyer and does not owe the same standard of care to escrow parties as would an attorney.[268]

White, 435 P.3d 1184 (Table), 2019 WL 1213177 (Kan.App.) (unpublished), a Kansas appeals court held that a title agency violated the Kansas Consumer Protection Act by not refunding a four dollar overcharge for the recording of a mortgage. However, the court said that the title agent did not violate the law by charging a flat fee of $20 for overnight delivery service, although that fee was several dollars more than the actual delivery cost, because the agent filed its flat rate with the insurance department.

[264] See *Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 182 L.Ed.2d 955, 80 USLW 4395 (U.S. 2012); *Echevarria v. Chicago Title Ins. Co*., 256 F.3d 623 (7th Cir. 2001); *Krzalic v. Republic Title Co*., 314 F.3d 875 (7th Cir. (Ill.) 2002); *Boulware v. Crossland Mortgage Corp*., 291 F.3d 261 (4th Cir. (Md.) 2002); *Wesolowski v. Title Source, Inc*., 608 Fed.Appx. 724, 2015 WL 1529841 (11th Cir. (Ga.) 2015) (unpublished); and *Clements v. LSI Title Agency, Inc.*, 779 F.3d 1269 (11th Cir. (Ga.) 2015) regarding alleged mark-ups of settlement service provider charges and RESPA compliance. A complete discussion of RESPA is beyond the scope of this publication.

[265] In *Bushman v. American Title Co. of Washtenaw*, 101 F.Supp.3d 714 (E.D.Mich. 2015), the court dismissed a class action suit brought by home sellers against title companies, alleging that they owed the sellers money for not having claimed exemptions from transfer tax.

[266] In *Marks v. Reliable Title Agency, Inc.*, 2012 WL 2522399, 2012 -Ohio- 3006 (Ohio App. 7 Dist.) (unpublished), Susan Marks bought a house in her name only. The title company hired to close the purchase money loan was asked to draft a deed vesting Susan only in title and a power of attorney from the husband to the wife. Richard Marks later sued the title company. The court found that it complied with its instructions by drafting the documents. The court said the escrowee did not owe Richard a fiduciary duty, and had no duty to make sure that he obtained an interest in the property. In *Bates v. Chicago Title Co*., 2013 WL 3753062 (Cal.App. 4 Dist.) (unpublished), although the holder of a lien on the property was not a party to a loan escrow, the court refused to hold as a matter of law that the escrowee owed him no duty, because it drafted a new deed of trust for him to replace the old one, and the instrument the escrowee drafted was defective. In *Gorsha v. Clark*, ___ F.Supp.3d ___, 2019 WL 1071576 (S.D. Ohio 2019) (permanent citation not yet available), the court held on a motion to dismiss that an attorney retained by a title company to draft a deed may be liable to the sellers for alleged malpractice, although the sellers did not retain the attorney directly and gave him no direct instructions.

[267] *Allen and Title Ins. and Trust Co. v. Webb*, 87 Nev. 266, 485 P.2d 677, 681 (1971).

[268] *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531 (1986). See also

An escrowee may be liable for drafting an instrument that does not have the same terms as recited in the purchase agreement.[269] The escrowee has a duty to include in the instrument the terms as instructed by the principals, whether directly or by reasonable inference from the instructions.[270] The escrowee complies with its standard of care when it drafts or obtains an instrument that corresponds to at least the spirit of the instruction it receives.[271] An escrowee may be held liable for damage resulting from its failure to properly draw and record a deed of trust.[272] Similar liability attaches regarding drafting of a deed.[273] The escrowee that agrees to prepare a new legal description for use by the parties has a duty to draft the description with reasonable care.[274]

However, when an escrowee does not serve as drafter of the instrument, it is only required to obey instructions regarding documents to be assembled for recording. Thus, when an escrow was

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Poferl v. National Title Co., 2001 WL 267464 (Minn.App.) (unpublished) (malpractice suit by lender against title agent for "drafting" usurious note and unauthorized practice of law barred because agent did not assume duties of attorney or practice law).

[269] In *Askew v. Allstate Title & Abstract Co*., 603 So.2d 29, 31 (Fla.App. 2 Dist. 1992), the escrowee drafted a mortgage back to the seller that contained a broader subordination clause than the purchase agreement described, which allowed the purchaser to immediately obtain other financing senior to the seller's mortgage. The court noted that the escrowee knew that the buyer would close on senior financing only hours after the purchase, thus immediately implementing the modified subordination clause. The court reversed a grant of summary judgment in favor of the escrowee, finding that it might be liable for failing to follow the terms of the purchase agreement.

[270] *Edwards v. Stewart Title & Trust of Phoenix, Inc.*, 156 Ariz. 531, 753 P.2d 1187 (Ariz.App. 1988) (when instructions specified that conveyance would contain a reverter, escrowee-drafter had implied duty to include reverter in deed it was instructed to draft).

[271] *Kirk Corp. v. First American Title Co*., 220 Cal.App.3d 785, 270 Cal.Rptr. 24 (Cal.App. 3 Dist. 1990) (escrowee did not go beyond instructions by obtaining lease cancellation, when instructions required that lease be removed before close of escrow).

[272] *Boatright v. Texas American Title Ins. Co*., 790 S.W.2d 722 (Tex. 1990); *Kish v. Bay Counties Title Ins. Co*., 254 Cal.App. 725, 62 Cal.Rptr. 494 (Cal.App. 1 Dist. 1967).

[273] *Ehmer v. Title Guarantee & Trust Co*., 156 N.Y. 10, 50 N.E. 420 (1898). In *Dixon v. Shirley*, 558 S.W.2d 112 (Tex.App. 1977), the escrowee discovered that the land owned by the seller was not the same land described in the purchase agreement. The escrowee prepared the deed using the accurate description but did not inform the buyer of the issue. The escrowee was liable to the buyer due to the fact that the land conveyed seriously limited the buyer's intended use of the land.

[274] In *Land Title of Central Florida, LLC v. Jimenez*, 946 So.2d 90 (Fla.App. 5 Dist. 2006), 32 Fla. L. Weekly D145, the escrowee inserted the wrong legal description in the deed and mortgage. The purchase contract did not contain a legal description. The sellers owned two parcels, and the drafter used the description of the other seller parcel. See *Brean v. North Campbell Professional Building*, 26 Ariz.App. 381, 548 P.2d 1193 (Ariz.App. 1976). *Executive Management, Ltd. v. Ticor Title Ins. Co*., 963 P.2d 465 (Nev. 1998), concerned a case in which a deed containing a defective legal description was deposited into escrow just before the land was platted. Later, the plat and a replacement description were delivered to the escrowee. There was apparently no clear instruction with the plat to modify the legal description on the deed already in escrow to match the plat to be recorded. The court did not reach the merits of the plaintiff's assertion that the escrowee was negligent and perpetrated a fraud by failing to correct the description on the deed before recording it.

merely instructed to attach a legal description to a deed, it was under no duty to verify that the description was correct, and acted prudently in taking the description from the title evidence. [275]

An escrowee may not alter an instrument that it has drafted, after it has been signed and deposited, without both parties' consent.[276]

13.8 Duty To Close According To Purchase Agreement Terms

When an escrow involves the sale and purchase of real estate, it is common for the purchase agreement to serve as the escrow instructions or to incorporate escrow instructions by reference so that the two contracts become integrated.[277] The escrowee both may and should obey the terms of the purchase agreement unless the joint escrow instructions given by buyer and seller state otherwise.[278] With the exception of the purchase agreement, however, an escrowee does not receive its instructions from documents that are part of the transaction.[279] Also, a purchase agreement alone

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[275] *Holder-McDonald v. Chicago Title Ins. Co.*, 2006 WL 289396 (Tex.App.-Dallas) (unpublished).

[276] In *Garton v. Title Ins. & Trust Co*., 106 Cal.App.3d 365, 165 Cal.Rptr. 449 (Cal.App. 3 Dist. 1980), an escrowee discovered a mineral reservation after the deed of trust was signed. The reservation also was not shown on the title commitment. The escrowee did not have authority to merely add the reservation to the legal description later without giving notice to the purchaser-signer. In *Carver v. RBS Citizens, N.A.*, 2019 WL 4733437 (Md.Sp.App.) (unpublished), a title insurer that added parcels to a deed of trust by rerecording it after closing was not liable to the borrowers on their claim of constructive fraud, because the insurer had no contractual relationship with the borrowers. The title insurer apparently also served as settlement agent.

[277] See *Highbridge House Ogden LLC v. Highbridge Entities LLC*, 155 A.D.3d 505, 64 N.Y.S.3d 32, 2017 N.Y. Slip Op. 08187 (N.Y.A.D. 1 Dept. 2017), in which the escrow instructions were appended to the purchase agreement and a jury trial waiver in the escrow instructions was found to control the entire transaction.

[278] *AD Group Southern & Ellsworth, LLC v. First American Title Ins. Co.*, 2011 WL 1592784 (Ariz.App. Div. 1) (unpublished) (escrowee correctly paid broker commission as called for in purchase agreement, which was deemed incorporated into the escrow instructions, and also correctly resisted contrary instruction of seller); *Wiczer v. Wojciak*, 30 N.E.3d 670, 391 Ill.Dec. 400, 2015 IL App (1st) 123753 (Ill.App. 1 Dist. 2015) (purchase agreement and not escrow instructions controlled the handling of money deposits when escrow instructions were not signed, even though the purchase agreement disagreed with the escrow instructions on who was to receive the money); *Hodges v. First Texas Title Company, LLC*, 2015 WL 5173527 (Tex.App.-Eastland 2015) (unpublished) (when purchase contract included both surface estate and mineral rights, and seller wanted to amend contract to reserve mineral rights but buyer refused, escrowee did not breach instructions by closing on purchase contract terms as agreed). In Michigan, an escrowee's duties are to obey escrow instructions and the terms of the purchase agreement related to the escrow. See *Smith v. First Nat'l Bank & Trust Co*., 177 Mich.App. 264, 440 N.W.2d 915 (1989); *Hills of Lone Pine Ass'n v. Texel Land Co*., 226 Mich.App. 120, 572 N.W.2d 256 (1997); *Coran v. Century Title Agency, L.L.C*., 2010 WL 4679498, 2010 Mich. App. LEXIS 2217 (Mich.App.) (unpublished).

[279] In *Shine v. Commonwealth Land Title Ins. Co. of Houston*, 1996 WL 134962 (Tex.App.-San Antonio) (unpublished), writ den. Nov. 15, 1996, the husband owned the family residence in his name solely. His wife joined the loan application, which said that title would be held in both names. The husband never gave a deed. The wife sued the escrowee and lender, on the theory that the loan application was an instruction to prepare a deed. The court rejected this contention, noting: "Title companies are not agents for the parties to supervise transfer of title. ... We agree that the loan application submitted to Citicorp does not constitute an instruction to prepare certain documents which would be necessary for the residential refinancing transaction." Id. at 4.

does not serve as escrow instructions that dictate how deposited money is to be disbursed.[280]

The escrowee may be required to perform a range of tasks described in the purchase agreement and escrow instructions. The escrowee may be instructed to assure that homeowner's or casualty insurance is in force as of closing.[281] Also, the escrowee may have a duty to obtain and deliver reports and inspections.[282] Similarly, when the purchase contract called for the buyer to assume a 9.5% mortgage but the escrowee learned that the actual rate was about to escalate to 11%, a valid cause of action was found to exist against the escrowee for not informing the buyer of the rate hike.[283]

An escrow closes when the conditions to closing as stated in the purchase agreement and escrow instructions have been met.[284] An escrowee that has been instructed to close escrow when a title insurance policy will be issued in the state described in the instructions may not close escrow until it is satisfied that the insurer will issue the policy as specified.[285]

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[280] In *Shafron Enterprises Defined Benefit Pension Plan v. Midland Title Security Inc*., 602 N.E.2d 253 (Ohio App. 1992), an escrowee that was given funds to disburse to the seller, but without any escrow instructions, had no duty to withhold funding because title was encumbered by an easement not permitted in the purchase agreement.

[281] The cases are not consistent. Compare *Bigelow v. Crescent Title, L.L.C.*, 997 So.2d 83 (La.App. 4 Cir. 2008), writ den. 3 So.3d 488, 2009-0058 (La. Mar 06, 2009) (New Orleans title agent that failed to get assignment of flood insurance at closing liable for cost of building and contents destroyed in Hurricane Katrina shortly after closing); *Bougere v. State Farm Fire & Cas. Co*., 2008 WL 4852286 (E.D.La.) (unpublished) (title company's failure to pay homeowner's insurance from refinance closing did not make the company liable for Katrina flood damage when the closing funds were wired the day Katrina made landfall and insurance was not placed); *Helmer v. Empire Fire and Marine Ins. Co*., 2009 WL 2356869 (E.D.La.) (unpublished) (title company closer had no duty to verify that homeowner's insurance was bound, was only responsible for sending premium check to insurer if so instructed).

[282] In *Florida Southern Abstract & Title Co. v. Bjellos*, 346 So.2d 635 (Fla.App. 2 Dist. 1977), when the purchase agreement called for a "negative termite inspection report," but the inspector found an active termite infestation, the escrowee was found to have a duty to inform the purchaser that the termite letter was not the negative report required by the purchase agreement. For a good discussion of this case and other Florida cases in this chapter, see Boyette, *Title Insurance Liability Beyond the Policy*, Florida Bar Journal, July/August, 1995, pp. 24-34.

[283] *Sudberry v. Lowke*, 403 So.2d 1117 (Fla.App. 5 Dist. 1981).

[284] See *Orlando Int'l Hotels, LLC v. Robert J. Guidry Investments, LLC (In re First Farmers Financial Litigation)*, 2017 WL 6026652 (N.D.Ill.) (unpublished). In that case, the purchase contract required concurrent performance by buyer and seller as conditions to closing, but neither party performed its duties. The court held that neither party was entitled to sue the other for breach of contract. Instead, the contract was simply void and unenforceable by either side. The *Orlando* court relied on *Pittman v. Canham*, 3 Cal.Rptr.2d 340 (Cal.App. 2 Dist. 1992) for the principle of concurrent performance.

[285] In *Donerail Corp. N.V. v. 405 Park LLC*, 100 A.D.3d 131, 952 N.Y.S.2d 137, 2012 N.Y. Slip Op. 06767 (N.Y.A.D. 1 Dept. 2012), a seller who arranged for the defeasance of a mortgage loan that could not be prepaid and the issuance of an owner's policy free of exception for the lien complied with the purchase agreement, which required that all non-permitted liens be paid or discharged. The escrowee was not at fault for being prepared to close the transaction. Instead, the buyer breached the contract by refusing to close. In *Perry v. First American Title Co.*, 2018 WL 4959354 (Cal.App. 1 Dist.) (unpublished), when the instructions said that escrow could not close until a lien and lis pendens had

The escrowee is not responsible for causing the escrow principals to fulfill their obligations to bring the escrow to a close.[286] The escrowee is not charged with making the transaction happen or causing any of the principals to perform their contractual obligations, including to command them to make the deposits into escrow that are contemplated by the instructions.[287]

Also, the escrowee may not be required to perform a principal's contractual obligations when that party fails to do so.[288] When a seller-builder failed to provide a home warranty, the buyer had no right to demand that the escrowee get such a warranty simply because it had disbursed according to a closing statement showing the warranty as a seller charge.[289] Similarly, an instruction to "secure" a note as a deposit into escrow did not carry with it an implied duty to verify that the instrument had not been forged.[290]

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been released of record, the escrowee correctly refused to obey the direction of the seller to close escrow based on the theory that the matters had been extinguished by passage of time.

[286] *Bridges v. Security Title Agency, Inc.*, 2011 WL 2174944 (Ariz.App. Div. 1) (unpublished) (escrowee not liable to buyers for seller's failure to deliver deed into escrow). See further citations concerning the fact that an escrowee has no duty to police the transaction for the benefit of the parties, in §13.3.

[287] *Clarkston Holdings, Ltd. v. Avington Park Condominium Ass'n, Inc.*, 2013 WL 2420973 (Mich.App. 2013) (unpublished) (provision of Michigan's condominium statute that says a developer shall deposit money with an escrowee for construction of must-be-built improvements does not impose duty on title company to make developer deposit that money); *Capcor at KirbyMain, L.L.C. v. Moody Nat'l Kirby Houston S, L.L.C.*, 509 S.W.3d 379 (Tex.App.-Houston 2014) (escrow officer did not interfere with buyer's performance under purchase contract by informing him on day before closing that he must make wire transfer, which he said he could not do in time to close escrow); *Jafari v. Federal Deposit Ins. Corp.*, 2 F.Supp.3d 1125 (S.D.Cal. 2014) (FDIC as receiver for failed bank had no claim against escrow company for failing to make sure that borrower met the terms of short sale release agreement that went beyond mere delivery of agreed-on sum).

[288] The purchaser had no claim against the escrowee when the contract fell through because an option was not prepared or delivered to the seller for signature, although the buyer issued a letter to the escrowee attempting to pass off the duty to prepare that agreement. *Bowles v. Key Title Co.*, 163 Or.App. 9, 986 P.2d 1236 (Or.App. 1999).

[289] In *Dickerson v. Trinity-Western Title Co.*, 985 S.W.2d 687 (Tex.App.-Ft. Worth 1999), the settlement statement included a disbursement for a home warranty which the seller had contracted to provide. The warranty was not delivered at closing, so the escrowee withheld the $600 premium from the seller. The buyer sued the escrowee, claiming that it had misrepresented something. The court found that the only "representation" was the line item on the settlement statement. The court saw the claim for what it was: "the allegations effectively seek to transfer, from the builder to [the escrowee], the contractual responsibility to furnish a home warranty." The escrow agreement stated that the escrowee was not responsible for the parties' performance of the building contract, however. The court awarded attorney fees to the escrowee because the escrow agreement said the escrowee would be reimbursed if it was "a prevailing party in any legal proceeding brought under or with relation to" the contract. See also, *James v. Shavon Ltd.*, 2012 WL 6029813 (Tex.App.-San Antonio) (unpublished) ("Western Title was the escrow agent; it was not responsible for James's or Shavon's performance or nonperformance of the sales contract").

[290] *Humphreys v. Northwestern Title Co.*, 2002 WL 475217 (Cal.App. 1 Dist.) (unpublished) (distinguishing *Lee v. Escrow Consultants, Inc.*, 210 Cal.App.3d 915, 259 Cal.Rptr. 117 (Cal.App. 2 Dist. 1989), which found a cause of action against the escrowee for accepting a forged amendment to the escrow instructions. *Humphreys* is limited in its holding because the party asserting the claim against the escrowee was not a principal, and the court found that the escrowee

13.9 Statements And Representations By Escrowee

Standards that impose a duty to disclose information run contrary to the cardinal rule that an escrowee's duties are no more or less than as stated in the agreement. A typical statement of the escrowee's duties is:

> A depository [escrowee] must be guided in carrying out its duty by what the contract says, for the agreement for escrow with its instructions constitutes the full measure of the duties and obligations assumed by the depository.[291]

Further, the traditional rule is that the paramount obligation of the escrowee is to remain neutral in the transaction. Favoritism to one party is breach of a duty to the other. The Oregon Appeals Court confirmed this view in one case:

> ... [A]ny duty that the escrow agent owed the plaintiffs "cannot be based upon defendant's role as an escrow agent or as a provider of title insurance. An escrow holder, by definition, is a neutral party with no obligation to either party to the transaction except to carry out the terms of the escrow instructions. '*They owe no duty to advise the parties of their legal rights * * * [and t]hey have no reason to protect the rights of any one party against another.*'"[292]

Thus, disclosure of information to one party that influences that party's conduct toward the other party to the escrow would be breach. The underlying rationale of this view is that the escrowee has no right, much less duty, to interfere in the business transaction in order to protect one party from the other.[293]

However, in other states, there is an affirmative duty incumbent on the escrowee to tell an escrow principal information about the state of title that, if withheld, would cause the party to suffer loss. Some states have adopted the view that the title insurer/escrowee is a "nongratuitous provider of information" as defined in Section 552 of the Restatement (Second) of Torts.[294] Under this

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owed no duty to that party.

[291] *Osborn v. Grego*, 596 P.2d 1233, 1237 (Kan. 1979) (citing *Lewis v. Shawnee State Bank*, 226 Kan. 41, 596 P.2d 116 (1979)).

[292] *Gebrayel v. Transamerica Title Ins. Co.*, 132 Or.App. 271, 888 P.2d 83, 88 (Or.App. 1995) (emphasis in original), citing *Barr v. Pratt*, 105 Or.App. 220, 224, 804 P.2d 496 (1991); *State Bar v. Security Escrow, Inc.*, 233 Or. 80, 82, 377 P.2d 334 (1962); and *McDonald v. Title Ins. Co.*, 49 Or.App. 1055, 1059, 621 P.2d 654 (1980).

[293] In *Gurley v. Bank of Huntsville*, 349 So.2d 43 (Ala. 1977), a non-title case, a bank escrowee was not obligated to disclose the terms of its loan agreement which was closely related to an escrow in which it acted as escrowee. The court held: "[t]here is no duty to disclose information received by an escrow agent unless such a duty is required by the terms of the agreement." Id. at 45.

[294] Comment D of §552 states: "The fact that the information is given in the court of the defendant's business,

analysis,

> although an escrow holder owes no duty to advise the parties on their legal rights and ... is not required to protect the rights of any one party as against another, it can assume a duty to exercise due care when it volunteers advice.[295]

Under the Restatement Section 552 rationale, then, the escrowee is held to assume a duty to use due care in communicating information to the escrow parties. Section 552 provides, in pertinent part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction ... .[296]

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profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time. It is not, however, conclusive. But when one who is engaged in a business or profession steps entirely outside of it, as when an attorney gives a casual and offhand opinion on a point of law to a friend who he meets on the street, or what is commonly called a 'curbstone opinion,' it is not to be regarded as given in the course of his business or profession; and since he has no other interest in it, it is considered purely gratuitous."

[295] *Lindstrand v. Transamerica Title Ins. Co*., 127 Or.App. 693, 874 P.2d 82, 84 (Or.App. 1994) [citing *McDonald v. Title Ins. Co*., 49 Or.App. 1055, 621 P.2d 654 (1980)].

[296] Adopted in *Mur-Ray Management Corp. v. Founders Title Co*., 169 Ariz. 417, 819 P.2d 1003 (Ariz.App. 1991). Section 552 was also accepted as a basis for liability of a title insurer whose marketing employee wrote reference letters on behalf of a lender customer. It was alleged that the reference letters induced a borrower to choose the lender, causing harm when the lender was unable to close the loan. The insurer argued that it was not in the business of supplying reference letters. The court replied: "Plaintiffs have offered evidence that sales representatives at Fidelity considered it a part of their jobs to give these reference letters. … Comment (d) to section 552 explains that '[t]he fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time.' Additionally, … Plaintiffs offer testimony from Lunde in which he admitted that one of his purposes in sending out the AMI referral letters was to 'try and get some initial business' for Fidelity out of the transaction if the borrowers ultimately chose AMI as their back-end lender. … This is sufficient to constitute a pecuniary interest in the transaction under section 552. Comment (d) to section 552 provides that 'defendant's pecuniary interest in supplying the information will normally lie in a consideration … paid in a transaction in the course of and as a part of which it is supplied. It may, however, be of a more indirect character. Thus … an agent who expects to receive a commission on a sale may have such an interest in it although he sells nothing.'" *Mid States Development, L.L.C. v. Fidelity Nat'l Title Ins. Co*., 2001 WL 1172215 (N.D.Tex. 2001) (unpublished).

See §16.7 regarding the assertion of a duty under Section 552 to create a standard of care for abstractor liability in the issuance of the commitment to insure.

A second basis on which an escrow party may assert escrowee liability is a consumer protection statute. The escrow principal may assert that the escrowee engaged in an unfair or deceptive act by failing to accurately disclose information. This theory was advanced in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,[297] in which the lender required that the borrower transfer the property to be given as security from their corporation to themselves individually, which created a tax liability. The borrowers sued the escrowee, claiming that the escrowee had a duty to warn them of this tax consequence. The court found that the necessary elements for a private suit under the Washington Consumer Protection Act were not met.

Most claims asserting that an escrowee had a duty to disclose fall under three categories:

1. Information about the state of title;

2. Advice about the legal effect of a closing document; and

3. Facts that suggest fraud or that a party has made a bad bargain.

These subjects are discussed below.

13.9.1 Information About The State Of Title

Generally, the escrowee has no duty to search title or to inform the parties to the escrow of facts or information about the state of title.[298] When the escrow instructions create any such duty, the escrowee will have a duty to disclose only those matters of which it is presently aware at the time of the escrow and which the escrow officer would reasonably believe to have a material effect on the

[297] 105 Wash.2d 778, 719 P.2d 531 (1986).

[298] *Tamburine v. Center Savings Ass'n*, 583 S.W.2d 942 (Tex.App. 1979); *Axley v. Transamerica Title Ins. Co*., 88 Cal.App.3d 1, 151 Cal.Rptr. 570 (Cal.App. 4 Dist. 1978); *Hobaica v. Seypet Resorts, LLC*, 2012 WL 6675129 (C.D.Cal.) (unpublished) (American escrow depositors had no claim against insurer-escrowee for its alleged lack of authority to issue policy in Mexico because they were not insureds); *Touch Stone AZ-Central Properties, L.L.C. v. Title Management Agency of Arizona, L.L.C*., 2014 WL 1778356 (Ariz.App. 1 Div.) (unpublished) ("the fact that Title Management knew that the parties intended a lien-free transfer did not transform Title Management from an escrow agent into a title investigator, guarantor, or insurer" and escrow duties were satisfied when escrowee obtained insurer's agreement to remove exception for deed of trust, not to verify that loan was in fact paid off); *K Corp. Enterprises, Inc. v. Fidelity Nat'l Financial, Inc*., 2015 WL 3755339 (Cal.App. 5 Dist.) (unpublished) (escrowee had no duty to examine title independently to determine if vesting of title shown in title report was accurate); *Eleazer v. First American Title Ins. Co*., 2017 WL 1137215 (Wash.App. 1 Div.) (unpublished) (escrowee had no duty to search title or to disclose information about recorded instruments; escrow instructions contained specific exculpation of any such duty); *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished) (escrowee owed no duty to search title and assumed no separate contractual duty to search title or disclose liens and encumbrances to buyers; title waiver enforced).

escrow transaction.[299] The insurer-escrowee's duty to disclose is limited to that information "acquired in the course of its agency with respect to matters pertaining thereto."[300] The escrowee has no duty to disclose information about the state of title that it learned other than in the course of that escrow.[301]

The insurer-escrowee may be required to advise the escrow party about the state of title in response to a direct inquiry, or when the circumstances are such that the failure to speak may allow the other party to provide false information.[302] Also, an insurer-escrowee was liable for not informing the purchaser that title had numerous liens and clouds on it, when specifically asked what was holding up the closing of the transaction. The jury found that the failure to give available information on specific inquiry allowed the seller to lie, and induced the buyer to assume that the transaction would eventually close.[303]

When an escrowee makes an incorrect statement about the status of title, and the insured reasonably relies on the statement to his or her harm, the escrowee may be liable to the escrow principal for damage suffered as a result.[304] Opinions offered with the sincere conviction that they are true, and which opinions are in fact reasonable, may or may not make the escrowee liable to the

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[299] *Cano v. Lovato*, 105 N.M. 522, 734 P.2d 762 (N.M.App. 1986) (escrowee had duty to tell party of pending tax sale that could and did extinguish title). In *Charles v. Florida Foreclosure Placement Center, Inc*., 988 So.2d 1157 (Fla.App. 3 Dist. 2008), the court held that an elderly lady who claimed she was tricked into deeding her house away in a foreclosure rescue sale stated a valid cause of action against the title company closer for failing to explain the nature of the transaction, making this distinction: "[w]hile it is clear that Quantum had no duty to explain the legal ramifications of these documents, it did have an obligation to at least identify them," meaning that it should have explained that the woman was signing a deed. However, in *Hilton v. Washington Mutual Bank*, 2009 WL 3485953 (N.D.Cal.) (unpublished), the borrower had not pled a valid cause of action based on breach of fiduciary duty or other claims simply by alleging that the closer rushed him through the signing of into signing loan documents that, he claimed, were predatory in nature.

[300] *Spaziani v. Millar*, 215 Cal.App.2d 667, 30 Cal.Rptr. 658 (Cal.App. 4 Dist. 1963), quoted in *Cano v. Lovato*, 105 N.M. 522, 734 P.2d 762 (N.M.App. 1986). *Spaziani* was cited with approval in *Vournas v. Fidelity Nat'l Title Ins. Co*., 73 Cal.App.4th 668, 86 Cal.Rptr.2d 490 (Cal.App. 4 Dist. 1999), which held that an escrowee had no duty to tell the buyer that the trust agreement obligated the seller trustee to obtain consents from the beneficiaries to a sale of the property. The court held that, even if a disclosure duty existed, it could not be asserted by the successor trustee, since he was not a party to the escrow.

[301] *Tamburine v. Center Savings Ass'n*, 583 S.W.2d 942 (Tex.App. 1979).

[302] In *Kraft v. Bartholomew*, 620 P.2d 755 (Hawaii App. 1980), the court denied a motion for directed verdict in favor of an escrowee that knew of a title defect and that the seller was misleading the buyer about it, and the buyer asked the escrowee what the problem was.

[303] *Kraft v. Bartholomew*, 620 P.2d 755 (Hawaii App. 1980).

[304] In *Abdel-Fattah v. Community Bank of Brockton*, 2007 WL 2705751 (Mass.Super.) (unpublished), an attorney who closed a mortgage loan and certified title to his client, the lender, was not entitled to summary judgment dismissing the claim of the buyer-borrower that the attorney had incorrectly informed the buyer that a missing one-quarter interest in the property had been cured.

party, but do not support a fraud or intentional misrepresentation claim.[305]

An escrowee may have a duty to disclose to an escrow party a survey that is in the escrow file that discloses material defects or encumbrances on the property or its title. An escrowee was found to have a duty to present the buyer with a survey in the escrowee's possession that identified several encroachments that were later alleged to have prevented the insured from selling or refinancing. The buyer argued that it might not have bought had it known what the escrowee knew at closing.[306] An insurer was not entitled to summary judgment when the insured alleged that the insurer had a survey in its possession at closing which disclosed significant encroachments, but the escrowee did not disclose that fact to the buyer.[307] However, the escrowee does not vouch for the accuracy of a survey merely by delivering it to a party through escrow.[308]

However, an escrow officer's statements are merely that. A statement by an escrow officer that a certain unrecorded access easement did not exist, although subject to dispute, was protected from the claim that it slandered title, because the title company anticipated litigation about the issue.[309]

The escrowee also has no duty to search title or have it searched by another.[310] The escrowee is not obligated to secure or procure title insurance on behalf of the principal, absent a specific instruction to that effect and proof that the escrow principal took all steps necessary to obtain such insurance.[311] An escrowee is not required to inform a borrower that an owner's policy will not be

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[305] In *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), an escrow officer announced at closing that "a survey had been conducted, [and] that it revealed no problems." A one-foot encroachment of the garage and driveway onto an easement appeared on the survey when it was delivered, however. The court found that the escrowee negligently made a false statement, although it found no evidence of fraudulent intent. In *McColgan v. Brewer*, 112 A.D.3d 1191, 977 N.Y.S.2d 790, 2013 N.Y. Slip Op. 08492 (N.Y.A.D. 3 Dept. 2013), leave to appeal denied 2014 WL 7152321 Dec. 17, 2014, the court held that a buyer could not maintain a fraud claim against an insurer for the statements of a title examiner employed by a title agent that he believed an easement benefited the parcel to be insured, when all of the parties who reviewed it, including an attorney, agreed with the title examiner.

[306] *Daniel v. Coastal Bonded Title Co.*, 539 So.2d 567 (Fla.App. 1989). The insurer-escrowee did not use the survey to give the owner survey coverage, and the court agreed that there was no basis for a claim on the policy.

[307] The court agreed with the insurer that it had a right to make exception for the encroachments on the policy, and there was no policy coverage for same. *Daniel v. Coastal Bonded Title Co*., 539 So.2d 567 (Fla.App. 1989).

[308] *Miller v. LandAmerica Lawyers Title of El Paso*, 362 S.W.3d 842 (Tex.App.-El Paso 2012).

[309] *M & H Glass Enterprises v. Tischler*, 2006 WL 1010470 (Cal.App. 2 Dist.) (unpublished).

[310] *Axley v. Transamerica Title Ins. Co.*, 88 Cal.App.3d 1, 151 Cal.Rptr. 570 (Cal.App. 4 Dist. 1978).

[311] *Van de Bovenkamp v. United Title Co.*, 2006 WL 3530473 (Cal.App. 2 Dist.) (unpublished). The court found that no such duty was created by Civil Code § 1057.6, enacted in 1992, which requires a written caution to be given to real estate purchasers stating that "it may be advisable to obtain title insurance in connection with the close of escrow since there may be prior recorded liens and encumbrances...."

issued in connection with a loan transaction.[312] When a purchaser elects to pay all or part of the purchase price outside of closing and in advance of obtaining title evidence, the escrowee-insurer does not have a special duty to warn the party at the earliest possible moment that title is defective, in order to avert loss to the party.[313] The escrowee's limited agency for a seller does not make it liable for a seller's contractual duty to disclose the condition of title.[314]

The insurer-escrowee has no duty to disclose information about matters that do not affect title. For example, the insurer-escrowee had no obligation to tell a buyer that property was located in a district in which a utility had the right to assess the property for converting to underground utility service, when no lien existed on the day escrow closed.[315]

If an escrowee relays information about title obtained from a third party that turns out to be inaccurate, the escrowee is not responsible for the inaccuracy.[316] This is especially true when the escrowee disclosed in writing that the tax information being provided was an estimate, and the escrowee was not liable for any incorrectness in the information.[317]

An escrowee may specifically contract to inform an escrow party about certain conditions to title. Failure to advise the party of such title matters in the face of such direction is a breach of instruction. Thus, when the escrow specifically required the escrowee to obtain and review title information, and inform the principal of any restriction which would be violated by the principal's

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[312] *Shine v. Commonwealth Land Title Ins. Co. of Houston*, 1996 WL 134962 (Tex.App.-San Antonio) (unpublished). The court noted: "[t]he Settlement Statement signed by plaintiff and her husband clearly shows that she instructed Commonwealth not to disburse funds for an owner's policy but only for the lender Citicorp's coverage." Id. at *4. Similarly, in *Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089 (10th Cir. (Okla.) 1999), the court found that borrowers did not have a right to assume that they were getting title insurance in connection with refinance loans. To the contrary, the lender gave "a HUD booklet entitled, 'Your Guide to Settlement Costs' to the homeowners. ... The information provided in this booklet advised the homeowners that a title insurance policy issued only to the lender would not protect them. ... It further advised that if the homeowners wanted to protect themselves, they would need to purchase an owner's policy." The affidavits of title provided to the title insurer from closing did not promise insurance. Finally, "'insurance agents in Missouri have no general duty to advise potential customers of optional coverages that may be available.'" *Farmers Ins. Co. v. McCarthy*, 871 S.W.2d 82, 86 (Mo.App. 1994). Thus, the Title Companies had no obligation to inform the homeowners about a title insurance policy that would protect their interests."

[313] *Taggart v. Nevada Title Guaranty Co.*, 76 Nev. 46, 348 P.2d 749 (1960).

[314] *Burman v. Richmond Homes Ltd.*, 821 P.2d 913 (Colo.App. 1991); *Rockville Tudor Apartment Corp. v. Bodner*, 1997 WL 34847566, Sept. 18, 1996 New York Law J. 25 (N.Y.Sup.) (Trial Order).

[315] *Wallace v. Dave Hansen Construction Co., Inc.*, 593 P.2d 307 (Ariz.App. 1979).

[316] *Wallace v. Dave Hansen Construction Co., Inc.*, 593 P.2d 307 (Ariz.App. 1979).

[317] *Wallace v. Dave Hansen Construction Co., Inc.*, 593 P.2d 307 (Ariz.App. 1979). Similarly, when a tax pro-ration was made based on the seller's tax statement, which was inaccurate because the seller qualified for an over-65 exemption but the buyer did not, the insurer/escrowee was not liable for the difference in tax amount. The source of injury to the buyer, if any, was the taxing authority's determination, not the insurer/escrowee's pro-ration. *Clayton v. Norwest Mortgage, Inc.*, 1997 WL 724944 (Tex.App.-Houston [1 Dist.]) (unpublished); *Title Agency of Texas v. Arellano*, 835 S.W.2d 750 (Tex.App.-Houston [14th Dist.] 1992), writ den.

intended use of the property, the escrowee had assumed such a duty.[318]

However, an escrowee has no duty to give advice or to coach the parties on how to protect themselves from risks. Thus, the escrowee has no duty to advise a buyer to obtain a title insurance policy[319] or a survey of the property.[320] The escrowee also has no duty to obtain a survey for the lender.[321] Washington holds that an escrowee has no positive duty to warn a buyer that the legal description for the property being purchased is less than that described in his offer to purchase. The high court reversed the appeals court ruling that an escrowee had a fiduciary duty to tell the buyer that the legal description in the offer included more land than the seller owned, even though that fact would have been evident if the buyer had reviewed the title commitment.[322]

A sub-escrowee charged with the disbursement of funds and recording of instruments, at the direction of the escrowee, is not itself an escrowee with a duty to determine and disclose the status of title for the parties to the escrow.[323] Rather, the court found:

> Fidelity was engaged to perform only the most rudimentary of the escrow functions--payout of funds and recordation of documents. It did not undertake to prepare or review the escrow documents or ensure that the parties' instructions were carried out. We decline to hold that a third party so engaged thereby becomes the fiduciary of the purchasers for purposes of searching the records or transmitting information regarding title.[324]

The court noted that the sub-escrowee never saw, much less signed, the escrow instructions in which the escrowee was told not to break escrow unless title was in the form permitted by the lender. Sub-escrows are further described at §13.2.

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[318] *Red Lobster Inns of America, Inc. v. Lawyers Title Ins. Corp*., 656 F.2d 381 (8th Cir. 1981).

[319] *Scott v. BAC Home Loan Servicing, L.P*., 2016 WL 320219 (E.D.Pa. 2016) (unpublished) (property owner had no basis to sue escrowee for its alleged failure to notify him of his option to purchase title insurance; the court also said that, in any event, Section 126.1 of Title 31 of the Pennsylvania Code, which requires the giving of a notice of the availability of an owner's policy, is not required to be given at a refinance loan closing such as the one conducted by the title company in this case).

[320] *Dudas v. Belinger*, 2003-Ohio-6118, 2003 WL 22715598 (Ohio App. 9 Dist.) (unpublished).

[321] In *Bank of New York Mellon, Trustee v. Jacobson*, 2015 WL 1757885 (Minn.App.) (unpublished), the court held that the statement in a lender's closing instructions that the title company closer was to review a survey if the lender obtained one was not the equivalent of a promise by the insurer-loan closer to obtain a survey in order to discover that there was no house built on the land to be mortgaged.

[322] *Denaxas v. Sandstone Court of Bellevue, L.L.C*., 148 Wash.2d 654, 63 P.3d 125 (Wash. 2003).

[323] *Siegel v. Fidelity Nat'l Title Ins. Co.*, 46 Cal.App.4th 1181, 54 Cal.Rptr.2d 84 (Cal.App. 2 Dist. 1996).

[324] 54 Cal.Rptr.2d at 91.

13.9.2 Advice About The Legal Effect Of A Closing Document

FORM 82, Appendix A
No duty to give legal advice

An escrowee is not an attorney or advisor to the parties to the escrow, as explained at §3.3. The insurer-escrowee does not assume the role of attorney based on the escrow party's past experience with settlement agents who were attorneys, or because certain documents referred to the insurer as "approved attorney":

> ... First American is a title insurance company, not a professional corporation qualified to render the professional services of an attorney pursuant to Code §§ 13.1-542 through -556. An attorney-client relationship cannot be created by a non-attorney acting as an attorney. If the non-attorney employees of First American engaged in acts reserved to attorneys, charges of unauthorized practice of law may lie, as noted by the trial court, but not claims for legal malpractice.[325]

Therefore, an escrowee may not, and does not have a duty to, explain the legal effect of a document presented at closing, even when the escrowee drafted the instrument.[326] The escrowee is not required to explain the effect of amendments to a closing document.[327] The escrowee has no duty to warn a party that he or she may be taking an imprudent risk.[328]

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[325] *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 669 (Va. 1994).

[326] *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973), rev'd other grounds 86 Wash.2d 545, 546 P.2d 440 (1976) (escrowee not bound to explain terms of subordination agreement); *Cowart v. Northwest Title Agency of Ohio and Michigan, Inc*., 2008-Ohio-9, 2008 WL 53292 (Ohio App. 6 Dist.) (unpublished) (escrowee not required to explain legal significance of property's location within a floodplain); *Fontenot v. LandAmerica Commonwealth Title of Houston, Inc*., 2014 WL 4260114 (Tex.App.-Houston) (unpublished) (escrow officer had no obligation to explain to a seller the risk in accepting a subordinate take-back purchase money deed of trust).

[327] *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157 (Tex.App. 1992) said: "[w]hile Metro had a duty to point out the interlineations, it did not have a duty to explain the signing of the interlineations because to do so would have breached its duty to both parties to remain a neutral third party at the closing. Despite his advanced years, Bell, Sr., was an attorney who was mentally competent at the time he signed the interlineations. Metro owed no duty to give him legal advice on the consequences of initialing the interlineations and signing the deed."

[328] *Axley v. Transamerica Title Ins. Co.*, 88 Cal.App.3d 1, 151 Cal.Rptr. 570 (Cal.App. 4 Dist. 1978) (no duty of "reasonable care and diligence" requiring escrowee to advise lender not to take fourth position deed of trust). In *Charles v. Florida Foreclosure Placement Center, Inc*., 988 So.2d 1157 (Fla.App. 3 Dist. 2008), the court held that an elderly lady who claimed she was tricked into deeding her house away in a foreclosure rescue sale stated a valid cause of action against the title company closer for failing to explain the nature of the transaction, making this distinction: "[w]hile it is clear that Quantum had no duty to explain the legal ramifications of these documents, it did have an obligation to at least identify them," meaning that it should have explained that the woman was signing a deed. However, in *Hilton v. Washington Mutual Bank*, 2009 WL 3485953 (N.D.Cal.) (unpublished), the borrower had not pled a valid cause of action

However, as in other matters, when the escrowee speaks, it has a duty to speak truthfully, and may be liable if a party reasonably relies on the escrow officer's opinion or statement, even if it was offered sincerely and thoughtfully.[329] A title agency attending a closing as agent of the buyer's lender was found to have a duty of care to the buyer, and could be sued for fraudulent misrepresentation when its employee volunteered the opinion at the closing table that a septic report was a "clear septic test."[330] Similarly, an escrowee was held liable under the volunteer doctrine for having given the advice to close on the purchase of a newly-built house although the buyers knew that some workmen had not been paid.[331] Also, an escrowee was found responsible for harm when the escrow officer represented to various sellers that the purchaser was "an honorable and wealthy man" and that "earnest money time deposits" were "valid devices in California" backed by certificates of deposit, all or most of which was not true.[332]

Liability for bad advice may be based on Section 552 of the Restatement (Second) of Torts, regarding negligent misrepresentation. See the discussion of this Restatement section above at §13.9. Parties were allowed to pursue negligent misrepresentation claims against escrowees for giving bad advice as to the sufficiency of an escrow party's security for a debt,[333] and advising that an indemnity

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based on breach of fiduciary duty or other claims simply by alleging that the closer rushed him through the signing of into signing loan documents that, he claimed, were predatory in nature.

[329] An escrowee was liable for having volunteered that there would be sufficient funds in the escrow to pay all lien claimants, in *Arizona Title Ins. and Trust Co. v. O'Malley Lumber Co.*, 14 Ariz.App. 486, 484 P.2d 639 (Ariz.App. Div. 1 1971). In *Premium Hospitality, L.L.C. v. Astra Capital Funding*, 2013 WL 3791495 (E.D.La.), recons.den., 2014 WL 896807 (E.D.La. 2014), later decision 2014 WL 3778687, an escrow officer's emailed statement that a "Conditional Letter of Guarantee" allegedly sent by a bank officer was "in fact, an official letter from Wells Fargo and was signed by him personally" was a sufficient promise on which to sue, when the other party allegedly released money from escrow in reliance on that promise about the piece of paper. The result was not changed by the fact that the escrow instructions contained an exculpation clause saying the escrowee would not be liable for the validity of any instrument deposited into escrow or the genuineness of any signature on a deposited instrument.

[330] *Bortz v. Noon*, 698 A.2d 1311 (Pa.Super. 1997), reh.den. The court found a duty of care to the purchasers because, in addition to appearing at closing for the lender, the title agent "provided the buyers with a service, namely the issuance of title insurance, for a fee. ... Obviously, Suburban Settlement was not acting merely for the mortgage company, but, instead, was providing dual services to the buyers and the lender." This blurring of functions is not as obvious as the court suggests, however. The claimed misrepresentation at closing did not affect the title to the real estate. The closer overstepped his role by opining on a matter that he was, as the court points out, not qualified to judge. Thus, the closer's liability more properly arose because he volunteered the opinion rather than because he had a legal duty to the purchasers to give such an opinion.

[331] *McDonald v. Title Ins. Co. of Oregon*, 49 Or.App. 1055, 621 P.2d 654 (Or.App. 1980).

[332] *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir. 1985). Based on the fact that the escrow officer made the same misrepresentation to various sellers, the court upheld a verdict against the insurer based on the Racketeer Influenced and Corrupt Organizations Act.

[333] *Mur-Ray Management Corp. v. Founders Title Co*., 169 Ariz. 417, 819 P.2d 1003 (Ariz.App. 1991).

rather than a title insurance policy would be adequate protection against construction liens.[334] Similarly, when the title insurance commitment correctly showed that a building height restriction had been changed by a second restriction, but the escrow officer voluntarily advised the homeowners that a restriction existed and gave them a copy of the earlier version, the escrowee was responsible for the homeowners' reliance on the escrow officer's incorrect information.[335] Likewise, a seller had a valid cause of action for fraud against a closer when the lender failed to fund, but the closer told the seller that the funds would be available the next day.[336]

In the State of Washington, an escrowee is not under any duty to give legal advice or see to it that an escrow party obtains such advice.[337] However, if the escrowee voluntarily performs acts that are later found to be the unauthorized practice of law, the escrowee is held to the same standard of care as is an attorney. For example, an escrowee who drew up a promissory note engaged in unauthorized practice of law. Thus, the escrowee became responsible for advising the party that it should not lend without getting a deed of trust as security.[338]

13.9.3 Facts Which Might Suggest Fraud Or Bad Bargain

An escrowee violates its limited agency duties by actively participating in or facilitating a fraud perpetrated by one of the escrow principals against another.[339] This may include the escrow

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[334] *De Zemplen v. Home Federal Savings & Loan Ass'n*, 221 Cal.App.2d 197, 34 Cal.Rptr. 334 (Cal.App. 4 Dist. 1963).

[335] *Lindstrand v. Transamerica Title Ins. Co.*, 127 Or.App. 693, 874 P.2d 82 (Or.App. 1994).

[336] *Boenker v. American Title Co.*, 590 S.W.2d 777 (Tex.App. 1979).

[337] *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973).

[338] *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675 P.2d 193 (1983); *Andersen v. Northwest Bonded Escrows, Inc.*, 4 Wash.App. 754, 484 P.2d 488 (1971); and *Hecomovich v. Nielsen*, 10 Wash.App. 563, 518 P.2d 1081 (1974).

[339] *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 5 P.3d 249, 320 Ariz.Adv.Rep. 51 (Ariz.App.Div. 1 2000) (closer who "facilitated" fraud was liable for her own acts and as co-conspirator; underwriter could be liable in respondeat superior for closer's acts, but not for her conspiracy to defraud, which would have created "two layers or 'double' vicarious liability"); *In re Ganier*, 2010 WL 1780356 (Bkcy.D. Idaho) (unpublished) (title agent that employed a notary was not responsible for damage allegedly caused by notary's misconduct in acknowledging forged deed of trust, despite liability statute, because title company had no knowledge of misdeed); *Straight v. Approved Fed. Savings Bank*, 2005 WL 1288091 (W.D.Wash. 2005) (unpublished) (borrower entitled to pursue claim that escrowee assisted perpetrator in getting him to sign conveyance and note he did not understand); *Vancura v. Katris,* 391 Ill.App.3d 350, 907 N.E.2d 814, 330 Ill.Dec. 1 (Ill.App. 1 Dist. 2008) (employer negligent in training notary employee, but did not actively condone his conduct in notarizing forged mortgage assignment). In *Teel v. American Title Co. of Houston*, 2001 WL 1097862 (Tex.App.-Houston (14 Dist.) 2001) (unpublished), rev.den. January 10, 2002, reh.den. February 28, 2002, an escrowee was sued for fraud and mental anguish damages based on the allegation that it conspired in a fraudulent sale at a below-market price. In *Spears v. Washington Mutual, Inc.*, 2009 WL 605835 (N.D.Cal.) (unpublished); related decision, 2009 WL 2761331 (N.D.Cal.) (unpublished), a title agent was dismissed from a lawsuit alleging that Washington Mutual and First American's appraisal

officer's knowing participation in a conspiracy to commit loan fraud.[340] However, the escrow officer serving as loan closing agent is not liable to the lender for allegedly failing to report information to the lender that the escrow officer did not observe, or that did not have the appearance of being false or fraudulent.[341]

However, an escrowee has no obligation to inform a party to the escrow that the terms of the transaction are simply not the best that might be available to the party.[342] Some borrowers have

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subsidiary conspired to inflate valuations. See also Steven Biskupic and David Cannon, *Advising Civil Clients: When the FBI Comes to the Door*, The Wisconsin Lawyer (February 2000), p. 11 (discussing white collar crime prosecutions, emphasizing loan fraud). In *Tafea v. Gateway Title Co.*, 2017 WL 5843239 (Cal.App. 4 Dist.) (unpublished), an escrowee who was found to have assisted a rehab flipper in misusing investors' money owed a duty to the investors not to work a fraud on them. The fact that the investors were not parties to written escrow instructions did not insulate the escrowee from liability for the fraud in which it participated. In *White v. Parker*, 2018 WL 1279545 (unpublished); recommendations adopted, 2018 WL 1278420 (E.D.Tenn. 2018) (unpublished), a person who delivered over a million dollars to be used to fund the purchase of property in double escrows (sometimes called a "seasoning" escrow, and a very dubious practice) received a judgment against the title company closer and others because his money was not returned to him as promised, and was apparently stolen.

[340] *Pulphus v. Sullivan*, 2003 WL 1964333 (N.D.Ill. 2003) (unpublished), (fraud, RICO and other claims against title company employee allegedly part of fraud ring); *Inner City Management, LLC v. JKV Real Estate Services, Inc*., 304 B.R. 250 (Bkcy.D.Md. 2003) (bankruptcy trustee for loan fraud ringleader may not sue title insurers for allegedly participating in fraud, because only injured parties have standing). In *Smith v. Berg*, 247 F.3d 532 (3rd Cir. (Pa.) 2001), the title insurer was sued as a RICO co-conspirator because it allegedly "cooperated with [the perpetrator] by 'allowing him to assume many of [Fidelity's] normal functions during settlements' and by recording false information on HUD-1 Settlement Statements." In *Menuskin v. Williams*, 145 F.3d 755 (6th Cir. (Tenn.) 1998), aff'g and rev'g in part 98 F.3d 1342 (6th Cir. (Tenn.) 1996) (Table), dismissing app. of 940 F.Supp. 1199 (E.D.Tenn. 1996).the court left open the question of whether or not an insurer-escrowee, by drafting deeds and delivering them in folders bearing the company name, gave the false impression that it had conducted a title search, which would bolster the legitimacy of the transaction. In *Tafea v. Gateway Title Co*., 2017 WL 5843239 (Cal.App. 4 Dist.) (unpublished), an escrowee who was found to have assisted a rehab flipper in misusing investors' money owed a duty to the investors not to work a fraud on them. The fact that the investors were not parties to written escrow instructions did not insulate the escrowee from liability for the fraud in which it participated. In *United States v. Granitur*, 2018 WL 3820686 (S.D.Fla. 2018) (unpublished), the court affirmed a loan closer's conviction on felony charges for failing to inform a lender that the seller paid the buyer's down payment on the purchase of a condo unit, and the seller was the government's lead witness at trial. In *Fifth Third Mortgage Co. v. Kaufman*, 934 F.3d 585 (7th Cir. (Ill.) 2019), the owner of a title agency who also personally conducted loan closings was found liable to the lender for having failed to report that the borrowers were straw buyers and had made misrepresentations in their loan applications.

[341] In *Saleh v. Hasan Merchant*, ___ F.Supp.3d ___, 2019 WL 1331788 (N.D.Ill. 2019) (permanent citation not yet available), the escrowee had no duty to discover or disclose the fact that a seller had given the buyer an appraisal that set too high a value on the property being sold, which was a subject beyond the escrow officer's ken. In *People v. Kidd*, 2013 WL 500356 (Cal.App. 1 Dist.) (unpublished), an escrow officer's conviction for aiding and abetting a large loan fraud ring was overturned, because she obeyed escrow instructions and notarized deeds that were signed by the correct parties, and the prosecutor merely conjectured that she knew the deals were fraudulent.

[342] *Ramsey v. Baxter Title Co.*, 54 A.3d 710, 2012 ME 113 (Me. 2012) (lender's closing attorney had no fiduciary duty to borrower to tell her that she might be able to get different loan with better terms). In *Dailey v. Thorpe*, 445 S.W.3d 785 (Tex.App.-Houston 2014), reh.den. Oct 23, 2014, the court held that an escrow officer who obeyed all written instructions was not liable to the sellers for allegedly conspiring with the buyers to defraud the sellers, when the claimed instruments of that fraud were made part of the escrow instructions. In *Jenkins v. Security Title Agency Inc.*,

asserted that the loan closing agent has a duty to inform the borrower if the terms of the loan are onerous or unconscionable. The loan closing agent has no such duty.[343] The imposition of such a duty would violate the escrowee's position as a neutral stakeholder, and would be tantamount to a mandate to offer legal advice. See the discussion of the escrowee's neutral role at §13.3.

Some states hold that an escrowee has a duty to warn one of the escrow principals when the escrowee has actual knowledge that another escrow principal is perpetrating a fraud.[344] Other states

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2017 WL 2547235 (Ariz.App. 1 Div.) (unpublished), sellers signed a contract under which they agreed to an installment sale of the property without any deed of trust or promissory note securing their rights. The court held that the escrow company had no duty to advise the sellers that they were entering into a risky transaction. The sellers cited *Burkons v. Ticor Title Ins. Co. of Cal*., 168 Ariz. 345 (1991), as authority suggesting that the escrowee had a duty to inform the sellers that the contract was a fraud. The appeals court disagreed, retorting that "our supreme court has explained that an 'escrow company is not a guardian for the uninitiated.' *Berry v. McLeod*, 124 Ariz. 346, 352 (1979)."

[343] In *Johnson v. Robinson*, 292 B.R. 821 (Bkcy.E.D.Pa. 2003), the court rejected the claim that the closer had an affirmative obligation to advise the borrower not to sign loan documents that were unfavorable to her. It said: "Title agencies are intermediaries who perform essentially ministerial, administrative tasks associated with documenting the transactions which lenders and borrowers bring to them. They are neither the counselor to the borrower nor the lender. The law imposes no duty of advice and disclosure on a closing agent. Indeed, the request to impose the onerous, impractical and amorphous duties which the Debtor demands upon the title clerk who conducts a loan closing seems patently unreasonable." However, in *Charles v. Florida Foreclosure Placement Center, Inc*., 988 So.2d 1157 (Fla.App. 3 Dist. 2008), the court refused to dismiss claims by an elderly lady against the closer for failing to explain that she was deeding her house away as part of a foreclosure rescue transaction. In *Prince v. Accardo*, 54 A.D.3d 837, 863 N.Y.S.2d 819, 2008 N.Y. Slip Op. 06975 (N.Y.A.D. 2 Dept.) (2008), the title insurer for the purchaser was granted summary judgment on the sellers' claim that the buyer had perpetrated a fraud in arranging a foreclosure rescue, holding that the sellers had offered no proof of fraudulent conduct by the insurer. Also see *Proctor v. Metropolitan Money Store*, 579 F.Supp.2d 724 (D.Md. 2008), later decision 645 F.Supp.2d 464 (2009) (underwriter not liable for agents' claimed negligence or fraud in failing to disclose terms of foreclosure rescue transactions; later decision held that complaint adequately pled RICO and other claims against buyers, after dismissal of insurer).

[344] "Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co*., 27 Cal.4th 705, 711, 41 P.3d 548, 552, 17 Cal.Rptr.2d 541 (Cal. 2002) (citing *Lee v. Title Ins. & Trust Co.*, 264 Cal.App.2d 160, 162, 70 Cal.Rptr. 378 (Cal.App. 5 Dist. 1968)). Arizona and Nevada have adopted the rule that an escrowee has a duty to disclose facts about fraud, as discussed below in this section. Those decisions are discussed in Nagy, *Escrowees' Duty to Disclose Fraud: An Expansion of the Limited Agency Doctrine*, 22 Ariz. L.Rev. 1146, 1150 (1980), citing *United Homes, Inc. v. Moss*, 154 So.2d 351, 354 (Fla.App. 1963); and *Bardach v. Chain Bakers, Inc*., 265 A.D. 24, 27, 37 N.Y.S.2d 584, 587 (1942), aff'd 290 N.Y. 818, 50 N.E.2d 233 (1943). See also, *American Title Co. of Houston v. Bomac Mortgage Holdings, L.P*., 196 S.W.3d 903 (Tex.App.-Dallas 2006) (title company that failed to inform lender of simultaneous flip of property and concealed flip by altering title commitment to show flipper in title liable for loan amount plus penalty under Deceptive Trade Practices Act). This duty is sometimes rooted in the escrow instructions. Some courts have based their rulings on this statement from 30A C.J.S. Escrows §10: "[T]here is no duty to disclose information received by an escrow agent unless such duty is required by the terms of the escrow agreement, or unless an agent knows that fraud is being committed on a party to the escrow." In *Home Loan Center, Inc. v. Flanagan*, 2012 WL 1108132 (N.D.Ill.) (unpublished), the court found that an escrowee has a duty to inform the lender of possible impersonation, when the person appearing before the closer looked nothing like the (genuine) driver's license presented for identification, and the loan closing instructions read: "[e]ach Borrower must sign all documents exactly as his or her name appears on the blank line provided for his or her signature." The escrowee proceeded with the loan closing without informing the lender of his suspicions about the man's identity. The court said that the closer "owed LendingTree a duty of ordinary care in supervising the closing and verifying identities and notifying LendingTree of circumstances indicating fraud." However,

hold that an escrowee does not have a duty to disclose to one escrow party its suspicion that the other escrow party may be perpetrating a fraud, or similar suspicious circumstances regarding the transaction.[345] The latter view is consonant with the escrowee's position as limited agent of each party. As discussed above, an escrowee is not a policeman, and may not interject its opinion about the economic benefits of the transaction. The escrowee is often in a position to witness a bad bargain or a "sharp" sale or purchase, without participating in any wrongful act against any of the escrow parties. See the discussion of the escrowee's neutral role at §13.3.

In California, an escrowee does not have a duty to report the potential that one of the parties is perpetrating a fraud on the other, absent "clear evidence of fraud."[346] The most influential modern

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in *Edelman v. Belco Title & Escrow, L.L.C.*, 754 F.3d 389 (7th Cir. (Ill.) 2014), another Illinois court found that an escrowee had no duty to warn investors who deposited money into escrow that the party to the escrow who induced their deposits might be taking advantage of them. For example, when a bank escrowee was alleged to have had knowledge of federal securities fraud, the court found a duty to disclose that information. "[The escrowee] contends its fiduciary duties as an escrow are limited by the express terms of the escrow agreement. Regardless of the agreement's express terms, however, an escrow agent's duty to its principal includes the obligation to disclose information about a known fraud being committed on the principal." *Powell v. H.E.F. Partnership*, 793 F.Supp. 91, 93 (D.Vt. 1992). See also *Schoepe v. Zions First National Bank*, 750 F.Supp. 1084 (D. Utah 1990).

[345] In *Victory v. Sneed Financial Services, LLC*, 2010 WL 45918 (N.D.Tex.) (unpublished), a title insurer that held investor funds in escrow was found to have no duty to act beyond its written instructions. A number of escrows were opened to accept investor deposits for the purchase of ATM-related machines. The escrowee was found to have no duty to detect the fact that the business operator was selling the same machines to different investors. The court noted that California and Texas laws are "substantially similar," because both states say that an escrowee has no general duty to police the affairs of its depositors and its obligations "are limited to faithful compliance with the depositors' instructions." It compared *Lee v. Title Ins. & Trust Co.*, 264 Cal.App.2d 160, 70 Cal.Rptr. 378 (Cal.App. 5 Dist. 1968) to the Texas cases of *Watkins v. Williamson*, 869 S.W.2d 383 (Tex.App.-Dallas 1993, no pet.) (citing *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex.1969)) and *Trahan v. Lone Star Title Co. of El Paso, Inc.*, 247 S.W.3d 269 (Tex.App.-El Paso 2007). In *Central Bank v. Rowe Construction, Inc.*, 2011 WL 1119872 (Minn.App.) (unpublished), a Minnesota court found that a title company loan closer had no fiduciary duty to the borrower and was not liable to the borrower for allegedly concealing from them that they were involved in a loan fraud flipping ring. In *Coran v. Century Title Agency, L.L.C.*, 2010 WL 4679498, 2010 Mich. App. LEXIS 2217 (Mich.App.) (unpublished), the court held that Michigan does not impose a duty on an escrowee to disclose facts about fraud, and specifically rejected the fraud disclosure duty adopted in Arizona under *Berry v. McLeod*, 124 Ariz. 346, 604 P.2d 610 (1979), discussed in this section. In *Pyper v. Reil*, 2018 UT App 200, 437 P.3d 493 (Utah App. 2018), the court held that an escrowee in Utah does not have a duty to shut down a transaction in which one party might be defrauding the other. It said that "Utah has not recognized as included in an escrow agent's fiduciary duty the affirmative obligation to detect and halt a potentially fraudulent transaction... ." It refused to expand the escrowee's duties in such a way based on alleged "industry standards." The court also said that Pyper had not explained how such a suggested duty "might reasonably coexist with an escrow agent's 'core' duty to follow the instructions provided to it or how the tensions inherent in affirmatively stepping outside of those instructions in situations implicating potential fraud might be resolved."

[346] One commentator summarized *Blackburn v. McCoy*, 1 Cal.App.2d 648, 37 P.2d 153 (Cal.App. 2 Dist. 1934), on which *Lee* relied, as follows: "The court concluded ... that a *general* agency did not exist between the parties and the escrow agent. An escrow agent owes duties to two parties with conflicting interest. The court reasoned that the duty to disclose fraud to one principal conflicts with the duty of loyalty to the other principal." Jacobsen, *California Escrow Agents: A Duty to Disclose Known Fraud?*, 17 Pacific L.J. 309, 315-6 (1985). In *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.*, 27 Cal.4th 705, 1160A, 117 Cal.Rptr.2d 541, 41 P.3d 548 (Cal. 2002), the court said: "… an escrow holder has no general duty to police the affairs of its depositors; rather, an escrow holder's obligations are

California decision is *Lee v. Title Ins. & Trust Co.*[347] The *Lee* court found that the escrowee does not have "a fiduciary duty to go beyond the escrow instructions and to notify each party to the escrow of any suspicious fact or circumstance which has come to his attention before or during the life of the escrow which could conceivably affect such party even though the fact or circumstance is not related to his specific escrow instructions."[348] This proposed duty would be too subjective a burden, in light of the escrowee's limited agency and duty of neutrality. Such a duty would leave the escrowee open to suit from the other party, whose benefit of the transaction would presumably be lost, once exposed:

> In fact, under the proposed rule, once an escrow holder received information (from whatever source) he would be forced to decide independently whether to believe the information and disclose it or disbelieve it and conceal his knowledge. If he concealed his knowledge he would risk suit. If he discloses and the information is inaccurate, he may be sued by all parties to the escrow for interfering with their contract. [footnote omitted] For example, in the fourth cause of action of appellants' complaint appellants allege that the other defendants falsely and fraudulently promised appellants that they would obtain tenants and the necessary financing to acquire and remodel the subject real property in order to induce appellants to purchase the property.
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> Thus, if respondents had informed appellants of these facts, and if it was later discovered that their information was inaccurate, they would have subjected themselves to multiple lawsuits.
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> Establishing a rule which would create such a dilemma and subject to the escrow holder to a high risk of litigation would damage a valuable business procedure. Manifestly, appellants' contention, if adopted by judicial fiat, would effectively discourage a reasonable and prudent man or company from acting as an escrow holder and would ultimately defeat the very purpose for which escrows

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limited to faithful compliance with the depositors' instructions. Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." The last sentence of that quote was relied on in *Phleger v. Countrywide Home Loans, Inc*., 2009 WL 225416 (N.D.Cal.) (unpublished), in which the court refused to dismiss a claim against the escrowee because the principal "has shown that there is a genuine issue of material fact as to whether Stewart had 'clear evidence of fraud,' and failed to stop the escrow, thus breaching its duty to the parties to the escrow." In the companion decisions of *AREI Colonnade 1, LLC v. Stewart Title Guar. Co*., 2013 WL 637231 (Cal.App. 1 Dist.) (unpublished), and *Wood River Capital Resources, LLC v. Stewart Title Guar. Co*., 2013 WL 637903 (Cal.App. 1 Dist.) (unpublished), a California court held that a title insurer that acted as a sub-escrowee in preparing deeds for the purchase of interests in a nursing home did not have a duty to discover that the operator of the purchasing investor syndicates was operating a Ponzi scheme and warn his investors.

[347] 264 Cal.App.2d 160, 162, 70 Cal.Rptr. 378 (Cal.App. 5 Dist. 1968), relying on *Blackburn v. McCoy*, 1 Cal.App.2d 648, 37 P.2d 153 (Cal.App. 2 Dist. 1934), which reached the same conclusion on similar facts.

[348] 70 Cal.Rptr. at 379.

> originated.[349]

California courts have reiterated the *Lee* rule in later decisions.[350]

The *Lee* rule dovetails with, and is partly a recognition of, the escrow principals' legitimate interest in keeping the details of a transaction private. Escrow officers routinely and properly preserve the confidentiality of a transaction. Many escrow officers are taught not to disclose the facts of an escrow to anyone other than the parties. This is a business practice and is not based on a legal duty, but protects a legitimate interest of the principals to whom the escrowee owes a limited duty. Thus, the mere refusal to comment on a transaction to a person who is not a principal does not suggest or establish that an escrowee is in league with another party to defraud.[351]

The rule enunciated in *Lee* was followed in the Alabama decision of *Gurley v. Bank of Huntsville*.[352] Missouri also follows the California approach. A Missouri appellate court acknowledged that a limited fiduciary duty existed on the part of the escrowee, but held:

> The fiduciary relationship of an escrow agent and the other parties to the agreement is much narrower in scope than other fiduciary relationships such as attorney/client. An escrow agent is bound by the terms of the escrow agreement and breaches the fiduciary duty only when the agent fails to follow those terms. [citation omitted] It is not the escrow agent's duty to discover fraud committed by one party upon another or to protect the parties from each other except as to the limited duties outlined by the agreement. The escrow relationship between plaintiff and defendants did not lull plaintiff into a false sense of security. The scope of this fiduciary relationship did not encompass a duty on the part of defendants to protect plaintiff from the acts of Resort [the seller].[353]

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[349] 70 Cal.Rptr. at 380.

[350] See *Barrons v. Chicago Title Co.*, 2016 WL 4156975 (Cal.App. 4 Dist.) (unpublished), which dismissed claims brought by buyers against an escrowee in which the buyers claimed that they had paid too much for the property because transaction costs were hidden by the device of a double escrow. The court said that California does not assume that a double escrow is evidence of fraud that the escrowee must disclose to the second buyer. It said "[g]iven that there were two transactions—the seller to BH & Sons, and BH & Sons to plaintiffs—the existence of dual escrows does not seem particularly troubling, and certainly is not 'clear evidence of fraud' such that the Chicago Defendants would be required to depart from their instructions." See also the related decision of *Kornievsky v. Chicago Title Co.*, 2016 WL 4156976 (Cal.App. 4 Dist.) (unpublished).

[351] In *Bosch v. Jaffer*, 2000 WL 280436 (Tex.App.-Houston (1 Dist.)) (unpublished), a partner in the selling partnership who did not consent to the sale of real estate did not establish that the title insurer conspired with the general partner to defraud him simply because a closer told him she "could not comment" on whether or not the property had been sold. The objecting partner's consent was not required for the sale.

[352] 349 So.2d 43 (Ala.1977).

[353] *Gilmore v. Chicago Title Ins. Co*., 926 S.W.2d 695, 699 (Mo.App.E.D. 5 Div. 1996).

A second Missouri decision held that an escrowee cannot disclose what it does not know. Mere evidence that a person was fraudulently not paid through an escrow was not sufficient to show that the escrowee did anything other than "participate in the ordinary course of business in a real estate financing transaction."[354]

The double escrow or simultaneous flip transaction has spurred Arizona and Nevada to adopt the principle that an escrowee has a duty to disclose the existence of both transactions to all three parties, as discussed below. The states divide on the issue in large part because not every flip transaction is fraudulent. There are at least four different types of flips, one of which is fully legitimate, another subject to equitable claims, and two typically criminal in nature. In the legitimate sweat-equity flip, the buyer renovates the property and later resells at a higher price. The second is the double-escrow or back-to-back sale, in which the second buyer agrees to purchase for more than the first seller agrees to sell and the middle man collects the profit between the two prices. The double-escrow flip is not illegal and the title passed in each phase of the flip is valid. However, the first sale is sometimes the result of overreaching or undue influence, which can cause both transfers to be attacked.[355] The third is the forgery flip, in which the perpetrator forges a deed putting himself

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[354] *McNeill v. Community Title Co.*, 11 S.W.3d 863 (Mo.App.E.D. 2000).

[355] The double escrow or "flip" occurs when a party lines up a buyer for property willing to pay more than the amount for which the intermediary is able to purchase it. The escrows are conducted separately but in rapid succession, with the intermediary desiring that neither the initial seller nor ultimate buyer know of the other transaction. "As long as the intermediary buyer-seller is not an agent of one of the parties, and as long as there is no other misrepresentation, the use of the 'double escrow' is a legitimate transaction." Miller & Starr, *Current Law of California Real Estate*, §12:83 at 395 (1977). An example of misrepresentation or concealment of fact by the middleman, not the escrowee, is found in *Tschira v. Willingham*, 135 F.3d 1077 (6th Cir. 1998). In that case, a real estate investment firm was sued for breach of fiduciary duty and intentional misrepresentation when it flipped property to German investors. In one transaction, the middleman bought for $774,000 and sold the same day to the investors for $1,985,000. The title insurance policy was issued in the amount of the first sale price, but the middleman altered the policy or misrepresented it so that the investors believed the policy was in the second sale price amount. In *Memphis Hardwood Flooring Co. v. Daniel*, 771 So.2d 924 (Miss. 2000), the court unwound a flip purchase by ruling that the middleman buyer was not a bona fide purchaser. Jamie Daniel, a retired schoolteacher, hired "Lucky" Easley to clear timber on 800 acres, for which Daniel was grossly underpaid. Easley contracted with Memphis Hardwood Flooring to sell the timber for a large profit. Memphis Hardwood's lawyer drafted all of the documents. Daniel discovered the "flip," and sued for rescission, among other things. Memphis Hardwood defended on the basis that it was a bona fide purchaser for value. The court found that Memphis Hardwood had constructive or actual knowledge of Easley's fraudulent statements to Daniel, had acted in "bad faith" because it drafted all the documents, and knew that the timber was being flipped, which precluded the company from being a bona fide purchaser for value. "Memphis' claim that it was not astride the horse of fraud may be so, but the evidence is clear that its left foot was in the stirrup, and that's sufficient to destroy its claim of innocent purchaser without notice." In his discussion of Memphis as a Daily Development on the DIRT listserv of the American Bar Association Section on Real Property, Probate & Trust Law and the University of Missouri, Kansas City, School of Law, Moderator Professor Patrick A. Randolph, Jr. noted that many flip transactions have no element of fraud, and in this case "the court tells us of no facts that, under established principles, would make Memphis aware of facts sufficient to reach a conclusion that fraud was being carried out." An example of a double escrow in which full disclosure of the facts was made to the second purchaser is found in *Resh v. Realty Concepts, Ltd.*, 2016 WL 593809 (S.D.W.Va.) (unpublished). In that case, the purchase agreement signed by the buyers disclosed that the sale was part of a double escrow. The title insurance commitment likewise accurately recited the record ownership of the property. The court found that the

or herself in title and then conveys, usually to an innocent buyer. The forgery flip is criminal and does not pass good title to the second buyer. The fourth type is the loan fraud flip, in which property is traded between members of a ring of creditworthy individuals at ever-more-inflated prices, with the goal of obtaining loan money in an amount greater than the real value of the property.[356] In a loan fraud flip, the transfer of the title itself is typically valid. However, the loan that is obtained by the buyer is almost always the product of fraud. The key element in such a fraud scheme is an appraisal giving a falsely inflated value to the property.

California follows the rule that an escrowee does not have an obligation to disclose to the parties that a double escrow is being conducted.[357] The leading California decision is *Lee v. Title Ins. & Trust Co.*, [358] which involved a double-escrow flip in which the escrowee was alleged to have known about both sales. The court rejected Lee's claim that the escrowee had a duty to tell him about the double sale. In a double escrow, as in any transaction, the escrowee breaches its duties if it deliberately misrepresents facts to an escrow principal. Thus, all states would likely accept the principle that an escrowee may not actively conceal a double sale, such as by altering its title insurance commitment to make it appear that the middleman is already the owner of record before the close of the first escrow.[359]

Arizona was the first state to adopt the rule that an escrowee must disclose to all parties the existence of a double escrow. In *Berry v. McLeod*,[360] the broker arranged to have the seller convey to a shell corporation controlled by the broker. The broker then immediately resold the property to a third party for double the amount. The escrowee was alleged to have knowledge because the broker set up both escrows with the same company. Unlike *Lee*, the intermediate owner, as a broker, was the agent of the seller. The flip transaction violated the broker's duty of fidelity to the seller. The

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escrowee had no independent duty to inform the buyers of that fact, and was not liable to the buyers for the damages they claimed, which were based on the differences in the two sale prices. In *Cooper Enterprises, PC v. Brighton Title Co., LLC*, 233 P.3d 548, 2010 UT App 135 (Utah App. 2010), an escrowee was found *obligated* to close a double escrow despite its insurer's refusal to issue a policy and the fact that Utah regulations prohibit an escrowee from conducting such an escrow. The court said: "Brighton had no choice but to conclude the escrow in a manner consistent with the [purchase contract] and its fiduciary duties to both parties. … Brighton is not somehow excused from its fiduciary duties just because adverse consequences might result from deviating from the instruction in the insurance commissioner's bulletin… ."

[356] In *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 7 F.Supp.2d 523 (1998), Cristo allegedly purchased 200 income properties, selling them to investors who obtained loans based on inflated appraisals and false leases. After each sale, the purchaser secretly transferred a 60% interest in the property back to Cristo, which pooled rents from several properties to meet mortgage obligations. Cristo's buyers eventually defaulted on a large share of the loans. Flip transactions are further discussed at §9.2.

[357] *Chen v. Dynasty Escrow, Inc.*, 2002 WL 1227478 (Cal.App. 2 Dist.) (unpublished), rev.den. August 14, 2002.

[358] 264 Cal.App.2d 160, 70 Cal.Rptr. 378 (Cal.App. 5 Dist. 1968).

[359] *American Title Co. of Houston v. Bomac Mortgage Holdings, L.P.*, 196 S.W.3d 903 (Tex.App.-Dallas 2006).

[360] 124 Ariz. 346, 604 P.2d 610 (1979).

Berry court reviewed the California decisions and found their reasoning "sound," but only "up to a point":

> The California rule on disclosure by an escrow agent is sound up to a point. Absent fraud, the activities of real estate investors and speculators in buying and selling real property is a legitimate activity. The escrow agent has no duty to regulate the transactions so that each party receives a fair price for his property. The escrow company is not a guardian for the uninitiated. On the other hand, the escrow agent should not assist the perpetration of fraud by silence when disclosure could prevent the accomplishment of the fraud.
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> Generally, there is no duty to disclose information received by an escrow agent unless such a duty is required by the terms of the agreement, but we hold that there is an exception to the foregoing rule when the escrow agent knows that a fraud is being committed on a party to an escrow and the failure of the escrow agent to disclose the information of the fraud will assist in accomplishing the fraud; under such conditions the escrow agent has a duty to disclose the facts actually known.[361]

The court found that, in the facts presented in *Berry*, the escrowee had a duty to disclose the double escrow to the first seller and second buyer. This newly-created rule was founded in the general principle that, in Arizona, an escrowee is a fiduciary, and owes the parties to the escrow a duty of "disclosure."

Arizona followed *Berry* with the case of *Burkons v. Ticor Title Ins. Co. of California*.[362] In *Burkons*, and the companion case of *Manley v. Ticor Title Ins. Co. of California*,[363] in which the buyers induced the sellers to convey their properties and subordinate their seller financing deeds of trust on the promise of construction development on the properties. Pyramid I, the buyer, bought land from various individuals, who took back deeds of trust. Pyramid signed letters of intent that gave the impression it would be constructing commercial buildings. Based on these letters, the sellers agreed to subordinate their deeds of trust to later deeds of trust obtained by Pyramid. In fact, the proceeds of the later loans were used to fund the down payments to the sellers, with the balance paid to Pyramid. None of the money was used for construction. When Pyramid defaulted, the subordinated sellers sued the insurer-escrowee for failure to disclose fraud per *Berry*. The insurer argued that there was no fraud apparent to the insurer in its role as escrowee. It posited that the sellers were suggesting a duty to discover fraud rather than disclose fraud already known to the insurer, which would extend the *Berry* decision. The court disagreed:

> Berry requires the escrow agent to disclose information when it "knows that a fraud

[361] 124 Ariz. 346, 604 P.2d 610, 616 (Ariz. 1979).

[362] 813 P.2d 710 (Ariz. 1991).

[363] 798 P.2d 1327 (Ariz.App. 1990). The *Burkons* case contains the legal analysis. *Manley* cites to *Burkons*.

> is being committed." Berry, 124 Ariz. at 352, 604 P.2d at 616. It does not require the escrow agent to investigate and search for fraud. Id. But our reading of Berry also leads to the conclusion that it does not permit the escrow agent to close its eyes in the face of known facts and console itself with the thought that no one has yet confessed fraud. Although not required to investigate, when the agent is aware of facts and circumstances that a reasonable escrow agent would perceive "as evidence of fraud," then there is a duty to disclose.[364]

In reaching this conclusion, the court relied heavily on the insurer's internal directives and training which warned against insuring over-encumbered property. The training specifically described the Pyramid style of transaction, labeling it "fraud." The escrow officer identified the Pyramid deals as being in the suspect category. Thus, the *Burkons* court found liability because the insurer-escrowee was aware of the type of fraud at issue, and an employee had spotted that *modus operandi* in the transaction at issue. While a liberal interpretation of *Burkons* would mean that the case broadened *Berry*, the *Burkons* opinion itself does not so hold. It merely held that the insurer knew that a fraud was taking place and had a duty to speak, as in *Berry*.

The *Berry* and *Burkons* decisions produced much critical commentary.[365] The *Berry-Burkons* rule has been applied by Arizona courts in later cases.[366] The later decisions carefully limit the effect of those decisions, by repeating the observation from *Berry* that the escrowee is not the guardian for the uninitiated.[367]

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[364] 813 P.2d at 718.

[365] Note, 22 Ariz. L.Rev. 1146 (1980) at 1153; Martindale, *Expanding the Duties of Arizona Escrow Agents: Burkons v. Ticor Title Insurance Co*., 24 Ariz.St.L.Rev. 821 (1992); Note, *California Escrow Agents: A Duty to Disclose Known Fraud?*, 17 Pac.L.J. 309 (1985).

[366] See *Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc*., 197 Ariz. 535, 5 P.3d 249, 320 Ariz.Adv.Rep. 51 (Ariz.App.Div. 1 2000) (escrow officer who "facilitated" fraud on investors violated her duty to disclose the fraud); *M & I Bank, FSB v. Coughlin*, 2011 WL 5445416 (D.Ariz.) (unpublished) (escrowee had duty, based on written instructions from lender, to trace source of funds for cashier's check delivered as down payment); *Thornton v. Chicago Title Ins. Co.*, 2011 WL 540287 (Ariz.App. Div. 1) (unpublished) (because Arizona requires escrowee to tell an escrow principal information indicating fraud, trial court was wrong to dismiss claims by hard-money lenders that escrowee should have warned them borrower was misapplying loan money and that the deed of trust ahead of theirs was in larger amount than they thought); *Bridges v. Security Title Agency, Inc*., 2011 WL 2174944 (Ariz.App. Div. 1) (unpublished) (due to unusual facts, escrowee may have had duty to tell buyers about option agreement encumbering land they wanted to buy, on theory that option was an indicator that sellers were working a fraud on buyers, and thus claim survived summary judgment).

[367] In *Madison Square Development Partnership of Arizona v. Chicago Title Ins. Co.*, 2015 WL 3501556 (Ariz.App. 1 Div.) (unpublished), the court found that the escrowee had no reason to disclose an indicator of fraud to one party when the other party sent a notice to the escrowee instructing it to deliver deposited money but did not send that notice to the other party, and the escrowee had no reason to suspect that the notice had not been sent. The court said the Arizona escrowee does not have a duty to investigate or police the transaction to prevent fraud. It quoted *Berry v. McLeod* for the principle that an escrow company "is not a guardian for the uninitiated." , 124 Ariz. At 352. Similarly, in *Jenkins v. Security Title Agency Inc*., 2017 WL 2547235 (Ariz.App. 1 Div.) (unpublished), sellers signed a contract under which

Nevada adopted the *Berry-Burkons* doctrine in *Mark Properties, Inc. v. National Title Co.*[368] In that case, two Las Vegas real estate developers sold a pair of properties to two investors at inflated prices. The developers first conveyed the real estate to an entity that they controlled, then to the investors. When the investors discovered at closing that the developers controlled the selling entity, they insisted that the two sale prices were the same and represented fair market value, neither statement being true. The investors sued the escrow company for failing to disclose known fraud. The Nevada court weighed the California position espoused in *Lee* and the Arizona position adopted in *Berry* and *Burkons,* and adopted the Arizona approach:

> We agree with Mark Properties that an escrow agent has a limited duty to disclose facts concerning actual fraud of which the agent is actually aware. Although we conclude that the escrow agent has such a duty, we hold that an escrow agent has no duty to investigate circumstances surrounding a particular sale in order to discover fraud.

Nonetheless, the standard adopted by *Mark Properties* is perhaps less onerous than Arizona's, and not far from the California rule. The court held that the escrowee has no duty to disclose unless it is "actually aware" of facts "concerning actual fraud." The court said that a stringent disclosure rule can cause the escrowee to disobey the instructions, its primary obligation. If the escrowee had obeyed the non-party plaintiffs' instruction to freeze the earnest money held in escrow, "it would likely be liable to the parties to the escrow for breach of fiduciary duty and conversion."

A Nevada federal court applied the *Mark Properties* rule in the 2012 decision of *Donnell v. Fidelity Nat'l Title Agency of Nevada, Inc*.[369] In that case, a scammer named Farris caused investors to open escrows with Fidelity. Although an inquiry by Fidelity "would likely have led to the discovery of the Ponzi scheme operated by Farris," the court admitted, the company "had no legal duty to pursue an investigation." It agreed with Fidelity that the information actually known to the company was not unusual or suspicious. It said the plaintiffs had "offered nothing to show that Fidelity and Flood [the escrow officer] were 'aware of facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud,'" the standard set in *Mark Properties.* Fidelity had obeyed its duty to follow the escrow instructions.

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they agreed to an installment sale of the property without any deed of trust or promissory note securing their rights. The court held that the escrow company had no duty to advise the sellers that they were entering into a risky transaction. The sellers cited *Burkons v. Ticor Title Ins. Co. of Cal*., 168 Ariz. 345 (1991), as authority suggesting that the escrowee had a duty to inform the sellers that the contract was a fraud. The appeals court disagreed, retorting that "our supreme court has explained that an 'escrow company is not a guardian for the uninitiated.' *Berry v. McLeod*, 124 Ariz. 346, 352 (1979)." In *C & G Farms Inc. v. First American Title Ins. Co.*, 2018 WL 1281847 (Ariz.App. 1 Div.) (unpublished), the lenders asserted a fraud because the borrower divided a large tract in order to give each lender a lien on a different part of the whole. The court held that the escrowee did not breach a duty to the lenders because there were no facts suggesting fraud. The appeals court also reminded that *Berry* does not require the escrow agent to investigate and search for fraud.

[368] 34 P.3d 587 (Nev. 2001), earlier opinion at 14 P.3d 507 (Nev. 2000) withdrawn and superseded on rehearing.

[369] 2012 WL 1669421 (D.Nev.) (unpublished).

Most states have refused to follow the Arizona decisions, particularly when the escrow party suggests that the court impose a disclosure duty that goes beyond a double escrow to some other alleged type of fraud.[370] A federal court in Illinois has decided or assumed that, in that state, an escrowee may be liable to the defrauded escrow principal if the double escrow was conducted for a fraudulent purpose.[371] Further, an escrowee has been found to have complied with a duty to disclose

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[370] A Washington decision also stated the rule that an escrowee has a duty to disclose facts that a reasonable person would perceive as evidence of fraud. *Butko v. Stewart Title Guar. Co.*, 99 Wash.App. 533, 991 P.2d 697 (Wash.App. 2 Div. 2000) (unpublished), recons.den. March 8, 2000, order for publication withdrawn May 5, 2000. *Butko* went one step further, finding that an escrowee may be sued by the person who gives notice of the fraud for damage caused by the failure to notify. However, the decision was withdrawn from publication and has no precedential value. The decision received attention before its withdrawal, after it was made a Daily Development on October 27, 2000 by Professor Patrick Randolph, the long-time moderator for the DIRT listserv of the ABA Real Property, Probate & Trust Law Section. The *Berry-Burkons* model was rejected by a Louisiana court. That court found that neither the agent nor its underwriter had a duty to disclose loan irregularities to the lender. *Resolution Trust Corp. v. American Title Ins. Co.*, 901 F.Supp. 1122 (M.D.La. 1995). The agent disbursed a loan in which the lender's president and a director held interests in the borrower partnership. The issue before the court was the claimed liability of the insurer for its agent's failure to disclose. The court found that the insurer "assumed no liability beyond its insurance policy's coverage." It went on to find that "Dupree, as agent for American Title, did not have a duty to disclose to River City, the lender and policy holder, irregularities, illegalities, or acts of fraud in the loan transaction." Id. at 1124. In *Central Bank v. Rowe Construction, Inc*., 2011 WL 1119872 (Minn.App.) (unpublished), a Minnesota court found that a title company loan closer had no fiduciary duty to the borrower and was not liable to the borrower for allegedly concealing from them that they were involved in a loan fraud flipping ring. In *Coran v. Century Title Agency, L.L.C*., 2010 WL 4679498, 2010 Mich. App. LEXIS 2217 (Mich.App.) (unpublished), the court held that Michigan does not impose a duty on an escrowee to disclose facts about fraud, and specifically rejected the fraud disclosure duty adopted in Arizona. In *Resh v. Realty Concepts, Ltd*., 2016 WL 593809 (S.D.W.Va.) (unpublished), the court found that the escrowee had no independent duty to inform the buyers of double escrows. In *Orlando Millenia, LC v. United Title Services of Utah, Inc*., 355 P.3d 965, 2015 UT 55 (Utah 2015), the court said that an escrowee owes a fiduciary duty to all parties in the transaction, which duty requires the escrowee to act in good faith, with loyalty and due care, and to "make disclosure." In *Cooper Enterprises, PC v. Brighton Title Co., LLC*, 233 P.3d 548, 2010 UT App 135 (Utah App. 2010), an escrowee was found *obligated* to close a double escrow despite its insurer's refusal to issue a policy and the fact that Utah regulations prohibit an escrowee from conducting such an escrow. In a later Utah decision, *Pyper v. Reil*, 2018 UT App 200, 437 P.3d 493 (Utah App. 2018), the court accepted the plaintiff's position that an escrowee in Utah has a duty to disclose facts "that would reasonably indicate a fraud was occurring." However, the court observed that "recognizing a duty to disclose facts indicating fraud does not equate to a duty to halt a transaction where fraud is known or suspected." The court thus held that an escrowee in Utah does not have a duty to shut down a transaction in which one party might be defrauding the other. It said that "Utah has not recognized as included in an escrow agent's fiduciary duty the affirmative obligation to detect and halt a potentially fraudulent transaction... ." It refused to expand the escrowee's duties in such a way based on alleged "industry standards." The court also said that Pyper had not explained how such a suggested duty "might reasonably coexist with an escrow agent's 'core' duty to follow the instructions provided to it or how the tensions inherent in affirmatively stepping outside of those instructions in situations implicating potential fraud might be resolved." In *Just Us Realtors, LLC v. Nudge, LLC*, ___ F.Supp.3d ___, 2019 WL 2526731 (D. Utah 2019) (permanent citation not yet available), people who bought real estate from promoters through real estate investor seminars at inflated prices because the promoters bought through double escrows. The buyers sued all of the parties involved in those sales, including the escrowees, claiming that the deals were frauds that violated RICO. The case was dismissed on jurisdictional grounds, without reaching the merits of the claims.

[371] The federal court made that assumption in a series of decisions involving four double escrows allegedly conducted in order to inflate the amounts of the loans to beyond the intended loan-to-value ratio. See *Federal Deposit*

a double escrow by informing all parties of the two simultaneous sales.[372] Other states not only recognize a double escrow as a valid and enforceable set of contracts, but obligate the escrowee to carry out both escrows *without* questioning their validity or giving notice to all parties of the existence of two simultaneous escrows.[373]

The party suing the escrowee often alleges that the escrowee owed a duty that was greater than mere disclosure of facts about fraud, sometimes framing the supposed duty as being to prevent the transaction from closing. However, not even Arizona courts have held that an escrowee has a duty to prevent an escrow from closing. Such a claimed duty would be antithetical to the escrowee's primary duty, which is to obey the instructions and close the transaction, putting the escrowee in a legally untenable position.[374]

Ins. Corp. v. Chicago Title Ins. Co., 2017 WL 3592736 (N.D.Ill.) (unpublished), *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 1437873 (N.D.Ill. 2019) (permanent citation not yet available), and *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6497354 (N.D.Ill. 2019) (not yet released for publication. There is no prior Illinois decision holding that an escrowee is responsible for disclosing double escrows to the principals of the escrows.

[372] A leading commentary on title and escrow issues states that, "[a]s long as the intermediary buyer-seller is not an agent of one of the parties, and as long as there is no other misrepresentation, the use of the 'double escrow' is a legitimate transaction." Miller & Starr, *Current Law of California Real Estate*, §12:83 at 395 (1977). An example of a double escrow in which full disclosure of the facts was made to the second purchaser is found in *Resh v. Realty Concepts, Ltd*., 2016 WL 593809 (S.D.W.Va.) (unpublished). In that case, the purchase agreement signed by the buyers disclosed that the sale was part of a double escrow. The title insurance commitment likewise accurately recited the record ownership of the property. The court found that the escrowee had no independent duty to inform the buyers of that fact, and was not liable to the buyers for the damages they claimed, which were based on the differences in the two sale prices. In *Cooper Enterprises, PC v. Brighton Title Co., LLC*, 233 P.3d 548, 2010 UT App 135 (Utah App. 2010), an escrowee was found *obligated* to close a double escrow despite its insurer's refusal to issue a policy and the fact that Utah regulations prohibit an escrowee from conducting such an escrow. The court said: "Brighton had no choice but to conclude the escrow in a manner consistent with the [purchase contract] and its fiduciary duties to both parties. … Brighton is not somehow excused from its fiduciary duties just because adverse consequences might result from deviating from the instruction in the insurance commissioner's bulletin… ." In *Burman v. Richmond Homes Ltd.*, 821 P.2d 913 (Colo.App.1991), an insurer that also performed the escrows was not liable for fraudulent concealment of a title encumbrance, because the existence of the general improvement tax district was disclosed in the title commitments and policies. The seller did not show the commitments to the purchasers. The insurer was found not to have a duty to make sure the purchasers saw the commitments.

[373] In *Ramji v. 6100 Clarkson, L.P.*, 2019 WL 2455620 (Tex.App.-Houston) (unpublished), when the property owner and the buyer under the second leg of a simultaneous property flip signed a new contract cutting the middle man out of the deal, the jury awarded the middle man his lost profit, and the appeals court upheld that verdict. *Ramji* makes it clear that, in Texas, a double escrow is a valid transaction and that parties who interfere with it may be sued.

[374] In *Pyper v. Reil*, 2018 UT App 200, 437 P.3d 493 (Utah App. 2018), the court held that an escrowee in Utah does not have a duty to shut down a transaction in which one party might be defrauding the other. It said that "Utah has not recognized as included in an escrow agent's fiduciary duty the affirmative obligation to detect and halt a potentially fraudulent transaction... ." It refused to expand the escrowee's duties in such a way based on alleged "industry standards." The court also said that Pyper had not explained how such a suggested duty "might reasonably coexist with an escrow agent's 'core' duty to follow the instructions provided to it or how the tensions inherent in affirmatively stepping outside of those instructions in situations implicating potential fraud might be resolved."

A lender has an interest in receiving from its loan closing agent facts that the closing agent learns that indicate that the borrower might be perpetrating loan fraud on the lender. This issue is very different from the *Berry-Burkons-Mark Properties* rule devised to protect an investor purchaser from paying an inflated price through the device of a double escrow. The *Berry-Burkons-Mark Properties* rule does not impose a general duty on a loan closer to disclose loan fraud indicators to the lender. The loan closer has no general duty to warn the lender about possible fraud or impropriety that might be suggested during the loan closing. In *Resolution Trust Corp. v. American Title Ins. Co.,*[375] a bank made a loan to a partnership in which an officer and director of the bank were partners. In addition, the bank made an unsecured loan to the partnership for its "equity" in the project. The RTC took over the institution, and sued the title insurer on the theory that the insurer's agent, who was also the bank's attorney, had a duty to disclose these irregularities to the uninvolved officials of the bank. The court disagreed, holding that the agent had no duty to disclose "irregularities, illegalities, or acts of fraud in the loan transaction." In addition, the insurer "assumed no liability beyond its insurance policy's coverage," and therefore would not be responsible for a breach of duty by the attorney in his role as closing attorney.

A lender seeking to impose a duty on its independent loan closing agent to inform the lender of loan fraud indicators may do so only by written instructions. The independent loan closing agent is considered by all or most states to be the agent only of the lender, as discussed in §13.4. Therefore, the lender certainly can craft closing instructions to its agent that require it to disclose to the lender various indicators of loan fraud, as a condition to the closing of the loan. The loan closing agent may be liable to the lender if it disobeys such instructions.[376]

Such closing instructions do not create strict liability for the closing agent for borrower loan fraud. The loan closing agent is entitled to defend itself by establishing that the lender had already disregarded a series of ref flags indicating that the borrower was perpetrating loan fraud before the lender even scheduled the closing, as is almost always the case. If the loan closer provides that proof, the court may fairly imply that the lender was not induced to make the loan by the loan closer's failure to disclose a fact learned at the closing table.[377]

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[375] 901 F.Supp. 1122 (M.D.La. 1995).

[376] For example, *M & I Bank, FSB v. Coughlin*, 2011 WL 5445416 (D.Ariz.) (unpublished) held that, when the escrow instructions told the escrowee that, if it received a cashier's check for the loan closing, it must perform a "complete sourcing of the funds to insure the funds belong to the borrower," the escrowee was required to verify that the money came from the borrower's account. In *Home Loan Center, Inc. v. Flanagan*, 2012 WL 1108132 (N.D.Ill.) (unpublished), the court found that an escrowee has a duty to inform the lender of possible impersonation, when the person appearing before the closer looked nothing like the (genuine) driver's license presented for identification, and the loan closing instructions read: "[e]ach Borrower must sign all documents exactly as his or her name appears on the blank line provided for his or her signature." The escrowee proceeded with the loan closing without informing the lender of his suspicions about the man's identity. The court said that the closer "owed LendingTree a duty of ordinary care in supervising the closing and verifying identities and notifying LendingTree of circumstances indicating fraud."

[377] See *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co.*, 2017 WL 3592736 (N.D.Ill.) (unpublished). In that case, the court said that the FDIC's claims against Chicago Title as loan closer were grounded in negligence, making the defunct lender's comparative negligence in its loan underwriting a valid defense on which the court would hear testimony at trial. It said: "The Court agrees with the Chicago Title Entities that evidence of Founders Bank's own practices is

Only one decision has suggested that a loan closer has a duty to disclose loan fraud indicators based on some duty that goes beyond the lender's written instructions. In *Home Loan Corp. v. Texas American Title Co.*,[378] a lender argued that earlier Texas decisions stating that an escrowee has a duty of "full disclosure" should require the loan closer to inform the lender of loan fraud indicators. The court restated the Texas duty of "full disclosure" this way:

> … a title company that accepts funds for disbursement in a closing transaction for a fee owes the party remitting those funds a duty of loyalty, a duty to make full disclosure, and a duty to exercise a high degree of care to conserve the money and pay it only to those persons who are entitled to receive it. *See City of Forth Worth v. Pippen,* 439 S.W.2d 660, 664-65 (Tex.1969). Ordinarily, a fiduciary duty of full disclosure requires disclosure of all material facts known to the fiduciary that might affect the rights of the person to whom the duty is owed.[379]

The *TATCO* court said that Texas falls in line with states that follow the rule that "an escrow agent owes a duty to disclose all matters coming to the agent's notice or knowledge concerning the subject of the agency that are material for the principal to know for his protection or guidance."[380] The title

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relevant and admissible to show that their actions contributed to their losses. As for evidence of banking industry practices generally, such evidence may be relevant to show whether Founders Bank's failure to follow its own industry standards contributed to its losses, but only if introduced through proper means, i.e., such as through properly disclosed and supported expert witness testimony." The court said it would not allow Chicago Title to argue generally that "the banking industry was riddled with incompetence and corruption during the relevant time period." However, it said that the insurer could introduce evidence about "the downturn in the real estate market," because that would be relevant to the damages claimed by the FDIC. In a later decision in the same case, *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co.*, ___ F.Supp.3d ___, 2019 WL 1437873 (N.D.Ill. 2019) (permanent citation not yet available), the court granted the title insurer a new trial because the jury instructions did not accurately reflect the complicated balancing of negligence, contributory negligence and willful and wanton behavior. However, a few months later, the court flipped its position and found that contributory negligence is not a valid defense to a breach of fiduciary claim, so that no new trial was warranted on that claim. *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., ___ F.Supp.3d ___, 2019 WL 6497354 (N.D.Ill. 2019) (not yet released for publication).

[378] 191 S.W.3d 728, 731 (Tex.App.-Houston 2006).

[379] *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728, 731 (Tex.App.-Houston 2006). In *In re SMIC, Ltd*., 2013 WL 4078704 (Bkcy.N.D.Tex.) (unpublished), the court found that a Texas escrowee that had already opened an escrow for the sale of property to one buyer violates its duty of loyalty to that buyer by serving as escrowee on a second sale by the same seller that was arranged when the seller believed the first buyer was unable or unwilling to close, because the escrowee had ceased to be a neutral third party.

[380] The court cited for this proposition *Aronoff v. Lenkin Co.*, 618 A.2d 669, 687 (D.C.1992) and *Kitchen Krafters, Inc. v. Eastside Bank of Montana*, 242 Mont. 155, 789 P.2d 567, 573 (1990), the latter of which it acknowledged has been overruled (on other grounds) by *Busta v. Columbus Hosp. Corp*., 276 Mont. 342, 916 P.2d 122, 134-40 (1996). Both cases contained statements similar to the court's paraphrase, but neither in the context of disclosure of fraud. In Aronoff, the court denied summary judgment to Commonwealth Land Title regarding a closing it conducted in which, allegedly, its closer was aware that the seller was unable to convey insurable title. The court said that, "despite this knowledge, [Commonwealth] never intimated there was any problem with the sellers' title during the course of a five

company argued, based on Texas cases and other authorities, that the duty of disclosure is not unlimited, and is always tied to the scope of the written escrow instructions.[381] The court said that it found no Texas Supreme Court decision explicitly limiting the disclosure duty to the written instructions.[382] The title company also urged that a broad duty "would allow participants in failed real estate transactions to shift their losses to title companies for not disclosing information concerning the merits of the underlying transaction (such as market factors affecting the value of property, terms at which financing could have been obtained, and the like) that could have alerted a party to abandon the transaction in time to avoid the loss." The court responded that the duty was not as broad as the insurer feared:

> [T]his contention fails to recognize that a fiduciary's duties do not extend beyond the scope of the fiduciary relationship. To the extent an escrow agent is employed only to close a transaction in accordance with a contract that has already been entered into by the parties, it is not apparent how the agent's duty of disclosure could extend beyond matters affecting the parties' rights in the closing process to those concerning the merits of the underlying transaction.[383]

In *Home Loan Corp. v. Texas American Title Co.,* the lender contended that the loan closer should have disclosed the seller's direction to deliver a portion of his net proceeds of sale to someone else. The court did not grant the lender's motion for summary judgment. It made three important points. First, the lender had committed to making the loan before the closing occurred, and it seemed improbable that the lender would have had the right to cancel the loan if the escrowee had disclosed the third-party payments. Second, the parties had not even briefed the question of whether or not a payment at the seller's direction is the same as paying the money to the seller. In fact, it is settled law that a seller has the right to direct payment of the net proceeds to a third party, and the escrowee is obligated to honor that direction.[384] Third, there was no apparent causal connection between the lender's losses from the fraudulent loan and the seller's payment direction. The court said:

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hour closing, not even when the sellers tendered their title documents in escrow. If proven, these allegations would establish a breach of duty … for then Commonwealth must have known it could not perform the escrow even if the purchasers changed their mind and decided to close the deal." Kitchen Krafters also did not involve fraud. In that case, a bank acted as escrowee for collection of payments under a land contract, and separately made a loan secured by the real estate. The court affirmed a jury finding that the bank should have told the borrower how a prepayment under the contract had been applied.

[381] The insurer accurately cited *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 438 (Tex.App.-Houston [14th Dist.] 2000, pet. denied) (citations omitted) and *Equisource Realty Corp. v. Crown Life Ins. Co*., 854 S.W.2d 691, 697 (Tex.App.-Dallas 1993) for this proposition.

[382] 191 S.W.3d at 733.

[383] 191 S.W.3d at 733-4.

[384] See §13.4 and discussion of *Kirby v. Palos Verdes Escrow Co.*, 183 Cal.App.3d 57, 227 Cal.Rptr. 785 (Cal.App. 1 Dist. 1986), which concerned an assignment of escrowed proceeds of sale.

> Moreover, because the underlying loan transaction was a sham, Home Loan would have suffered the resulting loss on it even if TATCO had disbursed the funds to the seller expressly named in the HUD-1.[385]

Thus, even under *TATCO*, a lender faces a difficult burden in attempting to prove that facts not disclosed by a closing agent were the direct cause of a loan loss.

13.10 Creditor Claims Against Money Held In Escrow

A creditor may seek to attach, levy on or garnish money held in a pending escrow. Also, if one of the parties to the escrow files for bankruptcy, the trustee or creditors may claim money of the debtor that is held in an escrow.

Money deposited into escrow belongs to one of the parties to the escrow. Most such issues center on the question of whose property the escrowed money is while it is being held in escrow.[386] To prevail, the creditor or trustee must establish that the money is owned by the debtor. The ownership of escrowed money is usually analyzed based on the underlying contract. The creation of an escrow alone does not create a binding contract for sale of property. Until such contract exists, the escrowed money is typically still the property of the depositor.[387]

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[385] 191 S.W.3d at 735.

[386] A good discussion of the bankruptcy trustee's right to claim escrowed money or documents is contained in Mears, *Can Bankruptcy Trump an Escrow? A Primer on Enforceability*, Business Law Today, September/October, 1996, p. 40. When money was paid out of escrow to a creditor/investor of the bankruptcy debtor less than 90 days before an involuntary petition was filed, the trustee was permitted to recover the money for the benefit of all creditors, on proof that the money belonged to the debtor and had been obtained by hucksterism from the other investor/creditors. *In re Ogden*, 314 F.3d 1190 (10th Cir. (Utah) 2002). When a company deposited money into an escrow based on a court order, to be paid to its creditors, it no longer held an interest in the money, and the company's bankruptcy trustee could not take it back. *In re G & G Investments, Inc.*, 458 B.R. 707 (Bkcy.W.D.Pa. 2011). In *In re Expert South Tulsa, LLC*, 522 B.R. 634 (10th Cir. B.A.P. 2014), the court held that a company's bankruptcy estate did not include as an asset money being held in escrow for a construction project, which the debtor would only be entitled to receive if it completed a contract that it has not yet performed.

[387] *The Sports Authority, Inc. v. Chesapeake Associates*, 145 F.3d 1325 (Table), 1998 WL 234331 (4th Cir. (Md.) 1998) (unpublished).

When a buyer or seller files for bankruptcy while there is a pending escrow for the sale or purchase of real estate, the money in escrow is deemed to be property of the estate if it belonged to the debtor on the date the petition was filed. Title to the money passes from buyer to seller when the conditions to the escrow have been met for close of escrow.[388] Escrowed earnest money becomes the seller's property if the buyer breaches the contract and forfeits the deposit.[389] When the seller files bankruptcy immediately after the close of a purchase escrow, money held by the escrowee to pay liens and closing costs is no longer the seller's property.[390] However, seller proceeds paid through escrow to a creditor of the seller, shortly before the filing of the petition, may be recaptured by the trustee as a preferential transfer.[391]

Money held in an escrow other than a real estate purchase escrow is the property of the party having the better or more substantial claim to it.[392] When money is held in escrow pending resolution of a dispute by arbitration, title to the deposited money passed to the winner when the arbitration award is made.[393] Money deposited into escrow to pay a judgment, if affirmed, is no longer the property of the debtor when the judgment is affirmed.[394] New York follows the rules stated in *In re Stockbridge Funding Corp.*:[395]

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[388] See *Dickerson v. Central Florida Radiation Oncology Group*, 225 B.R. 241 (D.C.M.D.Fla. 1998), in which it was found that a bankruptcy debtor who was a party to an escrow in which the conditions for release of money had not yet been satisfied held only a contingent remainder interest in the money. In *Davis v. Cox*, 356 F.3d 76 (1st Cir.(Me.) 2004), similarly, the court found that, when the debtor delivered money into an attorney escrow under court order, "the funds were placed in custodia legis and Cox was divested of legal title of the funds and title passed to the attorneys as officers of the court. … As a result, the funds held in custodia legis did not pass into the bankruptcy estate upon the filing of the bankruptcy petition. … Cox held just a contingent interest to the property held in custodia legis, subject to the divorce court's disposition of the property. Thus, only Cox's contingent interest became property of the estate." In *In re Goodwin Miller*, ___ B.R. ___, 2018 WL 878841 (Bkcy.E.D.Cal. 2018) (permanent citation not yet available), retirement fund money deposited by the debtor into escrow as down payment on the purchase of real estate was property of the estate, and was no longer entitled to protection from creditors because it lost that status when it was placed in escrow.

[389] *Hallmark Builders, Inc. v. Bradfordt Co.*, 205 B.R. 971 (1996); *O'Reilly Law Group, LLC v. Stewart Title Co.*, 2017 WL 2345609 (D.Nev.) (unpublished).

[390] *In re Smith*, 2007 WL 1832110 (Bkcy.C.D.Ill.) (unpublished). The court found that the money earmarked for the payoff of the sellers' mortgage debt was not the sellers' property because the sellers committed to convey the property free of liens. The money was still sitting in the settlement agent's hands after closing because the sellers had misrepresented the payoff amount and the lender refused payment as being short.

[391] *Coulson v. Kane (In re Price)*, 589 B.R. 690 (D. Hawaii 2018), aff'd 773 Fed.Appx. 893 (9th Cir. (Hawaii) 2019) (unpublished).

[392] In *In re Expert South Tulsa, LLC*, ___ B.R. ___, 2018 WL 1588410 (Bkcy.Kan. 2018) (permanent citation not yet available), money deposited into escrow by a bankruptcy debtor was not property of the estate when the debtor had only a contingent interest in the money and the other party had the better claim to it.

[393] *In re Arrow Mill Development Corp.*, 185 B.R. 190 (Bkcy.D.N.J. 1995).

[394] *In the Matter of Newcomb*, 744 F.2d 621 (8th Cir. 1984). By contrast, in *Dodson v. National Title Ins. Co.*, 159 Fla. 371, 31 So.2d 402 (1947), a party's direction to pay his proceeds of sale to his daughters was found not to be a

> 1. For an escrow to be valid, the delivery of the property must be irrevocable. Although the grantor retains a contingent right to repossess the property if the specified condition does not occur, while the property is in the hands of the depository it must be beyond the possession and control of the grantor ...; and,
> 2. Under New York law, legal title to the property placed in escrow remains with the grantor until the occurrence of the condition specified ...; and,
> 3. [T]he deposit of property in escrow creates in the grantee such an equitable interest in the property that upon full performance of the conditions [of the] escrow ..., title will vest at once in him.[396]

Other New York cases add the further gloss that, when there is a dispute, deposits may not be released unless it is "clear that no factual issues or viable claims exist under the closely scrutinized terms of the escrow agreement."[397]

Money held by an insurer-escrowee as security for an indemnity in the insurer's favor is not held in escrow. It is the property of the insurer until the purpose of the indemnity is fulfilled. See §5.10.3. However, when a title insurer is holding money as security against a title defect in what is termed an escrow, that money can be subject to attack by the trustee if the depositor files bankruptcy. The trustee will typically argue that the transfer is subject to avoidance as a preference, with the insurer an "initial transferee" under §550 of the Code. An initial transferee can be compelled to return money to the estate. However, many courts have adopted an exception known as the "control" or "conduit" rule.[398] An escrowee who holds money as a conduit for another is not an initial

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completed escrow, and thus of no effect when the party died before the money was delivered. *Dodson* was distinguished in *Naylor v. U.S. Trust Co. of Fla*., 711 So.2d 1350, 23 Fla.L. Weekly D1510 (Fla.App. 2 Dist. 1998), however, in which a party gave similar instructions but also expressly stated his intent to make a gift "immediately." Although the giver died before the funds were transferred, the letter was found to be a delivery of the funds.

[395] 145 B.R. 797 (Bkcy.S.D.N.Y. 1992).

[396] 145 B.R. 797, quoting from *Cohen v. Drexel Burnham Lambert Group, Inc*., 138 B.R. 687 (Bkcy.S.D.N.Y. 1992) and *In re O.P.M. Leasing Services, Inc.*, 46 B.R. 661, 667 (Bkcy.S.D.N.Y. 1985).

[397] *E.S.P. Adj. Services v. ASTA Group*, 125 A.D.2d 849, 850, 509 N.Y.S.2d 955; quoted in *Takayama v. Schaefer*, 240 A.D.2d 21, 669 N.Y.S.2d 656 (N.Y.A.D. 2 Dept. 1998).

[398] See, for example, *In re Harwell*, 414 B.R. 770 (M.D.Fla. 2009) (attorney who received money for his client was not "initial transferee" but mere conduit for client, barring trustee for client's estate from recovering the amount of money that passed through attorney's account and into debtor-client's hands); *In re Pony Express Delivery Services, Inc*. 440 F.3d 1296 (11th Cir. (Ga.) 2006) (insurance broker mere conduit of premiums entrusted to it as fiduciary, and thus not an initial transferee subject to avoidance); *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.)*, 848 F.2d 1196 (11th Cir. 1988); *In re Ogden*, 314 F.3d 1190 (10th Cir. 2002); *Bonded Fin. Serv., Inc. v. European Am. Bank*, 838 F.2d 890 (7th Cir.1988); *In re Columbia Data Prods., Inc*., 892 F.2d 26 (4th Cir. 1989); *In re Bullion Reserve of N. Am*., 922 F.2d 544 (9th Cir. 1991); *In re Baker & Getty Fin. Servs., Inc*., 974 F.2d 712 (6th Cir. 1992); *In re Coutee*, 984 F.2d 138 (5th Cir. 1993); *In re First Sec. Mortgage Co*., 33 F.3d 42 (10th Cir. 1994); and *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52 (2nd Cir. 1997).

transferee subject to an avoidance action.[399] For example, in *In re Moskowitz*,[400] the trustee argued that the insurer was an "initial transferee" under §550 of the Code, because it received the funds from the seller. As an initial transferee, the insurer would be required to give the money back to the estate. The court refused, holding that the insurer either was not a transferee but a mere conduit of money, or was such a transferee but deserving of equitable protection. In *Moskowitz*, the insurer had no knowledge of the bankruptcy at the time it accepted the funds. Another series of cases holds that money held in escrow as a guarantee fund is not property of the estate.[401] Those cases did not involve title escrows, but the same principle should apply to a title escrow. An alternative is for the insurer to state in an escrow agreement that the funds belong to the insurer as long as they are needed for the protection of its insureds.[402]

When the escrowee files bankruptcy, the money in the escrowee account is assumed not to be the property of the escrow company's estate unless established otherwise. However, the claimants to that money must trace their funds unless they are held in a segregated account.[403] When the party who delivers funds is not able to establish that the money was delivered in trust, or under an escrow, it is not considered to be escrow money merely because the account into which it was deposited bears the label of "escrow."

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[399] In *In re Stanwich Financial Services Corp.*, 2018 WL 1219285 (D.Conn. 2018) (unpublished), the court rejected the bankruptcy trustee's claim that a law firm escrowee was an "initial transferee" subject to liability in a claimed transfer in fraud of creditors.

[400] 85 B.R. 8 (E.D.N.Y. 1988).

[401] *In re Atlantic Gulf Communities Corp.*, 369 B.R. 156 (Bkcy.D.Del. 2007); *In re Palm Beach Heights Dev. & Sales Corp.*, 52 B.R. 181 (Bkcy.S.D.Fla. 1985). In those cases, money was escrowed to pay for infrastructure improvements in large real estate developments.

[402] The agreement may contain a paragraph similar to the following: "[t]he Funds are agreed to be the property of Insurer. The Funds are held by Insurer to be used for the benefit of Insurer and its insured(s). The undersigned acknowledges that it is not an insured or a third-party beneficiary of a policy issued by Insurer, that the Funds are not its property, and its only interest in the Funds is a conditional right to receive all or the surplus of the Funds, if any, including any accrued but unused interest, if any, according to the terms of this undertaking."

[403] In *In re Dreier LLP*, 527 B.R. 126 (S.D.N.Y. 2014), recons.den. 2014 WL 4401222 (S.D.N.Y., Sep. 5, 2014), the court ruled that money held in escrow by a law firm that filed bankruptcy was not property of the estate, but could be reclaimed by the owners only if they could trace the cash through a commingled account or if there was a separate, segregated account set up in their names. *In re Handy Andy Improvement Centers, Inc.*, 196 B.R. 87 (N.D. Ill. 1996) held that money in a segregated account was the property of the escrow principal, not the debtor escrowee. However, the mere statement in a lease that "Lessee shall always have on deposit" certain funds did not create an escrow, since there was no prohibition on commingling of funds. In *In re Scanlon*, 239 F.3d 1195 (11th Cir. (Fla.) 2001), on the day the bankruptcy petition was filed, money the debtor had agreed to escrow was in the hands of his attorney, in a temporary escrow or trust account. The court relied on *In re S.E.L. Maduro*, 205 B.R. 987, 990-91 (Bkcy.S.D.Fla. 1997) for the rule that "funds that are deposited into an escrow account by a debtor, for the benefit of others, cannot be characterized as property of the estate." It held that the money was not part of the estate because the debtor had no control over the money, and would not receive any of it back. Therefore, the money merely "experienced a temporary layover" in the lawyer's account.

> Although one of the accounts bears the name "escrow" account, such labels only suggest a fiduciary relationship, but are not conclusive. [citations omitted] Instead, the nature of the account depends on the rights and obligations intended by the parties.[404]

If funds are commingled, the first burden of proof is on the trustee to prove that at least some part of the money belonged to the bankruptcy debtor. The burden then shifts to the party claiming the escrow to trace his or her money into and out of the account.[405]

> In the case of commingled accounts, the bankruptcy trustee's burden of proof is affected by the beneficiary's burden to trace. The funds in a commingled account maintained in the debtor's name may be used to pay his unsecured creditors unless a beneficiary can trace his or her superior right in the funds. Thus, the law implies the element of "control" in the absence of tracing. Accordingly, the bankruptcy trustee carries her burden of proving that the account was property of the debtor by showing that the debtor had legal title to the account, and the account consists of commingled trust and personal funds. …The burden then shifts to the defendant (1) to show that the debtor held only legal title and (2) to trace the equitable owner's interest to the specific property at issue.[406]

When tracing is impossible or extremely difficult, some courts adopt the "lowest intermediate balance" rule.

> [The rule] is grounded in the fiction that, when faced with the need to withdraw funds from a commingled account, the trustee withdraws non-trust funds first, thus maintaining as much of the trust's funds as possible. Hence, pursuant to the lowest intermediate balance rule, if the amount on deposit in the commingled fund has at all times equaled or exceeded the amount of the trust, the trust's funds will be returned in their full amount. [citation omitted] Conversely, if the commingled fund has been depleted entirely, the trust is considered lost. ... Finally, if the commingled fund has

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[404] 234 B.R. 337 (Bkcy.S.D.N.Y. 1999).

[405] *In re Carrozzella & Richardson,* 247 B.R. 595 (2nd Cir. BAP (Conn.) 2000) (party claiming constructive trust must trace funds to avoid having fund distributions reclaimed by trustee as preferences); *Lawyers Title Ins. Corp. v. Midwest Title Agency, Inc*., 99 Ohio St.3d 1440, 789 N.E.2d 1120 (Table), 2003-Ohio-2971 (Ohio App. 5 Dist. 2002) (unpublished) (title insurer creditor claiming pro-rata share between creditors able to trace funds, per Section 213 of Restatement of Law of Restitution). There are lengthy discussions of the principles concerning distribution of money to numerous defrauded people when the money was in a commingled bank account maintained by the debtor in three decisions emanating from the downfall of exchange intermediary companies controlled by Edward Okun, in *In re 1031 Tax Group, LLC,* 439 B.R. 47 (Bkcy. S.D.N.Y. 2010); 439 B.R. 78 (Bkcy.S.D. N.Y. 2010); and 439 B.R. 84 (Bkcy. S.D.N.Y. 2010).

[406] Id.

> been reduced "below the level of the trust fund but not depleted, the claimant is entitled to the lowest intermediate balance in the account." [citation omitted] In no case is the trust permitted to be replenished by deposits made subsequent to the lowest intermediate balance.[407]

In some circumstances, courts have dispensed with the requirement of tracing funds. [408] The escrowee's errors and omissions policy is an asset of the escrow company's bankruptcy estate.[409]

Also, when deposits are lost or stolen by the escrowee, the loss is borne by the party who owned the deposit at the time of its loss:

> [A]s between the seller and the buyer, the loss falls on the one who owns the property at the time of the embezzlement or loss. For example, if the escrow holder embezzles the purchase price before the time when, under the terms of the escrow, the seller is entitled to it, the loss falls on the buyer, since it is still his money. On the other hand, if the money be embezzled after the time when the seller has become entitled to the money, the loss falls on him, since it is now considered his property.[410]

On holdback escrows, the loss is generally borne by the seller because the purchaser now owns the property, while the seller has at least the conditional right to receive the escrowed funds.[411]

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[407] *In re Dameron*, 155 F.3d 718 (4th Cir. 1998), aff'g 206 Bkcy.Rptr. 394 (Bkcy.E.D.Va. 1997).

[408] *Union Savings Bank v. The White Family Companies, Inc*., 167 Ohio App.3d 51, 853 N.E.2d 1182, 2006-Ohio-2629 (Ohio App. 2 Dist. 2006). In that case, the title company accepted a bad check for $5 million and wrote two checks totaling $5 million in reliance thereon. The title company was forced to file bankruptcy as a result. In a dispute with the bank over liability for the checks, the court held that the parties whose money was used to fund the $5 million in checks were not required to trace the source of their loss, because the shortage in the account essentially matched the amount of the bad check accepted by the escrowee.

[409] *In re EMS Financial Services, LLC*, 2013 WL 64755 (Bkcy.E.D.N.Y.) (unpublished) (proceeds of escrow company's errors and omissions policy are property of company's bankruptcy estate, but trustee cannot take money until claims by customers are proven).

[410] *Bixby Ranch Co. v. United States*, 35 Fed.Cl. 674, 678 (1996), quoting *Pagan v. Spencer*, 104 Cal.App.2d 588, 232 P.2d 323 (Cal.App. 1 Dist. 1951).

[411] *Bixby Ranch Co. v. United States*, 35 Fed.Cl. 674, 678 (1996); *GE Capital Mortgage Services, Inc. v. Avent*, 114 N.C.App. 430, 442 S.E.2d 98 (1994); *Cradock v. Cooper*, 123 So.2d 256 (Fla.App. 1960); and *Stuart v. Clarke*, 619 A.2d 1199 (D.C.App. 1993).

13.11 Damages For Breach of Escrow Instructions; Defenses To Liability

An escrowee may become liable to a party to the escrow for violation of an escrow duty. An individual escrow officer may be directly liable to an escrow principal, even when the instructions name a corporation as escrowee and the escrow officer is an employee of that company.[412] When an insurer acts as escrowee, its escrow duties are separate from its policy liabilities. The loss payable for breach of an escrow duty is not dictated by the terms of a title insurance policy issued in relation to the transaction.[413]

In many states, a claim of escrow negligence sounds in tort rather than contract, and the claimant must prove that the escrowee's negligence was the proximate cause of damage.[414] Other states deem escrow to be contractual in nature.[415] When escrow instructions are construed as being contractual in nature, the economic loss doctrine applies to bar tort claims based on their violation.[416]

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[412] See, for example, *Covey Run, LLC v. Washington Capital, LLC*, 196 F.Supp.3d 87 (D.D.C. 2016), in which the principal appointed as escrowee a lawyer's professional corporation, and then sued both the professional corporation and the attorney for claimed breach of the instructions and fiduciary duties. The Florida court denied the individual defendant's motion for dismissal.

[413] *Red Lobster Inns of America Inc. v. Lawyers Title Ins. Corp.*, 656 F.2d 381 (8th Cir. 1981).

[414] See, for example, *Bear Creek Planning Com. v. Title Ins. & Trust Co.*, 164 Cal.App.3d 1227, 211 Cal.Rptr. 172 (Cal.App. 3 Dist. 1985); *Marsh v. Commonwealth Land Title Ins. Co*., 57 Wash.App. 610, 789 P.2d 792 (Wash.App. 1990); *Osborn v. Grego*, 596 P.2d 1233, 1238 (Kan. 1979); and *Walker v. Transamerica Title Ins. Co*., 828 P.2d 621 (Wash.App. 1992). 30A C.J.S. Escrows §10 states: "any loss suffered by a principal due to an escrow agent's noncompliance with the directions in an escrow agreement must be causally and actually attributable to such act of noncompliance in order for the loss to be recoverable." See the more complete discussion of proximate cause below. In *K Corp. Enterprises, Inc. v. Fidelity Nat'l Financial, Inc*., 2015 WL 3755339 (Cal.App. 5 Dist.) (unpublished), the court held that the escrow company was not liable to the seller for the difference between the sale price in the first contract, which fell through, and the price on the later sale that closed. The court said the escrowee did not breach its instructions but that, even if it had, it could not reasonably have foreseen that its actions would cause the loss of the sale. In *Alereza v. Chicago Title Co*., 6 Cal.App.5th 551, 211 Cal.Rptr.3d 469 (Cal.App. 3 Dist. 2016), the court dismissed the plaintiff's claims against the escrowee because he had not alleged matters indicating that his claimed losses were proximately caused by the escrow company's errors.

[415] Michigan views escrow as being contractual in nature, and there is no action in tort for breach of the escrow instructions. *Karloukli's, Inc. v. Walgreen Co*., 2004 WL 435384 (Mich.App.) (unpublished). Similarly, Colorado considers escrow instructions a contract, and the escrowee may not be sued for falsely representing facts about the escrow or other claims based on negligence or tort principles, which claims are barred by the economic loss doctrine. *A Good Time Rental, LLC v. First American Title Agency, Inc*., 259 P.3d 534 (Colo.App. 2011). In *Country Title, L.L.C. v. Jaiyeoba*, 2016 WL 66616 (Tex.App.-Houston) (unpublished), the court held that, because escrow is considered to be contractual in Texas, a customer was entitled to be paid her out-of-pocket losses caused by the escrowee's errors, but not for the alleged harm to her credit rating or punitive damages.

[416] *First Internet Bank of Indiana v. Lawyers Title Ins. Corp.*, 2009 WL 2092782 (S.D.Ind.) (unpublished) (federal court in Indiana held closing negligence claim barred by economic loss doctrine); *A Good Time Rental, LLC v. First American Title Agency, Inc*., 259 P.3d 534 (Colo.App. 2011); *Dyer v. Stewart Title Guar. Co*., 2012 WL 1288778 (M.D.Fla.) (unpublished) (negligence claim against Florida escrowee barred by economic loss doctrine); *First Magnus Financial Corp. v. Rondeau*, 2012 WL 607563 (D.Nev.) (unpublished) (because escrow instructions are a contract, economic loss doctrine bars claims against escrowee for negligence and failure to disclose material facts to lender).

However, the doctrine has been held not to bar claims against the escrowee that are valid in the jurisdiction and that do not sound in contract, such as for breach of fiduciary duty or intentional tort.[417] See §13.3 for a complete discussion of the issue of how various states construe escrow disputes as being either tort or contractual in nature.

In states that have adopted the tort framework for escrow disputes, the escrowee may be liable for damages caused by its actions and that could reasonably have been expected to flow from them.[418] However, the escrowee is not liable for damages that were not proximately caused by its

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[417] *Wall Street Mortgage Bankers, Ltd. v. Attorneys Title Ins. Fund, Inc.*, 2008 WL 5378126 (S.D.Fla.) (unpublished) (although loan closing instructions are a contract, lender may still sue for breach of fiduciary duty and negligence in handling of closing and economic loss doctrine does not negate those claims); *Federal Deposit Ins. Corp. v. Lennar Corp.*, 2014 WL 201663 (M.D.Fla. 2014) (unpublished) (in Florida, economic loss rule bars negligence claims but not claims of fraudulent inducement or negligent misrepresentation based on facts independent of the escrow contract); *Bates Energy Oil & Gas v. Complete Oilfield Services*, 361 F.Supp.3d 633 (W.D.Tex. 2019) (escrowee holding money for purchase of frac sand, accused of aiding and abetting theft of that money, not entitled to dismissal of intentional tort claims under economic loss doctrine).

[418] In *Bear Creek Planning Commission v. Title Ins. & Trust Co.*, 164 Cal.App.3d 1227, 211 Cal.Rptr. 172 (Cal.App. 3 Dist. 1985), an escrowee breached its duty to record restrictions, which the developer later sought to enforce. The landowner sued for slander of title, since the restrictions were not recorded. The escrowee was found liable for the judgment of slander of title and attorney fees incurred defending the action, on the basis that the attempt to enforce the restrictions was foreseeable. In *Ford v. Guarantee Abstract and Title Co. Inc*., 553 P. 2d 254 (Kan. 1976), when the insurer paid off the seller's mortgage without obtaining a deed to the insureds, and the insurer failed to either cure title or return the money later, the jury awarded punitive damages for breach of escrow duties. In *Schwartz v. Aracor Search & Abstract, Inc*., 2014 WL 4493662 (E.D.Pa. 2014) (unpublished), the damage to the borrowers' credit rating and other harm caused by the theft of loan payoff money justified entry of a punitive damage award against the title agent that stole the payoff money, despite the agent's plea that it had used the money for payroll rather than an evil purpose. In *Strohbach v. United General Title Ins. Co*., 2013 WL 3286218 (Cal.App. 4 Dist.) (unpublished), an escrowee that was instructed to require the delivery of a performance bond as a condition to a loan closing, but that failed to require its receipt, was required to pay the lender the full amount of the loan. The borrower siphoned off all of the loan money through a separate construction escrow. In *Ash v. North American Title Co*., 223 Cal.App.4th 1258, 2014 WL 612988 (Cal.App. 2 Dist. 2014) (certified for partial publication), a buyer agreed to extend the date for close of escrow for the replacement leg of his exchange from a Friday to the following Monday. On that Monday, November 24, 2008, LandAmerica 1031 Exchange Services froze all of its accounts, including the segregated account held by Ash. The court kept the account frozen until long after the six-month deadline under Section 1031 had passed. Ash sued his escrow company for his expenses, and the jury granted all of them, including legal bills of $140,000, tax liability of $465,000, lost income from the property and loan costs, totaling just over $1 million. The jury added punitive damages of $750,000. The appeals court found that the escrow company could not have foreseen either the LandAm shutdown or the misguided court orders that froze all accounts until it was definitely too late to complete the exchanges. It vacated the judgment and verdict and sent the case back for retrial, with instruction to tell the jury about the doctrines of intervening acts and superseding cause. In *Kreisers Inc. v. First Dakota Title Ltd. Ptnshp.*, 2014 S.D. 56, 852 N.W.2d 413 (S.D. 2014), a title agent that served as intermediary in a tax-deferred exchange and that did not ask if the customer intended a forward or reverse parking exchange arrangement was found liable to the customer for the taxes it did not defer because the intermediary set up the documents for a standard forward exchange when the customer needed to do a reverse parking exchange instead. In *K Corp. Enterprises, Inc. v. Fidelity Nat'l Financial, Inc*., 2015 WL 3755339 (Cal.App. 5 Dist.) (unpublished), the court held that the escrow company was not liable to the seller for the difference between the sale price in the first contract, which fell through, and the price on the later sale that closed. The court said the escrowee did not breach its instructions but that, even if it had, it could not reasonably have foreseen that its actions would cause the loss of the sale.

escrow negligence and that the escrowee could not reasonably have foreseen.[419] The measure of damage for an escrowee's breach of instructions that proximately causes a failure of title to the property or a diminution in its value is the lesser of the diminution in value resulting from the breach or the cost to remove the defect in or encumbrance on title.[420]

The escrowee may also be responsible for attorney fees incurred by the escrow principal "in prosecuting litigation against another party, if the litigation was necessary to remedy the injury

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[419] *Marsh v. Commonwealth Land Title Ins. Co*., 57 Wash.App. 610, 789 P.2d 792 (Wash.App. 1990); *NYCTL 1996-1 Trust v. Malihan,* 715 N.Y.S.2d 51, 2000 N.Y. Slip Op. 09174 (N.Y.A.D. 1 Dept.) (liability for negligent failure to pay taxes limited to tax amount, not value of real estate lost in ensuing tax sale); *Sparks v. United Title & Abstract, LLC,* 56 So.3d 302 (La.App. 2 Cir. 2010) (escrowee not liable for misdrafting of deed that allegedly prevented owners from leasing minerals, when seller had already leased minerals to another party). In *Amzak Capital Management v. Stewart Title of Louisiana (In re West Feliciana Acquisition, L.L.C.)*, 744 F.3d 352 (5th Cir. (La.) 2014), the appeals court found that the connection between the escrowee's failure to attach a legal description to a mortgage and the $58 million in business losses the lender suffered after it took title by foreclosure was so tenuous that it dismissed the recording negligence claim because the lender would not be able to establish proximate cause. In *Edwards v. Escrow of the West*, 2014 WL 4071223 (Cal.App. 2 Dist. 2014) (unpublished), the escrowee was not liable to the escrow parties for their own tax debt, when the partial payment made through escrow removed the tax lien from the property but did not cause the IRS to forgive the balance owed. The court held that the debtors had not proven the element of causation. In *Sean & Shenassa 26, LLC v. Chicago Title Co*., 2014 WL 5500512 (Cal.App. 4 Dist.) (unpublished), the court affirmed a jury verdict finding that there was no causal connection between the escrowee's issuance of an interim binder of insurance rather than a policy as instructed and the buyer's inability to flip the property in a bad market, which led to the loss of title through foreclosure. In *Amerivest Financial, LLC v. Malouf*, 263 Or.App. 327, 328 P.3d 739 (Or.App. 2014), rev.den. 356 Or. 397, Oct. 2, 2014, an escrow company that held $10 million used to buy large life insurance policies at a discount was able to get a dismissal of claims that it aided and abetted securities fraud. That claim was based solely on the fact that the escrow company agreed to serve as escrowee, giving the apparent fraud an air of security and legitimacy. In *Beckett Family Rentals, L.L.C. v. Schweitzer Title Agency, Ltd.*, 2015 WL 4506781 (Mich.App.) (unpublished), the court held that the fact that a new tax assessment was levied after closing, causing the tax payment made by an escrow company to be credited first against the new assessment and thus not to fully pay the pre-closing tax, was not a violation of the escrow instructions, and did not cause the later tax foreclosure that extinguished the owner's title. Therefore, the escrowee was not liable to the owner for the loss of the property.

[420] In *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985), an encroachment onto an easement was resolved by payment of a $100 fee to release part of the easement. The purchaser had insisted on rescinding the sale despite the easement holder's willingness to release. The court rejected the purchaser's claims against both seller and escrowee for "house hunting expenses, the cost of moving from their house, the cost of renting an apartment after they moved, the loss of favorable financing and depreciation on the house, closing costs, and house payments made to" their lender. Id. at 1205. Because the escrowee had obtained the release and paid the fee for it, the purchaser was not entitled to these further claimed damages. In *JAAV Investments, LLC v. Amcap Mortgage, Ltd*., 2014 WL 708492 (Tex.App.-Houston 2014) (unpublished), when a seller committed loan fraud that, in turn, caused the originating lender to have to repurchase the loan plus pay a penalty, the court found that the borrower was not required to pay the penalty because he could not have reasonably foreseen that the originator would be forced to pay such a fee. The case did not involve an escrowee, but is enlightening about the connection between closing acts and repurchase rights. In *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., 2015 WL 5276346 (N.D.Ill. 2015) (unpublished), the court held that the maximum amount that the FDIC could recover against a loan closer for its alleged failure to inform the defunct lender about double escrows was the amounts of the deficiency judgments taken by the FDIC after its credit bids on foreclosure. The FDIC admitted that it set those too-high bid prices based on valuations it had done by the same appraiser that gave inflated values for the properties before the loans were made. The court said the closer did not conspire with the appraiser in inflating the values, and thus the bid prices were binding on the lender in limiting its recovery against the closer.

caused by the defendant's tort."[421] However, the escrowee is not liable for such litigation expenses unless the escrow principal establishes that the escrowee's delay or actions necessitated the litigation.[422] A buyer does not prove diminution merely by showing that the current assessed value was less than the purchase price. In affirming a trial court that found no proximately-caused damage, one court said:

> As noted by the trial judge, "[The decrease in value] may have been because of the economy or they paid too much for it. There are a lot of things." We agree.[423]

The escrow principal has a duty to mitigate its damages.[424] However, not all conduct by the escrow principal that increases its loss necessarily violates the duty to mitigate damage.[425] Likewise, the escrowee must seek to mitigate the party's damages.[426]

The escrowee may assert the applicable statute of limitations.[427] It may also enforce a

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[421] *Prentice v. North Amer. Title Guar. Corp.*, 59 Cal.2d 618, 30 Cal.Rptr. 821, 381 P.2d 645 (Cal. 1963) (escrowee liable for cost of quiet title suit necessitated by delays caused by escrowee).

[422] *Rabutaso v. Canga*, 2002 WL 1064738 (Cal.App. 1 Dist.) (unpublished), rev.den. August 14, 2002; *Silber v. The Heritage Escrow Co*., 2004 WL 352660 (Cal.App. 4 Dist. 2004) (unpublished) (rejecting tort-of-another attorney fee doctrine because there was no evidence that escrowee forced escrow principal to sue for specific performance by delaying closing).

[423] *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 667 (Va. 1994).

[424] In *Castillo v. Express Escrow Co.*, 2011 WL 3911088 (Cal.App. 2 Dist.) (unpublished), the court held that the escrowee owed no damages to the escrow parties because they failed to mitigate their damages, which were also nominal.

[425] In *Royal Thrift and Loan Co. v. County Escrow, Inc.*, 123 Cal.App.4th 24, 20 Cal.Rptr.3d 37 (Cal.App. 2 Dist. 2004), involving the alleged forgery of escrow party's deed of trust, the lender conducted a trustee's sale, but chilled third-party bidding by giving notice that its lien might have been forged. The court found that the lender did not fail to mitigate, and affirmed a judgment against the escrowee of about the loan amount.

[426] In *Walker v. Transamerica Title Ins. Co.*, 828 P.2d 621 (Wash.App. 1992), an escrowee that recorded a defective trust deed was not granted summary judgment based on the trust deed holder's failure to mitigate, when the escrowee had an equal opportunity to do so by bidding at the foreclosure sale of the senior trust deed.

[427] *First American Title Ins. Co. v. Fiserv Fulfillment Services, Inc.*, 2008 WL 3833831 (S.D.N.Y.) (unpublished) (when title agent told insured lender its mortgages had been recorded, but they were not, statute of limitations began running on date mortgages should have been recorded, despite agent's concealment of true facts); *McGuire v. Mosley Rogers Title Company, L.L.C.*, 997 So.2d 23 (La.App. 2 Cir. 2008) (holding that escrow party had a duty to review closing documents immediately after closing to determine if any were missing, statute of limitations had run, and tardy discovery that a document had not been procured was not excused); *Dovenmuehle, Inc. v. Lawyers Title Ins. Corp.*, 478 So.2d 423 (Fla.App. 1985); *Arizona Title Ins. and Trust Co. v. O'Malley Lumber Co.*, 14 Ariz.App. 486, 484 P.2d 639 (Ariz.App. 1971); *Schmidt v. Chicago Title Ins. Co.*, 1996 WL 170050 (Ohio App. 8 Dist. 1996) (unpublished); *Baker Street Homeowners' Ass'n v. Old Republic Title Co.*, 2003 WL 157559 (Cal.App. 1 Dist. 2003) (unpublished) (two year statute of limitations for suit on alleged breach of oral escrow instructions); *Royal Thrift & Loan Co. v. County Escrow, Inc.*, 123 Cal.App.4th 24, 20 Cal.Rptr.3d 37 (Cal.App. 2 Dist. 2004) (three-year statute of limitations on escrow acts also

provision in the escrow instructions that shortens the statutory time for filing suit against the

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applies to suits against the escrowee's surety); *McCalla v. Stuckey*, 233 Ga.App. 397, 504 S.E.2d 269 (Ga.App. 1998), later app. 241 Ga.App. 527, 527 S.E.2d 219 (Ga.App. 1999); *Union Savings Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 946 N.E.2d 835, 2010-Ohio-6396 (Ohio App. 10 Dist. 2010) (negligence claim brought too late under Ohio's four-year statute of limitations, which begins running on date of alleged error, not date of discovery, but claim of implied contract not barred by negligence statute); *Sparks v. Pate-Campbell Properties, Inc.*, 283 P.3d 249 (Table), 2012 WL 3630263 (Kan.App. 2012) (unpublished) (Kansas' two-year statute of limitations for suit on deed drafting error began running on day deed was recorded because legal description error was obvious); *Dunmore v. Chicago Title Ins. Co*., 400 S.W.3d 635 (Tex.App.-Dallas 2013) (mistake in describing one lot on a deed, rather than the two that the purchase contract recited, was noticeable by looking at deed; statute of limitations for suing title company for error began when deed was delivered, not when corrected nine years later); *Federal Deposit Ins. Corp. v. St. Louis Title, LLC*, 2014 WL 200368 (E.D.Mo.) (unpublished) (statute of limitations that applies to the FDIC under FIRREA for negligence actions is the *later* of three years after the date the claim accrued or the state law deadline. 12 U.S .C. § 1821(d)(14)(A)(ii), which begins to run on the date the FDIC is appointed receiver or the date on which the cause of action accrues, whichever is later. 12 U.S.C. § 1821(d)(14)(B)); *Independent Trust Corp. v. Stewart Info. Serv. Corp*., 665 F.3d 930 (7th Cir. (Ill.) 2012) (statute for agent's theft of money does not begin to run "until a plaintiff knows or should know that he has been injured and that his injury was wrongful"); *Bank of America, N.A. v. Chicago Title Ins. Co*., 2014 WL 4435857 (N.D.Ill. 2014) (unpublished) (statute of limitations for claim against title agent for failure to pay off a loan began running not on date of closing but on date on which it knew or should have known payoff had not been made, citing *Independent Trust*); *Krot v. Fidelity Nat'l Title Co*., 2014 WL 7464084 (Tex.App.-Austin) (unpublished) (plaintiffs who sued escrowee for fraud conspiracy did not get extension of statute of limitations because escrowee gave more documents in discovery after limitations period had run, when there was no evidence that escrowee had concealed documents earlier); *WA Southwest 2, LLC v. First American Title Ins. Co*., 240 Cal.App.4th 148, 192 Cal.Rptr.3d 423 (Cal.App. 4 Dist. 2015) (sophisticated real estate investors not entitled to an extended statute of limitations under discovery rule because facts were disclosed in private placement memoranda); *NNN Parkway Corporate Plaza 8, LLC v. Hirschler Fleischer, APC*, 2017 WL 1020451 (Cal.App. 4 Dist.) (unpublished) (identical ruling as in *WA Southwest*, by same court); *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 386 P.3d 496 (Idaho 2016) (suit by lender against escrowee under Idaho Code section 45-1205, which provides cause of action for negligent reconveyance of deed of trust, was barred by three-year statute of limitations created by that law); *Angelo v. Stewart Title & Trust of Phoenix, Inc*., 2017 WL 410903 (Ariz.App. 1 Div.) (unpublished) (lawsuit not susceptible to class treatment because some of the two hundred plus plaintiffs' claims were barred by Arizona statute of limitations); *Fogarty v. Palumbo*, 163 A.3d 526 (R.I. 2017) (Rhode Island suit for escrow negligence against title agency falls under three-year legal malpractice limitations period; lawsuit dismissed because it was filed too late); *Long v. Freedom Escrow*, 2017 WL 462133 (Cal.App. 4 Dist.) (unpublished) (California statute of limitations for claim that escrow company typed wrong sale price on transfer declaration began running on date deed recorded; limitations period not tolled because error was discoverable immediately); *LCL, LLC v. Falen*, 308 Kan. 573, 422 P.3d 1166 (Kan. 2018) (when title company prepared deed that mistakenly conveyed mineral rights to grantee but grantor continued to receive royalties for six years, limitations period began running when grantor should have realized deed contained an error); *U.S. Bank, N.A. v. HLC Escrow Inc*., 919 F.3d 17 (1st Cir. (Me.) 2019) (escrow negligence claims barred based on Maine's six-year contract statute of limitations); *Holliday v. Stewart Title of California, Inc.*, 2018 WL 1358159 (Cal.App. 4 Dist.) (unpublished) (claims barred by all applicable California limitations periods and not tolled based on delayed discovery rule); *Nemeth v. Republic Title of Texas, Inc*., 2018 WL 3062393 (Tex.App.-Dallas) (unpublished) (claim that escrow agent had duty to inform buyers of condominium unit next buyer would not be approved for FHA loan dismissed based on two-year negligent misrepresentation statute of limitations, not merits of claim); *Sky Station Holdings I, LP v. Fidelity Nat'l Title Ins. Co*., 2019 WL 3786569 (Tex.App.-Austin) (unpublished) (limitations period for lender claims against escrowee about closing of allegedly fraudulent loan began running when lender received documents asserting fraud; action dismissed because it was filed after limitations period had run); *Hancock v. Kulana Partners, LLC*, 145 Hawai'i 374, 452 P.3d 371 (Hawaii 2019) (when escrowee altered deed after it was signed by grantor, grantor was entitled to assume that deed would be recorded as signed, and statute of limitations on grantor's fraud claim against escrowee began running when grantor discovered alteration).

escrowee. [428]

The escrowee may also assert other defenses to liability. The escrowee may defend a claim of having violated instructions with proof that the party ratified the conduct.[429] The escrowee may properly rebut a claim by the escrow principal that the escrowee had a duty to disclose or give advice with proof that it advised the party to obtain legal advice.[430] The escrowee is not liable for malfeasance when the escrow did not close and the principal that has sued the escrowee cannot prove it was prepared to close escrow.[431]

Many states have anti-deficiency statutes or rules precluding the lender from seeking payment of the debt after having accepted the property in satisfaction of the full debt. In such a state, a lender may be precluded from seeking money damages from the escrowee when it has taken title to the property after making a full credit bid at sale, or if it accepted a deed in lieu of foreclosure and cancelled the promissory note.[432]

Reasonable exculpatory provisions in escrow instructions or agreements are enforceable.[433] A

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[428] *10000 Millenium Plaza, LLC v. Brentwood Escrow, Inc.*, 2005 WL 2283085 (Cal.App. 2 Dist.) (unpublished) (provision shrinking time for suit under escrow to one year deemed reasonable in commercial transaction); *Fielding v. Gateway Title Co*., 2008 WL 2816750 (Cal.App. 4 Dist.) (unpublished), later decision 2009 WL 1847385 (Cal.App. 4 Dist.) (unpublished) (escrow instruction provision limiting time to sue escrowee to one year enforced, in part because clause was prominently displayed in instructions); *Openiano v. First American Title Ins. Co*., 2013 WL 5372878 (Cal.App. 4 Dist.) (unpublished) (one-year limitations period set by escrow instructions and initialed by the principals enforceable, and barred lawsuit filed three years after close of escrow); *Versailles Investments, LLC v. First California Escrow Corp*., 2017 WL 2264490 (Cal.App. 2 Dist.) (unpublished) (one year limitations period set by escrow instructions enforceable).

[429] See *First Federal Sav. & Loan Ass'n of Beaumont v. Stewart Title Co*., 732 S.W.2d 98 (Tex.App. 1987); *Pioneer Nat'l Title Ins. Co. v. Cranwell,* 369 S.E.2d 678 (Va. 1988) (ratification not found).

[430] *Styrk v. Cornerstone Investments, Inc.*, 61 Wash.App. 463, 810 P.2d 1366 (1991).

[431] *Rivera v. Fly*, 2009 WL 1059644 (Cal.App. 2 Dist.) (unpublished).

[432] In *Federal Deposit Ins. Corp. v. Ticor Title Ins. Co*., 2016 WL 7231455 (W.D.Wash. 2016) (unpublished), the court refused to dismiss the claims of the FDIC against an escrowee based on the lender's full credit bid at sale, under Washington's anti-deficiency statute. Ticor Title cited cases from California and Oregon that had barred claims against property insurers based on anti-deficiency laws, but none from Washington. The court said that, although the law would preclude the FDIC from pursuing the borrower, it "did not automatically immunize third parties from liability." Numerous decisions have considered this principle in relation to claims under the title insurance policy (see §3.2.4), a closing protection letter (see §14.4.1) or a title agent (see §17.7). In *First Bank of Lincoln v. Land Title of Nez Perce County, Inc*., 165 Idaho 813, 452 P.3d 835 (Idaho 2019), the Idaho Supreme Court held that, by making a full credit bid in its foreclosure of the deed of trust, the lender barred itself from later suing a title agent escrowee for its claimed negligence in the handling of the escrow, seeking the difference between the loan amount and the appraised value of the property.

[433] *Hurst v. Enterprise Title Agency, Inc*., 157 Ohio App.3d 133, 809 N.E.2d 689, 2004-Ohio-2307 (Ohio App. 11 Dist. 2004) (escrowee may exculpate itself from duty to comply with municipal ordinance requiring closer to deliver certificate of inspection to buyer at closing); *390 Kings Highway, LLC v. Maylov*, 95 A.D.3d 998, 944 N.Y.S.2d 261, 2012 N.Y. Slip Op. 03632 (N.Y.A.D. 2 Dept. 2012) (provision in a sale contract limiting the escrowee's liability to

liquidated damage provision inserted by the escrow principal is enforceable only if the penalty is reasonable and proportional to the violation of instruction, be it large or small.[434] In California, exculpatory clauses in escrow agreements are generally not enforceable as to the escrowee's own negligence because escrow is the pervasive means of closing transactions and thus is a matter of public interest and, further, the escrowee has superior bargaining power in setting the terms of an escrow agreement.[435] Thus, a broad exculpatory clause shielding the escrowee from liability for its own negligence was not enforceable, and was not justified on the rationale that the escrow party could have "covered" the escrowee's negligence by obtaining a title insurance policy.[436] However, an indemnity and hold harmless agreement given by an escrow party to the escrowee to induce it to perform an accommodation recording was enforceable, even as to a claim that the escrowee was negligent in failing to record the document immediately.[437]

In states other than California, where escrow is less pervasive, even a very broad exculpatory clause may be enforceable.[438] However, when the exculpatory clause carves out intentional acts or

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intentional or bad faith conduct found enforceable) *Batson v. Rim San Antonio Acquisition, LLC*, 2016 WL 6901312 (S.D.N.Y. 2016) (unpublished) (court enforced escrow instructions limiting escrowee's liability to its own "gross negligence, fraud and willful misconduct"); *Ramos v. Romero*, 2016 WL 1239277 (Cal.App. 4 Dist.) (unpublished) (escrowee had no general duty to verify that a person was who he purported to be, and escrow instructions disclaimed such a duty; therefore, escrowee was not liable to buyers for fraud caused by impersonation of sellers).

[434] *Shore Financial Services, Inc. v. Lakeside Title and Escrow Agency, Inc.*, 2013 WL 2223781 (Mich.App.) (unpublished), rev.den. December 23, 2013, 495 Mich. 914, 840 N.W.2d 331 (Mem), 2013 WL 6800563 (Mich.) (lender's liquidated damage provision of $1,000 a day, regardless of magnitude of violation, found unenforceable).

[435] *Akin v. Business Title Corp*., 264 Cal.App.2d 153, 70 Cal.Rptr. 287 (Cal.App. 2 Dist. 1968); *Tunkl v. Regents of Univ. of California*, 60 Cal.2d 92, 383 P.2d 441, 6 A.L.R.3d 693 (1963); *Selby v. Burtch*, 238 Cal.Rptr 212 (Cal.App. 5 Dist. 1987) (unpublished), previously published at 193 Cal.App.3d 147. In *Ultra Escrow, Inc. v. JP Morgan Chase Bank, N.A*., 2011 WL 2120187 (Cal.App. 4 Dist.) (unpublished), a loan assignee was found not to be liable to defend an escrowee under an indemnity, because the addendum creating the indemnity was not signed by the originating lender.

[436] In *Selby v. Burtch*, 238 Cal.Rptr 212 (Cal.App. 5 Dist. 1987) (unpublished), previously published at 193 Cal.App.3d 147, the court said: "[t]he responsibilities of Stewart Title as title insurer are distinct from those of escrow agent. (See Fin.Code, § 17000 et seq.; Ins.Code, § 12340 et seq.; Seeley v. Seymour (1987) 190 Cal.App.3d 844, 860, 237 Cal.Rptr. 282; see also Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal.App.3d 917, 938-939, 122 Cal.Rptr. 470. The negligent drawing of the trust deed was wholly unrelated to the normal incidents and benefits associated with the purchase of title insurance. ... It does not appear reasonable to require an escrow client to purchase title insurance in order to ensure that the corporation perform its duties as escrow agent without negligence to the injury of its client." *Selby* was withdrawn from publication.

[437] *Rooz v. Kimmel*, 55 Cal.App.4th 573, 64 Cal.Rptr.2d 177 (Cal.App. 1 Dist. 1997). The *Rooz* court held that the factors considered in *Akin v. Business Title Corp*., 264 Cal.App.2d 153, 70 Cal.Rptr. 287 (Cal.App. 2 Dist. 1968) which would void any attempted exculpatory clause in an escrow agreement, do not apply to all transactions conducted by title insurers. As to accommodation recordings, the court found there was no evidence that the conduct was "a service of great importance to the public," and the escrowee had no particular advantage in bargaining strength.

[438] *Lynch v. Santa Fe National Bank,* 97 N.M. 48, 627 P.2d 1247 (1981) (broad exculpatory provision enforced as to bank escrowee); *Home Healthcare of Illinois, Inc. v. Jesk*, 425 Ill.Dec. 231, 112 N.E.3d 594, 2017 IL App (1st) 162482 (Ill.App. 1 Dist. 2017) (attorney-escrowee entitled to enforce provision in escrow agreement limiting his liability to

gross negligence of the escrowee, the provision is not a bar to liability when acts of that character are proven.[439]

An arbitration provision in escrow instructions is enforceable if it complies with state law.[440]

The situs for a lawsuit for breach of escrow duties is, in most cases, the state in which the property is located, or in which the escrow activities were performed.[441] However, a reasonable forum selection clause in an escrow agreement is enforceable.[442] A waiver of the right to a trial by jury that is part of the escrow instructions is also enforceable.[443] An escrow principal who files suit against the escrowee is not entitled to make discovery demands for records or information concerning escrows conducted by the escrowee that involved other parties, which documents are protected by privacy laws.[444]

A provision in escrow instructions that the escrowee is to be reimbursed for legal expenses if it becomes embroiled in a dispute over the escrow is typically enforceable.[445] Such a provision may

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willful misconduct or gross negligence, and no such conduct had been proven).

[439] *BCV Colonnade v. United Realty Companies, LLC*, 2009 WL 2974768 (Mich.App.) (unpublished) (escrowee may be found grossly negligent for confirming receipt of an earnest money deposit that had not been made, rendering liability limitation provision in escrow instructions inapplicable).

[440] In *JAKS Properties, LLC v. St. Croix Hospice, LLC*, 924 N.W.2d 876 (Table), 2018 WL 5846088 (Iowa App. 2018) (unpublished), a mandatory arbitration provision in a judgment lien escrow agreement was enforceable, but was not binding on the judgment creditor, who was not a party to the escrow.

[441] In *Ex Parte Alamo Title Co*., 128 So.3d 700 (Ala. 2013), reh.den. May 17, 2013, an escrowee's wiring of money to Alabama and a few phone calls to people located there, in connection with the escrow in dispute, was found not to subject the escrowee to personal jurisdiction in that state.

[442] *Podesta v. Hanzel*, 684 Fed.Appx. 213, 2017 WL 1135696 (3rd Cir. (Pa.)) (unpublished) (clause requiring that suit be brought in North Carolina enforceable even though plaintiff accused escrowee of participating in fraud). *Summit Diamond Bridge Lenders, LLC v. Philip R. Seaver Title Co., Inc.*, 2016 WL 7427500 (Mich.App.) (unpublished) (escrow instruction clause selecting California as dispute forum not enforceable when transaction involved Michigan escrowee, real estate and borrower, and sole connection to California was would-be lender who did not make loan and which may have been a phony entity).

[443] *DAB, Incorporated v. Sunbelt Rentals, Inc.*, 2017 WL 280692 (D.Neb.) (unpublished) (when purchase agreement incorporated escrow agreement that said parties waived jury trial over any contract dispute, jury waiver enforceable in lawsuit for breach of purchase contract); *Highbridge House Ogden LLC v. Highbridge Entities LLC*, 155 A.D.3d 505, 64 N.Y.S.3d 32, 2017 N.Y. Slip Op. 08187 (N.Y.A.D. 1 Dept. 2017) (finding jury trial waiver in escrow instructions enforceable as to all disputes over the transaction, because escrow instructions were integrated into purchase agreement).

[444] In *Appel v. Boston Nat'l Title Agency, LLC*, ___ F.Supp.3d ___, 2019 WL 183504 (S.D.Cal. 2019) (permanent citation not yet available), an escrow customer sued the escrow company for failing to promptly return deposited money. The customer suspected that its money was not returned immediately because the escrow account was short. The court held that the customer was not entitled to see the deposits and transfers for the escrow account involving other escrow customers, because those transactions were not relevant and disclosing the information would violate the privacy rights of those customers.

[445] *Schuhman v. Green River Motel*, 835 P.2d 992 (Utah App. 1992). However, in *Busch v. Welling*, 2017 WL

be classed as a prevailing-party attorney fee provision.[446] The California courts have decided a number of cases interpreting whether or not an escrow instruction indemnity supports an award of prevailing-party attorney fees under California Civil Code § 1717. Under that statute, an agreement for the award of prevailing-party attorney fees must be reciprocal to be enforceable, which has resulted in a series of seemingly inconsistent rulings.[447]

930435 (D.Ariz.) (unpublished), the court held that an escrowee that was at least grossly negligent in carrying out its simple instructions was not entitled to be reimbursed for its expenses in being sued for breach of instructions.

[446] *Lee v. Investors Title Co.*, 241 S.W.3d 366 (Mo.App. E.D. 2007); *Wei v. Culture Escrow, Inc*., 2018 WL 6167880 (Cal.App. 2 Dist.) (unpublished).

[447] In *Bruckman v. Parliament Escrow Corp.*, 190 Cal.App.3d 1051, 1056, 235 Cal.Rptr. 813 (Cal.App. 2 Dist. 1987), an indemnity provision in escrow instructions was found to support an award of prevailing-party attorney fees. However, *Campbell v. Scripps Bank*, 93 Cal.Rptr.2d 635, 78 Cal.App.4th 1328, 00 Cal. Daily Op.Serv. 2024 (Cal.App. 4 Dist. 2000) held that an indemnity did not support prevailing-party attorney fee award, and overturned *Bruckman* as having been decided "without analysis and out of context." That decision was followed by *Rhodes v. First American Title Ins. Co*., 2005 WL 15429 (Cal.App. 1 Dist.) (unpublished), in which escrow instructions that contained both an indemnity of the escrowee and a separate paragraph requiring the principal to pay the escrowee's attorney fees in a dispute was found to be a prevailing-party fee agreement. The escrowee was thus entitled to collect its attorneys' fees after successfully defending against liability under the escrow. In *Paul v. Schoellkopf*, 128 Cal.App.4th 147, 26 Cal.Rptr.3d 766 (Cal.App. 2 Dist. 2005) (certified for partial publication), the court held that parties may not construct escrow instruction indemnities to limit recovery of attorney fees to a particular type of claim, such as failure to pay escrow costs. Based on *Paul* and an amendment to Section 1717 of the Civil Code, a court broadened a unilateral attorney fee indemnity to be reciprocal, then applied the court-modified provision against the escrowee to permit the escrow principal to recover fees in a suit for breach of escrow instructions, in *Kangarlou v. Progressive Title Co., Inc*., 128 Cal.App.4th 1174, 27 Cal.Rptr.3d 754 (Cal.App. 2 Dist. 2005). However, a similar unilateral instruction was not made reciprocal in order to convert it to a prevailing-party fee agreement, when the escrowee prevailed, in *Federal Agricultural Mortgage Corp. v. It's A Jungle Out There, Inc*., 2006 WL 1305207 (N.D.Cal. 2006) (unpublished). The decision held that an attorney fee indemnity provision was not a prevailing-party fee agreement enforceable by the escrowee that prevailed in a lawsuit claiming breach of escrow instructions, because the provision was unilateral rather than reciprocal and thus did not meet the requirements of Section 1717. The same ruling was made in *Castillo v. Express Escrow Co.*, 2011 WL 3911088 (Cal.App. 2 Dist.) (unpublished). However, in *Marina Glencoe, L.P. v. Malibu Escrow Corp.*, 2010 WL 685098 (Cal.App. 2 Dist.) (unpublished), an escrow provision saying that the principals would indemnify the escrowee in the event of a dispute, including payment of attorney fees incurred by the escrowee, was construed as a prevailing-party attorney fee agreement under Civil Code Section 1717, making the escrowee liable to the principal for its violation of the instructions. In *Rideau v. Stewart Title of California, Inc*., 235 Cal.App.4th 1286, 185 Cal.Rptr.3d 887 (Cal.App. 4 Dist. 2015), the court held that a provision in the escrow instructions saying that the principal would defend the escrowee in a dispute over the escrow was not a reciprocal prevailing-party attorney fee agreement under California Civil Code § 1717. Thus, an escrow principal who proved the escrowee disobeyed its instructions was not entitled to collect from the escrowee the attorneys' fees it spent in suing the escrow company. In an interesting twist, the court in *Fidelity National Title Co. v. 1575 Adrian Road Associates, LLC*, 2015 WL 177205 (Cal.App. 1 Dist.) (unpublished), held that a seller that sued an escrowee for "breach" of the purchase contract, as if the escrowee was a party to that agreement, must pay the escrowee back for the cost of defending that claim, under the *purchase contract's* prevailing-party fee provision. The escrowee was entitled to enforce that provision because the seller wrongly claimed that the escrowee was a party to the purchase contract; the court's ruling that it was not a party to the contract was not a defense to the attorney fee claim. In *Bong Je Choi v. Prima Escrow, Inc.*, 2019 WL 5157124 (Cal.App. 2 Dist.) (unpublished), the court enforced an escrow instruction requiring the parties to pay escrow fees based on the proposed sale price despite the fact that escrow did not close, but held that the escrowee was not entitled to also collect prevailing-party attorneys' fees.

In certain situations, the escrowee desires or is required to deliver the funds to a court of competent jurisdiction as full satisfaction of its obligations. This may be done by interpleader.[448] If no lawsuit has been brought, the escrowee will ordinarily have to bring at least a motion for interpleader, and perhaps a civil suit plus the motion. The order should accept delivery of the funds and release the escrowee from any further liability. If the insurer does not deposit the funds with the court under interpleader, some states say that the escrowee is a necessary party in the suit "so that [the escrowee] will be amenable to any judgment rendered after trial with respect to the disposition of the escrow funds."[449] The escrowee may not unreasonably delay in filing an interpleader action when it has received inconsistent instructions or there is a dispute between the parties about how the escrowee is to proceed.[450] When the agreement so provides, the escrowee is entitled to be reimbursed for its expenses.[451]

However, in some jurisdictions, the escrowee has a right to interplead only if certain criteria are met. For example, in Texas, interpleader is governed by Civil Procedure Rule 43. The petitioner in interpleader must prove:

> (1) it is either subject to, or has reasonable grounds to anticipate, rival claims to the same fund; (2) it has not unreasonably delayed filing an action for interpleader; and (3) it has unconditionally tendered the fund into the court's registry.

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[448] *Takayama v. Schaefer*, 240 A.D.2d 21, 669 N.Y.S.2d 656 (N.Y.A.D. 2 Dept. 1998). In *First American Title Ins. Co. v. Kenneally*, 2011 WL 3754048 (S.D.Cal.) (unpublished), an escrowee that had been made a defendant in the California lawsuit between buyer and seller for rescission of the purchase contract, and then in the Florida lawsuit between the buyer and his law firm, was entitled to interplead the escrowed money with the court, and an order discharging it from any further duty or liability. In *First American Title Ins. Co. v. Cumberland Farms, Inc.*, 62 Misc.3d 1205(A), 2019 N.Y. Slip Op. 50001(U), 2019 WL 82240 (Table) (Kings Cty.) (unpublished), the court said the escrowee was entitled to deposit escrowed money with the court in interpleader when it proved that the purchase did not close and there was a dispute over who was entitled to the money deposited by the buyer.

[449] *Takayama v. Schaefer*, *supra*, 669 N.Y.S.2d at 659.

[450] In *Wood v. Chicago Title Agency of Las Vegas, Inc.*, 109 Nev. 70, 847 P.2d 738 (1993), the escrowee obeyed a clear court order to deliver funds to Chapman. However, the escrowee had previously received notice that Chapman had assigned his interest in the money to Wood. The court entered summary judgment in favor of Wood for the escrowee's failure to honor the assignment. The court was unsympathetic to the fact that it was the court itself which the escrowee had obeyed. Rather, it offered: "Chicago Title would not have been subject to contempt had it sought guidance from the district court or filed an interpleader. Unfortunately, rather than seek the district court's assistance or pay Wood pursuant to the assignment, Chicago Title, at its peril, chose to release the account without paying Wood. In so doing, Chicago Title breached the duty it owed Wood." 847 P.2d at 740.

[451] *Schuhman v. Green River Motel*, 835 P.2d 992 (Utah App. 1992); *Advantage Title Agency, Inc. v. Rosen*, 297 F.Supp.2d 536 (E.D.N.Y. 2003) (escrowee normally may deduct reasonable fees and costs in filing an interpleader, but right does not "take priority over" federal tax liens and escrowee may not deduct fees if remaining funds in escrow will be less than federal tax lien amount over which escrow was created); *In re The Kirk Corp.*, 2010 WL 2293471 (Bkcy.N.D.Ill.) (unpublished) (interpleading assists all parties when there is a dispute, so escrowee was entitled to be reimbursed attorneys' fees incurred in the interpleader action from escrowed money even though the instructions did not so provide).

Also, an interpleader action is appropriate when the principals have given conflicting instructions that cannot be reconciled; however, if the instructions can be performed, one party's objection to the escrowee's performance of those instructions is not a sufficient basis for interpleader.[452]

When a bank that is serving as an escrowee fails and is taken over by the Federal Deposit Insurance Corporation, neither the FDIC nor the bank to whom it sells the failed bank's assets is accountable to the escrow principals for the money formerly held in escrow.[453]

13.12 Claims Against Insurer For Title Agent Escrow Acts

Escrow parties sometimes seek to make the insurer liable for the conduct of a title agency in its escrow or closing functions. Policy-issuing agents have no authority to act as agent of the underwriter for closings.[454] This subject is fully discussed in Chapter 17, particularly in §17.2.

13.13 Laws Regulating Closing Funds

Most states have passed laws regulating the method or instrument by which money may be delivered to or accepted by escrow companies and other closing agents.[455] Utah has a law requiring that an escrowee have collected funds before it issues funds from the escrow.[456] In that state, an escrow closes on the day prescribed by the closing funds statute, which in most cases is the day after the funds are deposited.[457]

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[452] For example, when the instructions were reasonably clear that earnest money belonged to the buyer, an objection by the seller to the release of the funds (solicited by the escrowee) was found an insufficient basis for interpleader of the funds. Interpleader was also not permitted when there was an existing lawsuit about the sale of the property and the suit by the escrowee (one of the parties' attorney) smelled to the court like forum-shopping. *Mesirov Gelman Jaffe Cramer & Jamieson, LLP v. SVD Realty, LP*, 2001 WL 120142 (E.D.Pa.) (unpublished). In *Land Title Co. v. Dubois*, 2000 WL 688253 (Tex.App.-Dallas) (unpublished), the escrow instructions said the funds were to go back to the buyer if he gave notice within a review period. The buyer gave the notice to the escrowee. Out of an abundance of caution, the escrowee asked the seller if it objected to the return of funds, which she did. The escrowee then brought an interpleader action. The court found that there was insufficient evidence of a dispute to justify interpleader. It said: " [t]he claims ... must be such as to place the stakeholder in some real doubt or hazard to entitle it to the remedy of interpleader, and the doubt must at least be a reasonable one." The court denied interpleader and made the escrowee pay the buyer's attorney fees in seeking the funds.

[453] When a bank failed while it was holding $1,250,000 in escrow, and the FDIC took over the bank and sold at least certain of its assets to Centennial Bank, the federal court held that the company whose money was being held in escrow was not entitled to its return, and did not even have standing to sue either the FDIC or Centennial Bank to get the money back. The court acted as though the money had simply evaporated. The court did not say that the FDIC owed anyone an accounting, or suggest any recourse to the escrow principal for the loss of its money. *RPM National Foundation, Inc. v. Centennial Bank*, 603 Fed.Appx. 836 (11th Cir. (Fla.)) (unpublished).

[454] See *Cameron County Savings Ass'n v. Stewart Title Guar. Co*., 819 S.W.2d 600 (Tex.App. 1991).

[455] See, for example, California Insurance Code §12413.1, discussed in *Newman v. Bank of New York Mellon*, 2017 WL 4325772 (E.D.Cal.) (unpublished).

[456] Utah Code Ann. § 31A-23-307(2) states: " (c) No check may be drawn, executed, or dated unless the segregated

One purpose of such laws is to limit the borrower's risk that a mortgage lender will go out of business and fail to fund loans closed by it or on its behalf.[458] A number of such failures have occurred.[459] There have also been many instances of schemes by criminals designed to steal money from escrowees' trust accounts. The combination of these risks creates a large danger to customers, title insurers, title agents and escrow companies.[460]

The National Association of Insurance Commissioners has promulgated the Title Insurance Agent Model Act and Title Insurers Model Act. Both model acts contain closing funds provisions.[461]

When a mortgage banker collapses and fails to honor the loan funding instrument, the closer's checks or wire transfers have already funded the loan. The closer is in the unenviable position of being asked to make its funds good, if possible, with scant likelihood of being repaid later. The escrowee logically will seek to take legal possession and assignment of the loan documents.

It seems logical that the escrowee should be entitled to hold the note, since it has funded the loan. However, the case of *In re Union Security Mortgage Co.* found to the contrary. In that case, Union Security Mortgage "funded" the loan with a $72,867 check issued to East Tennessee Title Insurance Agency, Inc. (ETT), the closer. ETT issued its checks to close the transaction. The Union Security check bounced. ETT immediately sued for a writ of possession for the note and deed of trust. It dropped the suit when it received a voluntary assignment from Union Security. ETT began to

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escrow account against which it is drawn contains a sufficient credit balance consisting of collected or cleared funds, at the time the check is drawn, executed, or dated. … (d)(iii) [C]ashier's checks, certified checks, teller's checks, U.S. Postal Service money orders, and check s drawn on a Federal Reserve Home Loan Bank may be disbursed on the day following the date of deposit... ."

457 *Schuhman v. Green River Motel*, 835 P.2d 992 (Utah App. 1992).

458 However, in *Newman v. Bank of New York Mellon*, 2017 WL 4325772 (E.D.Cal.) (unpublished), the court found that a borrower was not entitled to disavow his loan or defeat foreclosure of the deed of trust by asserting that the title company that closed the loan disbursed before the money arrived, in violation of California's good funds law.

459 See John Q. Beard, *Lawyers Just Want to Have Funds*, ABA Journal, September, 2001 (discussing good funds laws and risks in disbursing on uncollected funds).

460 Numerous articles have been published on a variety of schemes, including the following helpful items: Kurt Pahl, *Check Fraud--The Rules Have Changed and You Are Exposed*; Chuck Conner, *Red Flags: Look For Warning Signs on Checks Being Deposited Into Escrow!*; and *Staying Clear of Lender Fraud is Tougher Than Ever*, also by Conner, all appeared in Settlement Services Today magazine, in the May, July, and August, 1999 issues, respectively.

461 The model acts require the insurer-closer to obtain one of the following classes of funds before disbursing: "(1) Cash; (2) Wire transfers such that the funds are unconditionally received by the title insurance agent [insurer] or the agent's [insurer's] depository; (3) Checks, drafts, negotiable orders of withdrawal, money orders and any other item that has been finally paid before any disbursements; (4) A depository check, including a certified check, governed by the provisions of the Federal Expedited Funds Availability Act, 12 U.S.C. § 4001, et seq.; or (5) Credit transfers through the Automated Clearing House (ACH) which have been deemed available by the depository institution receiving the credits. The credits must conform to the operating rules set forth by the National Automated Clearing House Association (NACHA)." §10(E), Agent Act; §16(E), Insurer Act.

get monthly payments from the borrower. About a month later, Union Security was forced into an involuntary bankruptcy. The bankruptcy trustee brought suit against ETT to avoid the assignment of the loan to ETT as a preference. The Bankruptcy Court granted the trustee summary judgment, which the District Court reversed. The Sixth Circuit Court of Appeals, however, reversed again, voiding the assignment as a preference. The District Court decision was based on the view that ETT held equitable title to the loan documents from the time it funded the loan. The assignment of the documents thus, in that court's opinion, merely transferred the "bare legal title" to the documents, and was not attackable as a preference. The Sixth Circuit disagreed with this analysis, stating:

> ETT's argument rests upon a flawed conception of debtor's arrangement with ETT. Debtor [Union Security] plainly did not agree to give ETT $72,867 as consideration for ETT's "transfer" of the note and deed of trust. That debtor did not so agree is revealed by the fact that ETT never had any ownership rights in those documents, which were made out to debtor and held by ETT merely as an escrow agent. Instead, the arrangement between debtor and ETT appears to have been a more pedestrian one: in exchange for a relatively small fee, ETT agreed to make appropriate dispersals of funds and documents upon the satisfaction of certain conditions. Debtor's delivery of the $72,867 check to ETT was one of those conditions, just as Collins' delivery of the warranty deed to ETT was one of those conditions. Debtor's delivery of the check no more discharged an obligation owed by debtor to ETT than Collins' delivery of the warranty deed discharged an obligation owed by her to ETT. These deliveries were merely incident to the performance of ETT's escrow agent function. Since no obligation owed by debtor to ETT underlay debtor's delivery of the check to ETT, there was no "underlying obligation" upon which ETT could maintain an action when the check was dishonored.[462]

The court also dismissed several other arguments made by ETT, including that the assignment was not a preference because the debtor "paid nothing for the note transferred, received nothing and had nothing under state law." The Sixth Circuit admitted that the lender had not funded the loan. The court rested its decision on the undisputed fact that the loan itself was valuable, and therefore an assignment of the loan was a preference.

The *Union Security* decision errs by mischaracterizing the relationship between the lender and closer as strictly escrow. The court held in effect that the lender's only obligation to the closer was the deposit of a check, rather than the delivery of the loan funds. The court ignored the fact that a mortgage banker closer/escrowee has dual roles: escrowee as between the parties to the transaction, and also agent of the lender as between lender and borrower. In its role as lender's agent, the closer funds the loan on the lender's written promise to deposit funds with the closer for the loan amount. The lender's breach of its promise to fund leaves its agent as the permanent loan funder. The assignment of the loan documents to ETT was perfunctory and, in the closing industry, a phenomenon which is more and more common. The lender was unable to fund the loan, probably

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[462] *In re Union Security Mortgage Co.*, 25 F.3d 338, 342 (6th Cir. 1994).

because its line of credit had been frozen. Both lender and closer knew that the lender had no right to sell the loan on the secondary market, since that would require a representation that the lender had fully funded the loan. Therefore, the lender got a release of its liability to ETT by transferring the loan to it. By unwinding this assignment, without requiring the debtor to fund the loan, the court gave the debtor a windfall that the debtor itself had already acknowledged it should not receive.

In a case resulting from the demise of Abbey Financial, the escrowee was not permitted to recover from the bank that purchased the loans on a claim for unjust enrichment. In *Greenwald v. Chase Manhattan Mortgage Corp.*,[463] the Greenwald law firm closed a series of loans for Abbey. Chase Manhattan bought a block of loans from Abbey just before it went out of business, including two funded by the Greenwald firm. The trial court granted summary judgment to Chase, saying that, while Chase did hold the loans, "[Chase] paid for them" and, consequently, "[a]lthough defendant may be seen to have benefitted from plaintiffs' mistake, it was not enriched thereby and certainly not unjustly enriched." The appellate court focused on the timing of events. If Chase bought the loans after Greenwald had funded them, it "paid value for notes which had full value," and the bank would be a purchaser for value with "very strong" equity on its side. However, if Chase bought the loans before Greenwald funded them, as Greenwald argued was the case,

> Chase had already paid its funds to an insolvent recipient (Abbey) and held worthless (or at least less valuable) paper until the Greenwald firm paid off the first mortgages. So viewed, the case looks more like one in which Chase was enriched (whether or not unjustly is a different matter).

If the bank bought the loans before they were funded,

> this puts Chase in the position (or nearly so) of one who receives a third party's payment on a valid debt--but a debt on which the lender would otherwise not be able to collect from the insolvent debtor. The only difference is that the payments that benefitted Chase were made to a third party (the prior mortgagees) rather than directly to Chase. If the person who had paid off the loan had acted on a mistake of fact, he might seek restitution from the lender. Would he win?

The answer in Massachusetts, the federal court decided, was no. The court cited the Restatement of Restitution (1936) as its sole authority. It held that Greenwald had paid Abbey's debt under the mistaken belief that it had a right to be repaid by Abbey, but the restatement does not require Chase to repay Greenwald because it was not aware of "the circumstances" when it bought the loans.

In a series of cases stemming from the failure of Island Mortgage, title agents' claims to own the loans they funded were denied, in several cases because the agent failed to follow a good funds law.[464] For example, in *Guardian Title Agency, LLC v. Matrix Capital Bank*,[465] Island Mortgage

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[463] 241 F.3d 76 (1st Cir. 2001).

[464] A Georgia title agent was denied recovery in part because the agent violated that state's good funds law, and therefore had no legal right on which to claim the loans. *Prudential Securities Credit Corp., LLC v. Stewart Title Guar.*

filed bankruptcy shortly after Guardian Title Agency closed an Island loan with Island's ordinary check, on which payment was stopped. Matrix Capital Bank got an assignment of the loan from Island. When the check bounced, Guardian sued Matrix for unjust enrichment, to get the note back (replevin), to reform the deed of trust to put Guardian as the lienholder, and other claims. Guardian alleged that, about two weeks before the Sheck closing, Matrix officers went to see Island because it had refused to turn over promissory notes on loans bought by Matrix. Matrix reported Island to the New York State Banking Commission and the FBI. Island wired $2 million back to Matrix, then folded. Guardian alleged that the money returned to Matrix may have included the purchase price for the Sheck loan. Matrix asked the court to dismiss Guardian's complaint because the title agent had failed to get good funds as required by Colorado law. The Colorado law was passed in 1987 in response to the failure of Reliance Equities, which also left title companies and consumers holding bad checks.

The Colorado law apparently contains a flaw in that it regulates closers, not lenders. The court analyzed the issue this way:

> Title insurance agencies that engage in closing and settlement services are governed by C.R.S. § 38-35-125. This statute, known as the "Good Funds" law, provides that: "No person or entity that provides closing and settlement services for a real estate transaction shall disburse funds as a part of such services until those funds have been received and are ... available for immediate withdrawal." ... [F]ailure to comply with the Good Funds statute violates Colorado Insurance Regulation 3-5-1, which provides that "[t]he disbursement of funds prior to the actual delivery of 'GOOD FUNDS' to the closing and settlement services agent' is defined as an 'unlawful inducement.'"
>
> The face of the Complaint in this case reveals that Plaintiff failed to obtain good funds in the Scheck transaction. ... The Good Funds law was developed as a solution to "the need to insure that the title company or other party responsible for real estate closings has 'good funds' in hand before closing real estate transactions." ... In the event that the responsible party does not have good funds in hand before closing, the statute helps resolve the situation 'without causing undue expense, burden or delay to the consumer or any of the affected industries' by placing the burden of obtaining good funds, and the concomitant risks associated with a failure to obtain good funds, on the responsible party. ...

The court agreed with the lender, Matrix, that Guardian could not sue on breach of contract or unjust enrichment, because Guardian's violation of the good funds law made the loan transaction illegal, saying:

Co. (In re Apponline.com, Inc.), 284 B.R. 181 (Bkcy.E.D.N.Y. 2002). The Island Mortgage court also found that the title company closer lost a contest over the loan to a purchaser of the loan that was a holder in due course. *Broward Title Co. v. Jacobs (In re AppOnline.com., Inc.)*, 285 B.R. 805 (Bkcy.E.D.N.Y. 2002).

[465] 141 F.Supp.2d 1277 (D.Colo. 2001).

> The "bargain" (real estate transaction), was clearly not illegal per se. Had the parties complied with all applicable statutes, no illegality would have occurred. However, by failing to require "good funds" ... I find that Plaintiff injected an 'illegal purpose' into the situation and the 'bargain' became illegal.

Second, the court rejected the claim that Matrix had to give the note back to Guardian. A person may not sue for the equitable help of replevin and reformation if he does not have clean hands. Guardian's hands were dirty:

> The undisputed facts and [Guardian's] admission demonstrate that [Guardian] did, in fact, violate Colorado statutes by failing to require good funds at the Closing. As a result, I find that [Guardian] did not have clean hands and is barred from obtaining equitable relief.

Finally, Guardian could not sue Matrix for misrepresentation, because it was the party at fault under the law. The same court has handled several other similar claims by closers. It rejected a claim by a Georgia title agent, again holding that the agent violated that state's good funds law, and therefore had no legal right on which to claim the loans.[466] In a third decision, the Island Mortgage court ruled that the title company closer lost a contest over the loan because Matrix was a holder in due course.[467]

Other state good funds laws may be vulnerable to this type of challenge. For example, some have adopted versions of the NAIC Model Title Insurance Act which includes good funds regulation of the title industry, not lenders. By contrast, the Wisconsin good funds law makes the lender liable to the settlement agent if it fails to deliver good funds, rather than placing the burden of compliance on the settlement agent.[468] The Wisconsin law is administered by the Department of Financial Institutions, not the insurance commissioner.

The settlement agent took a different and more successful tack in *Lanco Title Agency, Inc. v. Mortgage Plus, Inc.*[469] In that case, as in the cases discussed above, a warehouse lender refused to honor a loan funding check, forcing the title company to take out a loan to cover its disbursement checks. Rather than seek to own the loan, however, the title company obtained an order voiding the mortgage for lack of consideration. It then obtained a voluntary equitable lien in its favor from the borrowers. The appeals court affirmed the order voiding the mortgage:

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[466] *Prudential Securities Credit Corp., LLC v. Stewart Title Guar. Co. (In re Apponline.com, Inc.)*, 284 B.R. 181 (Bkcy.E.D.N.Y. 2002).

[467] *Broward Title Co. v. Jacobs (In re AppOnline.com., Inc.)*, 285 B.R. 805 (Bkcy.E.D.N.Y. 2002).

[468] 708.10, Wis.Stats.

[469] 2004-Ohio-2267, 2004 WL 979827 (Ohio App. 4 Dist.) (unpublished).

> Flagstar argues that the Taylors received consideration for the mortgage. However, that is of no significance for the dispute between Lanco and Flagstar. While the Taylors' debts were paid off as they expected, neither Mortgage Plus nor Flagstar advanced any money that went to pay those debts. The sole source of the funds that paid off the Taylors' debts was Lanco. Flagstar has presented no facts that would raise a genuine issue on this fact for trial.

The court rejected the lender's argument that the title company should lose because it violated the Ohio good funds law. It also refused the argument that the equitable lien in favor of the title agent should be struck because the agent had "unclean hands."

13.14 Recovery Against Third Parties For Escrow Losses

When an escrowee has been compelled to reimburse a party to the escrow, it is in most cases entitled to recover the money from the party who received it in error.[470] Courts have rejected a variety of defenses raised by the recipients of the money that, if accepted, would merely allow the recipient to be unjustly enriched by the escrowee's mistaken payment or overpayment.[471] However, certain defenses can apply to prevent or limit the escrowee's right to recover the money, including the passage of time before the escrowee seeks the return of the money.[472]

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[470] In *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726 (Mo.App. 1994), for example, when the escrowee prepared the closing statement and listed the sale price as $2,000 too little, the escrowee reimbursed the seller for the mistake. The buyer was then obligated to pay the escrowee. In *In re Demarest*, 176 B.R. 917 (Bkcy.W.D.Wash. 1995), the insurer-escrowee missed a mortgage in its title search, the seller was found to have a duty to advise the escrowee that the closing statement was wrong. Because it did not, and thus received $65,000 too much from closing, the insurer had a cause of action against the seller for fraudulent concealment. The debt was nondischargeable in bankruptcy, because the money was obtained under "false pretenses" per §523(a)(2)(A) of the Code. In *Absure, Inc. v. Huffman*, 213 W.Va. 651, 584 S.E.2d 507 (W.Va. 2003), the buyers received an improper credit at closing. The title company reimbursed the sellers who were shorted. The court found the buyers liable to the escrowee. In *Poling v. Palm Coast Title & Abstract Co., Inc.*, 882 So.2d 483 (Fla.App. 5 Dist. 2004), sellers who were overpaid at closing were required to return the extra cash. In *Hill v. Cross Country Settlements, LLC*, 172 Md.App 350, 914 A.2d 231 (Md.App. 2007), a seller who received too much money at closing due to the fact that her mortgage was missed in the title search was required to pay the money back to the settlement agent, despite the searching error.

[471] In *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726 (Mo.App. 1994), for example, the court rejected the payee's argument that the money it received by mistake was a "compromise settlement" or a "voluntary payment," saying: "[t]he payor should be allowed to recover for payments made for others in good faith where, because of the relationship, he had reason to believe it would be reimbursed [and escrowee] had reason to believe that defendant would reimburse it for costs associated with the purchase." 887 S.W.2d at 728. In *Absure, Inc. v. Huffman*, 213 W.Va. 651, 584 S.E.2d 507 (W.Va. 2003), the court held that the fact that the title company made a mistake did not bar its recovery of the money, which would be unjust enrichment if left in the buyers' hands. In *Trahan v. Lone Star Title Co. of El Paso, Inc.*, 247 S.W.3d 269 (Tex.App.-El Paso 2007), the court held that an escrowee that stopped payment on a check which would have incorrectly refunded closing proceeds was not guilty of "theft." In *Arch Escrow Corp. v. KTW, LLC*, 2003 WL 22451727 (Cal.App. 2 Dist.) (unpublished), the court found that the party who caused the escrowee to pay money improperly may not assert the breach of instructions as a defense to the escrowee's demand for the return of the money improperly paid.

[472] In *Lawson v. Commonwealth Land Title Ins. Co.*, 69 Md.App. 476, 518 A.2d 174 (1986), the seller received too

An escrowee seeking to recover money paid to the wrong party by accident may support that claim with an agreement signed by the escrow principal in which he or she agreed to correct errors and to repay any excess money paid to them by mistake from closing.[473] Another doctrine that can support a claim for reimbursement is the principle of equitable subrogation.[474] The escrowee may

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much money from closing but the court denied the insurer's suit to recover the money based on a statute of limitations. The court noted the fact that the "sophisticated national company" had failed to act on its error for a considerable length of time. In *McKinley Title Agency, Inc. v. Cheyney*, 2002-Ohio-4072, 2002 WL 1823002 (Ohio App. 5 Dist.) (unpublished), the closer made an error in pro-rating taxes. The trial court split the difference between the seller and the title company, and the judgment was affirmed, although the appellate court acknowledged that the seller thus received a windfall. In *St. Paul Title Co. v. Meier*, 181 Cal.App.3d 948, 226 Cal.Rptr. 538 (Cal.App. 1 Dist. 1986), an escrowee that was sued for having disbursed money incorrectly was found not to have a cause of action against the attorney who drafted the confusing instructions. The court invented a less than overwhelming public policy concern, saying that to impose such a duty on an attorney "would be both 'an undue burden on the profession'... and a diminution in the quality of the legal services received by the client." In *Guaranty Nat'l Title Co., Inc. v. J.E.G. Associates*, 1995 WL 708667 (N.D.Ill.) (unpublished), an escrowee's claim for recoupment of excess funds paid out was denied as time-barred. The insurer held $9,650.00 in escrow, to be returned on occurrence of an event. When it returned the funds, it issued a check for $96,500.00. The error was not discovered for more than five years. The court held that the escrowee should have known of the error within 60 days of the issuance of the check, since the check would be shown on its next statement. The court rejected the argument that the escrow party was obliged to return the funds under the implied duty of good faith and fair dealing, which duty the court refused to find applicable. In any event, the court ruled, that duty does not "impose an unlimited duty of honesty and righteousness." Further, the court refused to nullify the statute of limitations in order to prevent unjust enrichment. The court cited a treatise to the effect that unjust enrichment is not an equitable remedy, but merely "refers to the way in which a claim should be approached 'since it is clear that the action is at law and the relief is a simple money judgment.'"[472] Similarly, a party to an escrow lost the right to an accounting by waiting more than six years to sue. *Temple v. AmSouth Bank*, 40 Fed.Appx. 943, 2002 WL 1608337 (6th Cir. (Tenn.) 2002). In *District Title v. Warren*, 118 F.Supp.3d 249 (D.D.C. 2015), affirmed by *District Title v. Warren*, 612 Fed.Appx. 5 (D.C.App. 2015) (unpublished), the court held that a home seller who mistakenly received her lender's payoff money in a wire transfer made by the title company closer was not entitled to dismissal of the title agent's suit to recover the money, on the theory that the money belonged to the lender and the agent had no "standing" to sue for its return.

[473] See *Guaranty Title Agency of Arizona, Inc. v. 402 Property Wholesalers, L.L.C.*, 2007 WL 5463558 (Ariz.App. Div. 1) (unpublished) (when loan payoff was short, seller owed the shortage amount and fact that title agent made mistake on closing statement was offset by seller's agreement to refund money for closing errors). In *Givens v. Ward*, 272 S.W.3d 63 (Tex.App.-Waco 2009), because there was a genuine dispute over whether or not a deed should be reformed, the seller was not (yet) guilty of breaching a closing agreement requiring him to correct errors on request. In *Charter Title Agency, Inc. v. Hosfelt Investment Co.*, 1999 WL 1221527 (Ohio App. 10 Dist.) (unpublished), the seller signed an agreement "to fully cooperate and adjust for clerical errors on any or all documents deemed necessary in the reasonable discretion of" the settlement agent. The court found that this obligated the seller to reimburse the closer for taxes that were incorrectly prorated on the closing statement. Charter Title Agency, Inc. of Ohio issued a title commitment which showed the proper amount of taxes owed. The court found that the seller would be unjustly enriched if it did not have to pay the taxes. It also emphasized that the title commitment showed the correct amount, and that the seller had signed the compliance agreement.

[474] In *Tower City Title Agency, LLC v. Flaisman*, 2001 WL 409528 (Ohio App. 11 Dist.) (unpublished), the court used equitable subrogation to order borrowers to pay back a title agency for a shortage on a loan payoff. The court noted that the twin purposes of equitable subrogation are "the prevention of frauds and relief against mistakes… ." The court held that the borrowers had, "in effect, received a $1,000 interest-free loan from" the title agent, and thus both equitable subrogation and unjust enrichment applied. The Flaismans argued that Tower City's negligence should keep it from being repaid. The court noted that the Flaismans were not "innocent" parties who would be harmed by having to return a

also have the right to be indemnified or reimbursed by a party to the escrow if that party falsely accuses the escrowee of wrongdoing.[475]

However, the escrowee's right to recover money paid from escrow to a creditor or other third party is different from its rights against the principals to the escrow, who are in privity with the escrowee. Thus, an escrowee may be prevented from recovering money it paid to a third party contrary to its instructions, if the full amount paid was actually owed to that third party and the circumstances would not indicate that the recipient was unjustly enriched by the receipt of the money.[476] An escrowee may pursue all legal remedies for collection of funds that third parties refuse to return. In some circumstances, criminal prosecution and other extreme measures are required or prudent.[477]

The escrowee also has the right to recover money stolen from its escrow account from the parties who received the money, including third parties, especially if the third parties had reason to understand that the money they received was not the property of the thief who gave it to them.[478] The

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windfall payment. Rather, it said, they "received an extra $1,000 to which they were not contractually entitled, and [Tower City] is $1,000 short."

[475] In *Yan v. Burnet Title, Inc*., 2012 IL App (1st) 111747-U, 2012 WL 6962163 (Ill.App. 1 Dist.) (unpublished), a buyer was ordered to pay a title company's entire defense costs as a sanction, in an action in which the buyer falsely asserted that the escrow officer forged her name on the HUD-1 and other closing documents, as she tried to weasel out of the auction purchase of a HUD-foreclosed property.

[476] In Commonwealth Land Title Ins. Co. v. Security Pacific Business Credit, Inc., 1996 WL 523815 (Minn.App.) (unpublished), an escrowee disbursed funds under a bankruptcy court order for sale free and clear, but failed to deduct from the secured creditor's proceeds the amount of a special assessment discovered when the tax search was updated. The insurer was not permitted to recover the money from the creditor. The court found no unjust enrichment, since the funds received by the lender were still less than the full debt owed. The court held that the insurer-escrowee should bear the ultimate loss because it violated its instructions. "This is just another version of the classic case where a land title insurance company or an abstractor who legitimately charges a fee for such services misses a recorded document of title, and becomes liable for the resulting pecuniary loss." Id. at p. 3.

[477] An escrowee that went to the police after being rebuffed by a person overpaid at closing was not guilty of malicious prosecution. *Weststar Mortg. Corp. v. Jackson*, 133 N.M. 114, 61 P.3d 823 (2002). The escrowee, Weststar, sent too much money to a person who sold his installment real estate contract to the escrowee. His lawyer told him that "the money was theirs to keep and that Jackson could not be arrested for keeping the money." When Weststar talked to the lawyer, he said he viewed the error as a "golden opportunity" for his clients, and laughed when they asked for the money back. Weststar went to the police, and the person was prosecuted. Weststar also sued for unjust enrichment, fraud and other claims, and was countersued for malicious abuse of process. The jury awarded damages on the claim, but the Supreme Court reversed. Similarly, in *Courtman v. Hudson Valley Bank*, 37 A.D.3d 181, 829 N.Y.S.2d 67, 2007 N.Y. Slip Op. 00996 (N.Y.A.D. 1 Dept. 2007), when an escrow account was set up at a bank to pay off a man's judgments, and the bank mistakenly handed the money over to the debtor and called the sheriff when he refused to return the cash, the debtor had no right to sue the bank for false arrest or emotional distress.

[478] In *Proctor v. Whitlark & Whitlark, Inc*., 406 S.C. 225, 750 S.E.2d 93 (S.C.App. 2013), a title insurer paid out over $500,000 due to theft of escrow money by a title agent employee to feed her gambling habit. The court held that the *employee* may recover from the owners of the illegal video poker machines into which she dumped the money, so that she can make restitution. A 1997 South Carolina decision had held that a gambler could sue the operator of a video poker machine under a state law if the machine was not run according to state regulation. The *Proctor* court recognized that the

escrowee may also have a right to recover from a sub-escrowee, mobile closer, closing attorney or other party who performed services related to the escrow that caused liability to the escrowee.[479]

The escrowee may seek to recover, from its bank or others, money stolen from its escrow account by unknown outsiders who hack into the escrow account, or by a check kiter.[480] The escrowee should continuously monitor its escrow account activity to make sure that checks, wires and account transfers are processed correctly. A bank may successfully assert a short statute of limitations in an action by the escrowee seeking to recover money improperly paid by the bank.[481]

The escrowee may also recover from a bank when it honors a fraudulent wire transfer request, sending closing money to the account of a person who is not a party to the transaction, under a wire transfer fraud scheme.[482]

The escrowee may also have a right of subrogation or indemnification from a surety that has issued a notary, employee theft or blanket bond. See §5.7 for a discussion of the cases regarding recovery on a notary's bond, subrogation against sureties on other types of bonds, and subrogation rights against other classes of parties. The escrowee's rights against a taxpayer on payment of a federal tax lien are discussed in §3.4.7.9. A title insurer's rights against a negligent or defalcating policy-issuing agent are discussed in §17.8.

When a bank that is serving as an escrowee fails and is taken over by the Federal Deposit

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laws should be read to "promote a policy which prevents a gambler from allowing his vice to overcome his ability to pay" and "protect a citizen and his family from the gambler's uncontrollable impulses." In *Chicago Title Ins. Co. v. Sinikovic*, 125 F.Supp.3d 769 (N.D.Ill. 2015), a title insurer's escrow department employee stole about $1.6 million through real estate closings and "invested" it in various ventures with third parties, including relatives, in order to shield the money from recovery by the company. The court held that the title insurer was entitled to take a judgment against the third parties and to impose a constructive trust on the real estate that they had bought with its money.

[479] In *Villanueva v. First American Title Ins. Co.*, 292 Ga. 630, 740 S.E.2d 108 (Ga. 2013), a title insurer that paid a lender whose money was stolen from a closing attorney's trust account was found to be entitled to pursue a legal malpractice claim against the closing attorney, despite the lawyer's plea to the Georgia Supreme Court that such claims should not be assignable. See §5.7 for a complete discussion of decisions concerning suits by title insurers and escrowees to recover from banks for improper payments on company accounts.

[480] In *Choice Escrow and Land Title, LLC v. BancorpSouth Bank*, 2013 WL 1121339 (W.D.Mo.) (unpublished), a hacker planted a Trojan horse that captured a title company's escrow account and wire transfer password, and used that information to initiate a wire to Cypress. The title company and not the bank bore the loss, because the title agent had declined a safer wire transfer option offered by the bank.

[481] *Chicago Title Ins. Co. v. California Canadian Bank*, 1 Cal.App. 4th 798, 2 Cal.Rptr.2d 422 (Cal.App. 1 Dist. 1991); affirming *Chicago Title Ins. Co. v. Superior Court*, 174 Cal.App.3d 1142, 220 Cal.Rptr. 507 (Cal.App. 1 Dist. 1985); (discussed in *Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992, *Recent Developments and Decisions*, John L. Hosack, at p. 643). Prior related opinions in the case are: *United States v. Benny*, 559 F.Supp. 264 (N.D.Cal. 1983); aff'd 786 F.2d 1410 (9th Cir. 1986).

[482] In *Thuney v. Lawyers Title of Arizona, Inc.*, ___ F.Supp.3d ___, 2019 WL 467653 (D.Ariz. 2019) (permanent citation not yet available), a bank that had been warned that fraudsters were trying to misdirect a wire transfer for purchase money, but that wired the money to the fraudsters' account anyway, was not entitled to dismissal of the buyers' claims.

Insurance Corporation, neither the FDIC nor the bank to whom it sells the failed bank's assets is accountable to the escrow principals for the money formerly held in escrow.[483]

13.15 Tax-Deferred Exchange Intermediary And Accommodation Party Role

The Internal Revenue Service acknowledges the deferral of capital gain on the sale of real estate and other property when the taxpayer performs a deferred exchange of one property for another.[484] The IRS rules create a safe harbor for taxpayers who use a qualified intermediary to sell the relinquished property and purchase the replacement property.

The role of "qualified intermediary" is essentially a creature of regulation. The IRS definition requires that the intermediary not be the agent of the taxpayer. Title insurers, title agencies and escrow companies qualify, barring a special relationship with a particular taxpayer. The attorney for the taxpayer is not permitted to serve as intermediary.[485] Thus, a title agent or approved attorney who also serves as counsel for the taxpayer is presumably not a qualified intermediary. The company serving as intermediary is not a tax advisor, and does not breach a duty to the taxpayer if the exchange fails to qualify for tax deferral under Section 1031.[486] However, a court may find that the intermediary is liable to the taxpayer if it prepared exchange documents and fails to confirm that those documents set up the type of exchange that the taxpayer seeks.[487]

One of the essential elements of the original safe harbor was that the taxpayer had to sell the relinquished property before purchasing the replacement property. The IRS has issued a guidance creating a safe harbor mechanism for "reverse" exchanges in which one of the properties is "parked" with an "accommodation title holder."[488] Under this arrangement, the accommodation title holder

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[483] When a bank failed while it was holding $1,250,000 in escrow, and the FDIC took over the bank and sold at least certain of its assets to Centennial Bank, the federal court held that the company whose money was being held in escrow was not entitled to its return, and did not even have standing to sue either the FDIC or Centennial Bank to get the money back. The court acted as though the money had simply evaporated. The court did not say that the FDIC owed anyone an accounting, or suggest any recourse to the escrow principal for the loss of its money. *RPM National Foundation, Inc. v. Centennial Bank*, 603 Fed.Appx. 836 (11th Cir. (Fla.)) (unpublished).

[484] 26 U.S.C. § 1031.

[485] 26 U.S.C. § 1031.

[486] *Cheney v. Hinton Burdick Hall & Spilker, PLLC*, 366 P.3d 1220, 2015 UT App 242 (Utah App. 2015) (taxpayers who chose as replacement properties to make non-qualifying investments in a mortgage company were not entitled to sue intermediary for their failure to get deeds to real estate as the replacement legs for their "exchanges").

[487] In *Kreisers Inc. v. First Dakota Title Ltd. Ptnshp.*, 2014 S.D. 56, 852 N.W.2d 413 (S.D. 2014), a title agent that served as intermediary in a tax-deferred exchange and that did not ask if the customer intended a forward or reverse parking exchange arrangement was found liable to the customer for the taxes it did not defer. The intermediary set up the documents for a standard forward exchange when the customer needed to do a reverse parking exchange instead. The taxpayer had a tax advisor, but the tax advisor relayed its advice through the taxpayer, who either did not send the information to the intermediary or got the message garbled.

[488] Bulletin 2000-40, Rev.Proc. 2000-37, published on October 2, 2000.

takes title to one of the properties and holds it until the taxpayer is in a position to convey the relinquished property before taking title to the replacement. The accommodation title holder need not be qualified intermediary, but there is no prohibition against one company performing both functions.

A central tenet of the deferred exchange rules is that the qualified intermediary and accommodation title holder have the benefits and burdens of ownership of the real estate. Thus, although the IRS permits the taxpayer to fund the purchase of real estate and guaranty a loan obtained by the accommodation party, for example, the accommodation party must have the risks and rewards of being the "real" owner.

The intermediary's unique legal status is different from the role of an escrowee, which is a limited agent of the principals. Escrowed property is not an asset of the escrowee. Nonetheless, in several contexts, courts have found that funds and property held by an intermediary is not a real asset of the exchange company.

When a tax-deferred exchange intermediary becomes a bankruptcy debtor, difficult issues arise as to whether the money and real estate held by the intermediary is property of the estate, and if not how to allocate the property between the creditors.[489] An intermediary who invests the money it

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[489] When LandAmerica's exchange company failed, the court put exchange principals into several classes, then made rulings on their entitlement to the funds in the company by class. In *Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, 412 B.R. 800 (Bkcy.E.D.Va. 2009), the court held that even exchange money held in a segregated account was property of the estate, and thus the taxpayers were not entitled to retrieve it. The court later ruled that money that was not in segregated accounts also was property of the estate. *Frontier Pepper's Ferry, LLC Howard Finkelstein and Matthew B. Luxenberg, Trustee v. LandAmerica Financial Group, Inc*., 2009 WL 1269578 (Bkcy.E.D.Va.) (unpublished). In *Rechtzigel Trust v. Fidelity Nat'l Title Ins. Co. of New York*, 748 N.W.2d 312 (Minn.App. 2008), the trustee sought to recover sale proceeds delivered by the intermediary. The court found taxpayer funds not to be property of the estate, in *In re Sale Guaranty Corp.*, 220 B.R. 660, 2 Cal.Bkcy.Ct.Rep. 80 (1998). Also, in *In re Exchanged Titles, Inc*., 159 B.R. 303 (Bkcy.C.D.Cal.1993), the court said: "For the purpose of the exchange ... there was no need for [the accommodator] to acquire a 'real' interest in the ... property by assuming the benefits and burdens of ownership to make the exchange qualify under the statute ... . [One] need not assume the benefits and burdens of ownership in property before exchanging it but may properly acquire title solely for the purpose of exchange and accept title and transfer it in exchange for other like property... ." The intermediary in *Deer Creek, Inc. v. Section 1031 Services, Inc*., 235 Ga.App. 891, 510 S.E.2d 853 (1999) was a man who assumed the identity of a dead person. He withdrew more than $2 million from the account and left the country. Two exchange parties got orders directing the bank to turn over their deposits from the money remaining in the account. Other exchange parties were not permitted to force them to return the funds and accept a pro rata division. The court characterized the account as an escrow account. There are lengthy discussions of the principles concerning distribution of money to numerous defrauded people when the money was in a commingled bank account maintained by the debtor in three decisions emanating from the downfall of exchange intermediary companies controlled by Edward Okun, in *In re 1031 Tax Group, LLC*, 439 B.R. 47 (Bkcy. S.D.N.Y. 2010); 439 B.R. 78 (Bkcy.S.D. N.Y. 2010); and 439 B.R. 84 (Bkcy. S.D.N.Y. 2010). In a case stemming from the LandAmerica 1031 Exchange Services bankruptcy, *In re § 1031 Exchange Litigation*, 716 F.Supp.2d 415 (D.S.C. 2010), two lawsuits brought by LandAmerica 1031 customers against SunTrust Bank for its multiple roles in the company's meltdown were dismissed. The interesting premise was that the bank did not actually know that LES would use later exchange deposits to cash out earlier exchanges when they became due, and therefore owed no duty to the taxpayers, even though SunTrust handled all of the LandAm 1031 accounts and had arranged for the short-term purchase of $200 million in auction-rate securities with the money in the commingled exchange account.

holds for exchanges is as if it was the intermediary's own property is guilty of stealing.[490]

The accommodation title holder faces several significant risks. As the owner of the exchange property, the accommodation party may enter into a number of contracts and loan documents. The accommodation party may have significant liabilities if those obligations are not unwound when the exchange is completed or aborted.[491]

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[490] *State v. Grimes*, 110 Wash.App. 272 (Wash.App. Div. 1 2002), amended 111 Wash.App. 544, 46 P.3d 801 (Wash.App. 1 Div. 2002). Ted Grimes was president of Pacific Coast Escrow, Inc (PCE) and Pacific Coast Financial Services (PCFS). PCE served as an intermediary. Grimes handed the exchange money over to PCFS, which made commercial loans with it. Grimes kept the earnings. Grimes was removed, the company audited, and it filed bankruptcy. A surety and the customers were the victims. Grimes was convicted of theft. He appealed, arguing that an intermediary has title to the money, and that exchange money is not held in escrow. The court affirmed his conviction, saying: "Grimes' argument that state escrow law does not apply to section 1031 funds fails because he failed to deposit the funds in separate escrow accounts, did not hold the funds in trust for the purpose of the transactions, used the funds for his benefit or the benefit of unentitled persons, and the [escrow law] in effect when he committed these offenses explicitly included exchange transactions... ."

[491] In *Tark Associates v. SSI Properties, Inc.*, 2001 WL 320909 (Wash.App. 1 Div.) (unpublished), an accommodation titleholder was found liable on a promissory note that was not cancelled when the taxpayer cancelled the exchange. E. Ray Holden hired SSI Properties, Inc. to serve as accommodation title holder on a reverse exchange. SSI bought the replacement property from Tark Associates, and executed a note to Tark guaranteed by Holden. Holden decided not to go through with the exchange, and had SSI deed the property to a corporation he controlled. However, SSI did not get Five Star's substitution on the note back to Tark. Holden and Tark had a disagreement over an environmental cleanup on the property. Final payment under the note was apparently tied to certification that the remediation was done. Holden stopped making payments on his guaranty. Tark sued SSI on the note and won. SSI argued on appeal that "the parties did not intend that [SSI] be liable on the note because of its status as a sec. 1031 exchange facilitator." The court refused to consider the argument because it was raised too late. It affirmed the judgment against SSI on the note.

14 Closing Protection Letters

14.1 Nature Of The Letter's Assurances

The ALTA Closing Protection Letter (the Letter) provides certain additional assurances incident to the duties undertaken in the policy.[1] The Letter was invented because mortgage lenders and certain other customer groups wanted the underwriter's financial backing when a title agent or approved attorney was to handle real estate settlements.[2] The primary protection of the Letter remains as to the risk that the title agent or approved attorney will steal the money delivered to closing:

> The purpose of the closing service letter is to provide indemnity against loss due to a closing attorney's defalcation or failure to follow a lender's closing instructions.[3]

The risk of the loss of closing funds is inherent in a lender's appointment of a title agent or approved

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[1] Excellent commentary on closing protection letters may be found in the following: John C. Murray, *Closing Protection Letters: What Is (And Is Not) Covered?*, which is available at First American Title's online reference library at http://www.firstam.com; Shawn G. Rader, *Real Property, Probate and Trust Law: Closing Protection Letters*, 70 Fla. Bar. J. 38 (1996); Solomon Genet and Laurie Beneralli, *Closing Protection Letters in Florida: A Title Underwriter's Liability to the Commercial Lender*, Florida Bar's RPP&T Law section ActionLine, Volume XXVIII, No. 2 (Winter 2006), p. 7; and James Bruce Davis' articles: *The New ALTA Closing Protection Letter*, The Title Insurance Law Newsletter (April 2007); *Are Closing Protection Letters Insurance?*, ABA TIPS Title Insurance Litigation Committee News (Summer 2000); and *The Law of Closing Protection Letters*, 36 Tort & Insurance Law Journal 845 (Spring 2001).

[2] See *Title Insurance: The New Policy Changes*, Practicing Law Institute Real Estate Law and Practice Number 300, 1987, at p. 21 and *Sears Mortgage Corp. v. Rose*, 607 A.2d 1327 (N.J. Super. 1992), order reversed in 634 A.2d 74 (N.J. 1993). "Title-insurance companies regularly offer protection to institutional lenders against attorney theft of closing funds intended to pay off a preexisting mortgage... . The protection [in the Letter] against the risk of loss caused by attorney defalcation under the circumstances clearly is an incident to the issuance of title insurance." *Sears Mortgage Corp. v. Rose*, 634 A.2d 74, 86 (N.J. 1993).

[3] *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 645 So.2d 295, 297 (Ala. 1993), citing *Lawyers Title Ins. Corp. v. Edmar Construction Co.*, 294 A.2d 865 (D.C.App. 1972).

attorney as its contract closer.[4] Unless the insurer issues a closing protection letter, it is not responsible for any losses incurred by the lender for an agent or approved attorney's closing acts.[5] An alternate rationale for the development of the Letter was recited in a Florida decision. The court reported that members of the title industry had asserted that closing protection letters came about to protect against the recording gap.[6] However, no case holds squarely that the Letter provides such protection, much less that the Letter was promulgated in order to give that assurance.

A form of the Letter was promulgated by the American Land Title Association in 1987 in an effort to standardize the language of the closing protection letters then in use in the industry. In October, 1998, the ALTA adopted three forms of the Letter, denoted the Regulatory version (with more restrictive assurances designed to comply with stricter standards in certain states), the Non-Residential Limitations version (for use in commercial transactions) and the Single Transaction Limited Liability version. The Letters were revised in 2006, and again in 2007 (adopted as of January 1, 2008). In the 2008 versions, the Regulatory Letter was renamed the Limitations version. ALTA promulgated two new versions of the Letter on December 1, 2011, called the Single Transaction and Multiple Transactions versions. As the names imply, the Single Transaction Letter is issued for only one transaction, and references a transaction or file number. The Multiple Transactions version is effective as to all transactions closed by the title agent or approved attorney from its effective date until the Letter is cancelled. ALTA revised the 2011 Letter on April 2, 2014, and again on December 1, 2015. The current version of the Letter is known as the 2015 ALTA Closing Protection Letter. Its two variants are known as the Single Transaction and Multiple Transactions versions. In this chapter, a reference to the Letter makes a statement that is true for all or most versions of the closing protection letter, but a reference to the 2015 ALTA Closing Protection Letter discusses the terms of that version only.

The Letter is unique because of its unusual purpose, the lack of separate consideration for its issuance, and the relationship it creates between insurer, agent and addressee. The party to whom the Letter is issued is referred to as the addressee. The addressee is the only party which is benefited by and may make a claim under the Letter. The addressee is most often a lender, but also may be a buyer. Most commonly, a Letter is issued by an underwriter on behalf of a title agent or approved attorney.[7] In most cases, the insurer has some sort of contract with the party for whom it issues the Letter, but not always.[8]

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[4] See *Anchor Equities, Ltd. v. Pacific Coast American*, 737 P.2d 532, 105 N.M. 751 (1987); *Shaw v. North American Title Co*., 76 Hawaii 323, 876 P.2d 1291 (Hawaii 1994); and *American Title Ins. Co. v. Burke & Herbert Bank & Trust Co*., 813 F.Supp. 423 (E.D.Va. 1993) (title agency principal theft from escrow account covered by Letters).

[5] *Cameron County Savings Ass'n v. Stewart Title Guar. Co*., 819 S.W.2d 600 (Tex.App. 1991).

[6] *Escrow Disbursement Ins. Agency, Inc. v. American Title Ins. Co., Inc.*, 550 F.Supp. 1192 (S.D.Fla. 1982). Not surprisingly, this case involved a complaint against a company that created an insurance policy which protected against matters recorded in the gap.

[7] See *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993), reversing 607 A.2d 1327 (N.J. Super. 1992).

[8] See *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co.*, 634 A.2d 90 (N.J. 1993) and *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993). In both cases, the insurer issued a Letter to allow the borrower's

The Letter is an indemnity contract, and is contractual in nature.[9] It is not an insurance policy.[10] In *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, the Alabama Supreme Court found that no bad faith action could be brought as to a Letter, because the normal indicia of an insurance policy are missing:

> "... [T]he only breach of contract which gives rise to a tort cause of action for 'bad faith' is [a] breach of a contract of insurance." *Peninsular Life Ins. Co. v. Blackmon*, 476 So.2d 87, 89 (Ala. 1985). An insurer-insured relationship must exist. An insurance contract would be evidenced by one party's entering into a written contract of insurance with the other, by the one's paying premiums to the other, and by the other's placing the premiums into a central fund out of which claims would be paid. *Peninsular Life*, supra, at 89. ... It is clear from a reading of the closing service letter that it states Commonwealth's responsibility for the acts of its approved attorney. It is also clear that the closing service letter is not a title insurance policy.[11]

Most other courts have agreed that bad faith damages cannot be sought under a Letter, because it is an indemnity contract and not insurance.[12]

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attorney to close a loan. There was no contractual relationship between the insurer and the closing attorney who absconded. The court found that the insurer had made the closing attorneys their agents by issuing the Letters. A similar practice exists in Wisconsin. In that state, at least one underwriter insists that each attorney act under a retainer agreement in which the attorney acknowledges a professional duty to the underwriter.

[9] *Lehman Brothers Holdings, Inc. v. Hirota*, 2007 WL 1471690 (M.D.Fla.) (unpublished); *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.*, 288 Ga.App. 642, 655 S.E.2d 269 (Ga.App. 2007).

[10] *Mandor v. Lawyers Title Ins. Corp.*, 28 N.Y.2d 739, 269 N.E.2d 828, 321 N.Y.S.2d 120 (N.Y.App. 1971). This issue is thoroughly examined in James Bruce Davis' articles *The New ALTA Closing Protection Letter*, The Title Insurance Law Newsletter (April 2007); *Are Closing Protection Letters Insurance?*, ABA TIPS Title Insurance Litigation Committee News (Summer 2000); and *The Law of Closing Protection Letters*, 36 Tort & Insurance Law Journal, 845 (Spring 2001). However, in *Horvath v. Lawyers Title Ins. Corp*., 2013 WL 1294677, 2013-Ohio-1295 (Ohio App. 11 Dist.) (unpublished), the court ruled very obliquely that a Letter is insurance because Ohio Rev. Code §3953.32 says that the issuance of a CPL "is part of the business of title insurance for purposes of Chapter 3953 of the Revised Code."

[11] 645 So.2d 295, 297 (Ala. 1992).

[12] *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.*, 288 Ga.App. 642, 655 S.E.2d 269 (Ga.App. 2007). The court said: "The issue here is whether the CPL qualifies as an insurance policy, and we find that it does not. In our law, "'[i]nsurance' means a contract which is an integral part of *a plan for distributing individual losses* whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies." (Emphasis supplied.) OCGA § 33-1-2(2). … Under Lawyers Title's CPL, however, no second party assumes the risk and significantly no distribution of risk is accomplished. Therefore, the CPL is not an insurance policy within the meaning of OCGA § 33-4-6, and the trial court did not err by so ruling." However, in *Horvath v. Lawyers Title Ins. Corp*., 2013 WL 1294677, 2013-Ohio-1295 (Ohio App. 11 Dist.) (unpublished), the court ruled very obliquely that a Letter is insurance, and that a bad faith claim may be brought. However, the court found no bad faith in the case before it, which may make the ruling dictum.

The ALTA Letters plainly state that the issuance of a Letter does not create an agency between the insurer and the title agent or approved attorney for closing acts.[13] When a state bar association's committee on professional conduct audited a closing attorney, it was given the right to also audit the books of a title agency partly owned by the attorney, including the accounts used for closing funds. The court noted that the insurer audited the agency's books, in part it presumed because the insurer had issued the Letters.[14] However, New Jersey courts have held that the issuance of a Letter makes the closing attorney the agent of the insurer.[15] One decision even held that the Letter was the key that allowed a closing attorney to conduct loan fraud:

> By making Levenson an Approved Attorney [that is, issuing a Letter on his behalf], First American put him in the position to steal from Vision [the lender] by creating this sham transaction. ... [T]he title insurance company was in the best position to prevent the loss created by the fraud and defalcation of the Approved Attorney.[16]

The New Jersey decision places too much causal blame on the Letter. The Letter is not the insurer's imprimatur. By issuing a Letter, the insurer does not absolve the other parties from dealing prudently with the approved attorney or agent. The Letter is not a guarantee or certification that the attorney or agent is honest. Rather, just as the title insurance policy is a contract of indemnity, the Letter indemnifies the assured in the event of a loss covered by the Letter.[17]

A major concern about the Letter is that, in many states, it is issued without charge or premium,[18] but insurers have incurred significant losses on closing protection claims, particularly

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[13] See Conditions and Exclusions 6 of the 2015 ALTA Closing Protection Letter. Despite such a disclaimer, however in *American Home Mortgage Corp. v. First American Title Ins. Co*., 2007 WL 3349320 (D.N.J.) (unpublished), the court found that the allegation that the Letter created a principal-agent relationship between approved attorneys and the insurer could at least survive a motion to dismiss. The insurer argued that the approved attorneys were not its agents, because the closing service letters at issue contained explicit disclaimers of agency. The court resorted to general law holding that written disclaimers of agency "do not necessarily negate the existence of the agency relationship." The court ruled that "[t]he key to determining the agency relationship is the principal's consent to the agent acting on its behalf and the principal's control of the agent," citing Restatement (Second) of Agency § 1. The court went on to find that the complaint sufficiently alleged an agency relationship, and that the wording of the CSL itself created a suggestion of agency *notwithstanding* the disclaimer.

[14] *In the Matter of Unnamed Attorney*, 645 A.2d 69 (N.H.1994).

[15] *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co*., 634 A.2d 90 (N.J. 1993) and *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993).

[16] *First American Title Ins. Co. v. Vision Mortgage Corporation, Inc*., 689 A.2d 154, 157; 298 N.J.Super. 138, 144 (A.D. 1997).

[17] The *Vision* decision is contrasted with *Fleet Mortgage Corp. v. Lynts*, 885 F.Supp. 1187 (E.D.Wis. 1995) and other cases in Comment, *Title Insurance Law Newsletter*, February-March 1997, p. 5. See the introduction to this text for further information about this periodical.

[18] One court has ruled that the "cost" of the Letter's protections is "built into the insurance premium." *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co.*, 634 A.2d 90 (N.J. 1993). The court cited no authority for

those involving theft of money. Those losses pose a legitimate threat to insurer solvency. In fact, closing protection letter liability has caused several of the country's oldest title insurers to go out of business.[19] This has caused many regulators, insurers and industry observers to carefully examine this risk.

Early court decisions gave unsatisfying explanations as to why insurers have assumed such significant liability without charge. In *Lawyers Title Ins. Corp. v. Edmar Const. Co., Inc.*,[20] for example, the court summarized the trial testimony as being "[i]n effect, Lawyers Title offered as a business gesture to indemnify the lender if a defalcation by an approved attorney occurred."[21] As a result, the court said, when the closing attorney stole closing money, the insurer paid the lender addressee in "an effort to continue the goodwill of the lender." The appellate court said that the loss due to the theft should thus fall on the insurer and not the lender who had appointed the closing agent, because "the title company loss admittedly followed its determination to 'save face' and issue a final title policy to District Building and Loan and pay the loss resulting from the defalcation… ."[22]

The closing protection letter is incidental to the policy or policies to be issued by the insurer that issues the Letter, and in some senses the two are integrated with each other.[23] The insurer is not liable under a Letter even if the title agent performs the closing, if no title insurance policy is issued

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this proposition. See also *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993), reversing 607 A.2d 1327 (N.J. Super. 1992).

[19] New Jersey Title Insurance Company, established in 1888, ceased to do business in 2011. *See* http://www.njtic.com/njtic.htm. Guaranty Title and Trust Company, domiciled in Ohio, was liquidated in 2008. *See* http://www.ohinsliq.com/Companies/companies.asp?comp_code=34. Ninety-year-old Southern Title Insurance Company shut down in September, 2011, and a moratorium on claim payments was ordered in July, 2012. *See* http://www.southerntitle.com/. Each company's failure was reportedly due largely to closing protection letter losses or liability.

[20] 294 A.2d 865 (D.C.App. 1972).

[21] 294 A.2d at 868.

[22] Id.

[23] In *Fleet Mortgage Corp. v. Lynts*, 885 F.Supp. 1187 (E.D.Wis. 1995), the court held that the Letter is incidental to the policy and, if it were not, it would fail for want of separate consideration. It said: "[i]f the closing letters were a 'separate contract' as Fleet urges, it would be very peculiar for Chicago Title to give such a promise without something in return. Furthermore, if the promise were considered a separate contract unsupported by consideration, Fleet would be in a worse position because such a gratuitous promise is unenforceable." 885 F.Supp. at 1190. In *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 634 A.2d 74, (N.J.1993), the court held that, while a Letter does not constitute a separate insurance contract, it is integrated into the insurance policy. In *Wells Fargo Bank, N.A. v. Bank of America, N.A.*, 2013 WL 372149 (S.D.N.Y.) (unpublished), involving Michigan property, a lender seeking to "reform" a policy to remove an exception for a $15 million mortgage based on its escrow instructions saying that the lender was to have a first lien survived a summary judgment motion on its theory that the closing protection letter and policy should be read as one integrated contract. In *Wells Fargo Bank, N.A. v. MLD Mortgage, Inc*., 2012 WL 6139366 (D.Minn.) (unpublished), the court held that claims under both the title insurance policy and the closing protection letter for the same problem in a transaction should be decided by the same court, because the "issue of defective title will be ruled on once, not twice, and claims for loss can be handled together rather than in a multiplicity of suits."

by the agent on the insurer's paper in connection with the closing.[24] The insurer is not liable on a fake Letter issued by a title company that has been cancelled as the insurer's policy-issuing agent.[25]

Insurance regulators have carefully scrutinized whether or not the Letter is insurance, the fidelity-like nature of the theft indemnification, and the threat posed to insurer solvency by the assumption of large theft risk. In many states, title insurers are monoline insurers. The Letter is not a title insurance policy, although it provides assurances closely related to the matters covered by the policy. Also, the indemnification for losses caused by the title agent's handling of closing funds bears some resemblance to fidelity bond or insurance coverage.

The concern that the Letter resembles fidelity insurance caused many insurance regulators to study the Letter and take action in the 1980s and 1990s. The New York Insurance Commissioner banned the issuance of a Letter containing the fraud or dishonesty indemnification in 1992:

> A CPL deals with failure to comply with instructions as well as fraud or dishonesty in the collection and payment of funds due to or advanced by the lender. As such, the CPL is in the nature of fidelity or surety coverage, or resembles professional liability insurance against legal malpractice on the part of the lender's attorney.[26]

The New York Commissioner ruled that the protection regarding fraud or dishonesty is:

> beyond the scope of the monoline title insurer's license and writing authority ... . Thus a CPL that attempts to address acts or omissions on the part of the lender's attorney is unauthorized, would give lenders no solace in the past, and should no

[24] *National Mortgage Warehouse v. Bankers First Mortgage Co*., 190 F.Supp.2d 774 (D.Md. 2002). The court said that a finding of liability would unhinge the Letter from this important limit on its scope: "[b]ecause Sovereign did not secure title insurance with Security Title, the liability coverage extended by the closing protection letter never went into effect. To hold otherwise would be to enforce a gratuitous promise by allowing Sovereign to benefit from a contract for which there was no consideration." 190 F.Supp.2d at 784. In *Capital Mortgage Associates, LLC v. Hulton*, 2009 WL 567057 (Conn.Super.) (unpublished), reh.den. 2009 WL 3284241 (Conn.Super. Sep 08, 2009), the court held that the Letter was never invoked because the title agent wrote the lender's policy on another underwriter's paper. It rejected the lender's claim that the insurer should be bound by the Letter anyway because it was issued by the title agent, who was a policy issuing agent of the insurer. The court said that the issuance of a policy by the same insurer was an "overt condition precedent" to liability.

[25] See *In re James*, 405 S.C. 17, 747 S.E.2d 169 (S.C. 2013), in which a lawyer was disbarred for issuing fake closing protection letters, which allowed him to perform the closings for the people whose money he stole from his client trust account. The South Carolina Supreme Court acknowledged in its decision that the victims could not recover under the fake closing protection letters. However, when an agent was cancelled but the Letter was not, and the former agent continued to issue fake title insurance policies to the lender, the court refused to simply dismiss the claim based on the Letter due to the lack of valid title insurance policies. *Mortgage Network, Inc. v. AmeriBanc Mortgage Lending, LLC*, 177 Ohio App.3d 733, 895 N.E.2d 917 (Ohio App. 10 Dist. 2008).

[26] Circular Letter No. 18 (1992), of December 14, 1992, by the Honorable Salvatore R. Curiale, Superintendent of Insurance, State of New York.

longer be issued ... by New York licensed title insurers.[27]

The Washington Insurance Commissioner prohibited the issuance of Letters on behalf of parties who are not the policy-issuing agents of the underwriter.[28] Kansas issued a directive prohibiting the issuance of the Letter, as being beyond the charter of a title insurer, but later rescinded that ruling based on a decision that "suggests the exposure covered by closing protection letters is negligence liability rather than surety or fidelity coverage."[29]

Some insurance regulators took the approach of ordering insurers to remove the "fraud or dishonesty" indemnification from the Letter. The Wisconsin Insurance Commissioner said that the assurances in the Letter about the agent's fraud or dishonesty are in the nature of fidelity insurance, and required insurers to strike that assurance from the Letter.[30] The Nebraska Commissioner also instructed insurers to remove the fraud or dishonesty assurance, but the legislature rescinded that prohibition.[31]

In 1995, the Virginia Commissioner instructed title insurers that they were not permitted to issue closing protection letters that indemnified lenders for losses unrelated to the condition of title to the property or the status of any lien on the property.[32] A form of the Letter has been written that complies with that instruction, and which the regulator has approved. In addition, Virginia now

[27] Id. The Circular Letter does permit a title insurer to issue a letter to a customer confirming that an appointed agent has authority to issue commitments and policies on behalf of the insurer.

[28] Letter of Ms. Melodie Bankers, Deputy Commissioner, Office of Insurance Commissioner, dated May 5, 1989, addressed to Mr. Dennis Sherman, President, Washington Land Title Association.

[29] Kansas Insurance Department Bulletin 1989-30, issued on December 1, 1989 by the Honorable Fletcher Bell, Commissioner of Insurance, rescinded by Bulletin No. 1996-6, issued on June 4, 1996. Bulletin No. 1996-6 stated its rationale as follows: "*Ford v. Guaranty Abstract and Title Co.*, 220 Kan. 244, holds that failure to use due care in the process of disbursing funds by a real estate conveyor is negligence. Therefore, it is inappropriate to continue Bulletin 1989-30 in force because the case law suggests the exposure covered by closing protection letters is negligence liability rather than surety or fidelity coverage."

[30] Letter of Mr. Don Cleasby, Legislative Attorney, Office of the Commissioner of Insurance, State of Wisconsin, dated April 27, 1989, addressed to Mr. John R. Bethell, Chairperson, Wisconsin Land Title Association Underwriters Committee.

[31] A notice from the Department of Insurance dated January 3, 1990 stated that the "fraud or dishonesty" language "falls squarely within the definition of fidelity insurance," and therefore was not within the purview of title insurance. The notice also warned that the duty to reimburse for failure to follow instructions "may not be a valid subject of title insurance." The legislature later rescinded the ruling by adopting R.R.S. Neb. § 44-1984(2), which authorizes the issuance of closing protection letters that include the theft indemnification.

[32] Administrative Letter 1995-8 of the Honorable Steven T. Foster, Commissioner of Insurance, issued on September 4, 1995. The Commissioner ruled that "By issuing a closing protection letter that indemnifies lenders for losses which are unrelated to the condition so the title to property or the status of any lien on property, a title insurance company is exceeding its license authority." The Commissioner invited the insurers to draft a form of letter limited to assurances about the status of title, which was adopted in early 1996.

licenses settlement agents, requires them to maintain fidelity bonds, and the state audits their escrow accounts.[33]

Other states also promulgated forms of the closing protection letter or have given instructions about their permitted terms. The New Jersey Supreme Court said the Letter did not constitute fidelity coverage, and the "fraud or dishonesty" assurance was not beyond the scope of a title insurer's insurance license.[34] The New Jersey department has promulgated its own limited form of the Letter, for which there is a mandatory $25 fee.[35] California permits the issuance of the Letter and includes it within the definition of the business of title insurance.[36] Connecticut states that title insurers may "guarantee the obligations of their agents in the normal course of business by issuing closing protection letters."[37] The Florida Commissioner authorizes the issuance of a letter having form and content approved by the Department of Insurance.[38] Ohio law mandates the offer of closing protection coverage to all parties in the transaction, and describes the terms to be included in the Letter without promulgating a form of the Letter.[39] Texas has promulgated a closing service letter and regulations regarding its use.[40] New Mexico has also promulgated its own version of the Letter.[41] In Iowa, which does not permit the issuance of title insurance but does allow attorneys to issue title guarantees, the state Finance Authority issues closing protection letters on behalf of certain guarantee issuers.[42]

Some states have adopted statutes simply declaring that title insurers are strictly liable for

[33] Virginia Consumer Real Estate Settlement Protection Act, Va. Code Ann. §§ 6.1-2.19 to 6.1-2.29.

[34] *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993).

[35] The form was approved for use effective June 1, 2004, according to John C. Murray in his excellent article, *Closing Protection Letters: What Is (And Is Not) Covered?*, which is available at First American Title's online reference library at firstam.com.

[36] Cal.Ins. Code § 12340.3.

[37] CGSA § 38a-404.

[38] § 627.786(3), Florida Stats. authorizes the issuance of closing protection letters. Rule 4-186.010 of the Florida Administrative Code (1993) promulgates the form of the letter.

[39] Ohio Rev. Code §3953.32 mandates the offer of closing protection insurance, and says that the issuance of a CPL "is part of the business of title insurance for purposes of Chapter 3953 of the Revised Code." The Ohio Department of Insurance has promulgated a form to be used in making the offer of coverage, as discussed in *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017).

[40] Texas Ins. Code §§ 2702.001-002.

[41] §§ 13.14.18.21 and 13.14.1.7(D)(2), New Mexico Admin. Code.

[42] Iowa Code § 16.93(1) states that the Iowa Finance Authority "through the title guaranty division may issue a closing protection letter to a person to whom a proposed title guaranty is to be issued, upon the request of the person, if the division issues a commitment for title guaranty or title guaranty certificate."

theft of money by their appointed agents. Florida law also makes a title insurer liable for the theft of closing funds by a licensed title insurance agent.[43] Nebraska also imposes strict liability on insurers for agent theft of closing funds.[44] Utah law makes a title insurance company directly and primarily liable to parties who deal with its appointed agents concerning the receipt and disbursement of funds deposited in escrows, closings, or settlements.[45] The strict liability statutes and the cases construing them are fully discussed at §17.8.3.

Some legislatures and regulators have taken the approach of requiring title insurers to charge for the Letter *and* imposing limitations on the scope of its assurances. North Carolina has taken this approach.[46] The Pennsylvania rating bureau has filed a limited-scope version of the Letter, which may only be issued to lenders.[47] The 2015 ALTA Closing Protection Letter carefully limits the theft assurance to reimbursement of money that was delivered by the addressee. This indemnification is much more limited than the assurance contained in versions of the Letter that regulators scrutinized in the 1980s and 1990s, and clearly has been designed with the regulators' fidelity-coverage concern in mind.

Despite the issues about the efficacy of the Letter, the fact remains that title agents and approved attorneys sometimes steal closing money, and in many situations there is no avenue of recovery for the theft victims except through closing protection letters. To date, there is no other form of comprehensive insurance or bonding protection for theft by an owner of a title agency.

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[43] Fla.Stat.Ann. § 627.792 provides that a title insurer is liable for the defalcation, conversion or misappropriation of settlement funds held in escrow by a licensed title insurance agent. However, that law does not apply to attorney title agents, who are regulated by the state Supreme Court rather than the legislature. *Hechtman v. Nations Title Ins. of New York*, 840 So.2d 993 (Fla. 2003).

[44] Neb. Rev. Stat. § 44-1993(8).

[45] Utah Code Ann. § 31A-23-308. However, Utah Code Ann. § 31A-23a-407, adopted in 2017, limits the insurer's liability to "the amount of money received and disbursed, not to exceed the amount of proposed insurance set forth in the commitment or title insurance policy described in Subsection (1) plus 10% of the amount of the proposed insurance," and states that this statutory liability "does not modify, mitigate, impair, or affect the contractual obligations between an individual title insurance producer or agency title insurance producer and the title insurer."

[46] North Carolina law authorizes title insurers to "insure the proper performance of services necessary to conduct a real estate closing performed by an approved attorney licensed to practice in North Carolina." N.C. Gen.Stat. § 28-26-1. The state says that the filed and approved per-thousand premium rate is an "undivided" fee covering both the policy and the Letter. Effective October 1, 2003, the North Carolina Department of Insurance approved a Letter filed by the North Carolina Title Insurance Rating Bureau that omits assurance 1(c) of the ALTA Letter, limits assurance 2 and creates a three-year statute of limitations. As reported by Mr. Murray, the North Carolina department acknowledged that "closing-protection liability claims have escalated to an alarming extent and become a major cause of losses for title companies." In *GMAC Mortgage, LLC v. Flick Mortgage Investors, Inc.*, 2010 WL 2132184 (W.D.N.C.) (unpublished), the court commented that "the law related to CPLs remains somewhat unclear," and the magistrate judge had observed that "whether a CPL constitutes insurance has yet to be answered definitively in North Carolina."

[47] Section 7.5, Pennsylvania Manual of Rates and Forms filed by the Title Insurance Rating Bureau of Pennsylvania. The $35 fee may not be waived, and must be remitted in its entirety by the agent or approved attorney to the title insurer, in recognition of the fact that the fee is entirely for the risk borne by the insurer.

However, sellers and refinancing borrowers are not insureds under policies issued in their transactions, and therefore are not entitled to obtain closing protection letters or to receive the benefit from the Letter unless mandated by law.[48]

As a result of a high number of large and very public escrow thefts, particularly after the real estate depression that began in 2007, some insurance regulators and legislatures began to encourage or mandate insurers to make the Letter available even to parties who are not insureds. Illinois now mandates the issuance of closing protection letters to all of the parties to a transaction, including sellers and refinancing borrowers.[49] Some laws require that a Letter be *offered* to all parties.[50] Other state laws adopted after 2007 do not require issuance of Letters, but solve the monoline issue by authorizing title insurers to issue a form of the Letter that protects against theft of closing money.[51]

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[48] In *Karpontinis v. First American Title Ins. Co*., 2013 N.J. Super. Unpub. LEXIS 641, 2013 WL 1150722 (N.J.Super.A.D. 2013) (unpublished), rev.den 214 N.J. 119, 67 A.3d 1193 (Table), the court refused to extend New Jersey's expansive view of the Closing Service Letter, as it is termed by state law, to benefit a seller, because the seller is neither an insured nor an addressee of the CSL.

[49] An Illinois statute, 215 ILCS 155/et. seq., effective January 1, 2011, requires title insurers to issue closing protection letters issued to lenders, borrowers, buyers and sellers for all residential real estate transactions, and non-residential transactions under $2,000,000. See 215 ILCS 155/16.1. The companion regulation (50 Ill. Adm. Code 8100.2402) mandates that title insurers charge not less than $25 to buyers on purchases and lenders, and $50 to sellers and borrowers on refinances. In addition, title insurance agents must be registered with the state, and the regulator has the power to audit agents' escrow and closing activities. 215 ILCS 155/16.

[50] Alabama adopted a law in 2011 requiring agents to offer closing protection letters to buyers and sellers. Ala. Code § 27-3-6.1. The law also amended Alabama's monoline statute (Ala. Code § 27-3-6) to specifically authorize title insurers to issue closing protection letters and to collect fees for them. In Alabama, the charge is $25 for a lender or buyer/borrower and $50 for a seller who is not an insured under a loan policy. In Arizona, the law provides that, when the escrow agent is a title insurance agent employed by the buyer or seller, the agent shall disclose to the buyer and seller that "the title company may offer a CPL that provides protection for the loss of escrow monies due to fraud or dishonesty of the escrow agent." Ariz.Stat. § 6-841.0 The form of promulgated CPL issued in Arizona is virtually the same as the ALTA CPL except that there are three separate letters for lender, buyer and seller. Arkansas adopted a law in 2012 requiring title agents to offer closing protection letters. Ark. Code Ann. § 23-103-405. The District of Columbia has exempted the Letter from the District's monoline statute, and says a title insurer "may issue closing or settlement protection to a proposed insured upon request… ." In addition, the Letter may be offered in a residential transaction to a seller, refinancing borrower or buyer who does not purchase title insurance, for whom the charge "shall be not less than $50." D.C. Code § 31-5031.04. At the same time, the District imposed on title insurers the duty to set aside an additional, temporary loss reserve for title and closing protection letter liability. D.C. Code § 31-5031.08. In a 2012 law, Georgia explicitly permitted insurers to issue closing protection letters, mandated the filing of a premium charge, instructed insurer that they "shall maintain adequate reserves" for CPL liability, and stated that the Letter may be issued to "a buyer, lender, or seller." Ga. Code Ann., § 33-7-8.1. Louisiana adopted a law in 2012 that says a title insurer "may issue closing or settlement protection to a person who is a party to a transaction in which a title insurance policy is contemplated to be issued." La.R.S. § 22:2092.5. This includes sellers and refinancing borrowers. The customary charge in Louisiana is $25. Ohio requires that a title agent offer a closing protection letter to lenders, buyer-borrowers, refinance borrowers and sellers. Ohio Rev. Code § 3953.32. The charges are $35 for the lender, $15 for the buyer/borrower and $50 for the seller.

[51] Missouri regulates title agents, and states that a title agent may not close a transaction unless it has caused the insurer to issue a Letter "protecting the buyer's and the seller's interests, or the title agency or agent has given written notice to the affected person in a title insurance commitment or on a form approved by rule promulgated by the director

These laws and regulations also mandate that the insurer charge for the Letter. The imposition of a charge solves or ameliorates the risk that the insurer will be bankrupted by the increased risk that it assumes, and the legal problem that a Letter issued to a non-insured would fail for want of consideration.

14.2 Indemnification And Requirements

Most versions of the Letter were arranged so that there were two assurances, the first being an indemnification for loss caused by the failure of the issuing agent or approved attorney to comply with written closing instructions relating to title; and the second covering losses suffered due to the fraud or dishonesty of the issuing agent or approved attorney in handling the addressee's funds or documents in connection with the closing.

In the 2015 ALTA Closing Protection Letter, the events that trigger the indemnification obligation of the Letter are recited at paragraph 4 of what is labeled the Requirements section of the Letter. In contrast to prior versions of the Letter, there is one overarching indemnification statement in the 2015 ALTA Closing Protection Letter. It is found in the first sentence, which states that the insurer:

> ... agrees to indemnify You for actual loss of Funds incurred by You in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the Date of this letter, subject to the Requirements and Conditions and Exclusions set forth below.

That statement is followed by four Requirements.

Requirement 1 creates the threshold limitation that the Letter applies only when "the Company issues or is contractually obligated to issue title insurance for your protection in connection with the closing of the Real Estate Transaction… ." The Letter has been found to be incidental to the issuance of a title insurance policy.[52] Thus, its protections may not be invoked unless the insurer issues a title insurance policy in connection with the transaction.[53]

Requirement 2 states that the addressee must be a lender, buyer or lessee. That requirement is discussed in full in §14.3. Requirement 3 is new to the 2015 ALTA Closing Protection Letter, and states that the aggregate of "all Funds You transmit" to the agent for the transaction must not exceed

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that the person's interest in the closing or settlement is not protected by the title insurer, title agency, or title agent." Missouri Stats. § 381.022(5). A 2010 Rhode Island law sanctions the issuance of a Letter that indemnifies against the "[t]heft of settlement funds." Rhode Island Gen. Law § 19-14.1-10. In 2012, South Carolina adopted a law that says a title insurer may issue a Letter that indemnifies against "theft or misappropriation of settlement funds… ." S. Carolina Code § 38-75-1010.

[52] *National Mortgage Warehouse, LLC v. Bankers First Mtg. Co., Inc.*, 190 F.Supp.2d 774, 783 (D. Md. 2002) ("the issuance of a title insurance policy is generally necessary for liability to ensue under a closing protection letter"); *Fleet Mortgage Corp. v. Lynts*, 885 F. Supp. 1187, 1190 (E.D.Wis. 1995) ("the [closing protection] letters are generally only issued in connection with a title insurance policy or expected policy").

[53] See cases at §14.1.

the dollar amount that is inserted in the Letter.

Requirement 4 is the condition that "Your loss is solely caused by" one of the two events that are listed, which are numbered 4(a) and 4(b).

The net effect of this rearrangement of the Letter's format is to emphasize the fact that the 2015 ALTA Closing Protection Letter indemnifies for the loss of money, and is not a compliance bond or the grant of agency authority for the conduct of real estate closings or escrows. The events listed in Requirement 4 must lead to the actual loss of Funds by the addressee. Further, by putting the four Requirements in the same list, the 2015 ALTA Closing Protection Letter makes it clear that all four conditions must occur before the indemnity contract is invoked. The references in this chapter to the closing instruction violation and theft "assurances" of the Letter should be understood, in relation to the 2015 ALTA Closing Protection Letter, as being references to the covered events listed in the Requirements section of that version of the Letter.

The covered event listed as Requirement 4(a) of the 2015 ALTA Closing Protection Letter concerns the issuing agent's violation of written closing instructions. To trigger coverage, the addressee's loss must be "solely caused by":

> ...any failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:
>
> (i) (A) the disbursement of Funds necessary to establish the status of the Title to the Land; or
>
> (B) the validity, enforceability, or priority of the lien of the Insured Mortgage; or
>
> (ii) obtaining any document, specifically required by You, but only to the extent that the failure to obtain the document affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land... .[54]

This statement is carefully crafted to apply only to compliance with instructions that are incidental to the coverage of the policy.

Thus, the 2015 ALTA Closing Protection Letter is not a blanket or far-reaching assurance in the nature of a bond or errors and omissions policy, as to any possible violation of closing instructions by the title agent. Many lenders' closing instructions now require title agents and approved attorneys to perform a number of duties unrelated to obtaining a valid debt instrument and

[54] The 2011 ALTA CPL was less precise in tying the land insured in the policy to the coverage of the Letter, and did not define Title, Insured Mortgage, Your or Funds. That version read: "1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document… ."

perfected lien. These can include the payment of personal unsecured debts from closing, obtaining various reports and inspections as to the property, securing the borrowers' signatures on a multitude of certificates and disclosure notices, and various chores that button up the lender's own loan underwriting. In addition, some lenders now also require title agents and approved attorneys to report various indicators of possible loan fraud. The 2015 ALTA Closing Protection Letter provides no coverage against loss caused by the issuing agent's violation of such loan closing instructions.

When a Letter's closing instruction protection is not limited to title-related violations, courts have held the insurer liable for losses caused by the violation of other types of loan closing instructions.[55] However, when the Letter limits the closing instruction violation event to title issues, most courts have found no coverage for the violation of other types of closing instructions.[56] The refinements in the wording of the 2015 ALTA Closing Protection Letter directly address those issues

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[55] In *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 857 F.Supp. 1507 (M.D.Ala. 1994), the court found the instruction assurance invoked because the agent closed a loan without proof of a home warranty.

[56] Thus, for example, in *Federal Agricultural Mortg. Corp. v. It's a Jungle Out There, Inc.*, 2005 WL 3325051 (N.D.Cal. 2005) (unpublished), Vintage Capital withheld information from the loan investor of a federal tax lien and pending suit against the borrower. The loan investor sued Vintage, who brought in Stewart Title, which had issued a Letter for its agent, New Century Title. The court let Stewart out of the lawsuit, because Vintage had not pled a violation by New Century of any closing instruction related to the status of title, obtaining a document for the lender, or the handling of its funds: "In response, Vintage and the Howers posit that the insured closing letter encompasses losses caused by New Century's failure to perform obligations it undertook in addition to those set forth in the written escrow instructions. This theory fails simply by virtue of the language of the insured closing letter. … [None of the claimed violations of instructions] implicates the three discrete categories of failure to follow instructions against which the insured closing letter provides indemnification." 2005 WL 3325051 at *31. In *ABN AMRO Mortgage Group, Inc. v. Promised Land Mortgage, LLC*, 2005 WL 705338 (S.D.Ind.) (unpublished), a lender claimed that a title agent misrepresented various facts to the lender as part of a loan package presented to the lender by a mortgage broker which included false information about the borrowers and fraudulent appraisals. In ruling on motions to dismiss, the court did not decide whether or not such claimed representations could be covered by the Letter. In *Lakeside National, LLC v. Chicago Title Ins. Co.*, 2011 WL 3420431 (D.Md.) (unpublished), the fact that the building on the insured parcel had been razed after closing but before the insured mortgage was recorded was found not to trigger coverage under the closing protection letter, because the razing did not affect the validity of the mortgage or violate a closing instruction. In *Wells Fargo Bank, N.A. v. MLD Mortgage, Inc*., 2012 WL 6139366 (D.Minn.) (unpublished), the court said "MLD construes the CPL as obligating First American to search for title defects or inform it of a title defect. But, MLD pleads no facts in the Third-Party Complaint that could lead to holding First American responsible for the actions of its agent." In *New Freedom Mortgage Corp. v. Globe Mortgage Corp.*, 281 Mich.App. 63, 761 N.W.2d 832 (Mich.App. 2008), the court ruled that the closer violated the lender's closing instructions by allowing the borrower to leave closing with significant cash rather than delivering a down payment in the amount specified by the lender. However, because that instruction did not relate to the title to the real estate or the mortgage, the court held that the insurer was not liable to the lender under the closing protection letter. The court also held that the fraud and dishonesty assurance did not apply, because that provision covered the handling of the lender's money, and any dishonesty of the title agent about money had to do with the borrower's money, not the loan money. In *James B. Nutter & Co. v. Old Republic Nat'l Title Ins. Co*., 2016 WL 5792686 (N.D.Ga. 2016) (unpublished), the Letters issued to Nutter protected against the misconduct of the title agent only to the extent that such acts related to the status of title or the validity, enforceability or priority of the mortgage. The lender had not established that there was any defect in title. The court held that the Letters were not invoked, saying: "The clear and unambiguous message of the Closing Protection Letters is that Old Republic would only cover those losses that actually affected the status of title in some way. Old Republic was only insuring against any danger that would lead the Lender to actually lose title to the property."

and clarify that the Letter applies only to closing instructions having to do with payment of money to clear title of liens and the obtaining of documents required to clear title or to obtain a valid mortgage in favor of the lender insured.

The second protection of the Letter is against the fraud or dishonesty of the title agent or approved attorney in the handling of the addressee's money or documents. The 2015 ALTA Closing Protection Letter addresses this subject as the second covered event, recited in Requirement 4(b), which protects the addressee if "Your loss is solely caused by":

> ... fraud, theft, dishonesty, or misappropriation of the Issuing Agent or Approved Attorney in handling Your Funds or documents in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation adversely affects the status of the Title to the Land or to the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land.[57]

This covered event is the fundamental reason why the Letter came into being and is still sought, because it provides protection against theft of the loan money delivered to the title agent or approved attorney.[58] Based on this covered event, the insurer is ordinarily bound to pay off a mortgage for the benefit of the addressee when the closing attorney or agent steals the payoff funds.[59]

Some courts have significantly stretched the indemnification for theft or dishonesty in the handling of "Your Funds or documents."[60] The 2014 and 2015 revisions to the Letter are clearly

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[57] As with the closing instruction covered event, the most substantive changes to the theft and dishonesty covered event described in the 2015 ALTA Closing Protection Letter result from the use of newly-defined terms. The 2011 ALTA CPL read: "2. Fraud, theft, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closing to the extent that fraud, theft, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land... ."

[58] As was stated in *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 645 So.2d 295, 297 (Ala. 1992), "'The purpose of the closing service letter is to provide indemnity against loss due to a closing attorney's defalcation or failure to follow a lender's closing instructions.' See, *Lawyers Title Ins. Corp. v. Edmar Construction Co.*, 294 A.2d 865 (D.C.App. 1972)."

[59] *Lawyers Title Ins. Corp. v. Edmar Construction Co.*, 294 A.2d 865 (D.C.App. 1972); *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993); *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co*., 634 A.2d 90 (N.J. 1993); *American Title Ins. Co. v. Burke & Herbert Bank & Trust Co*., 813 F.Supp. 423 (E.D.Va. 1993). In *Lawyers Title Ins. Corp. v. Dearborn Title Corp*., 993 F.Supp. 1159 (N.D.Ill. 1998), later decision 22 F.Supp.2d 820 (N.D.Ill. 1998), when an agent had stolen money from its escrow account, the insurer paid parties based on closing protection letters it had issued. The insurer then sought recovery from the bank at which the escrow account was located, under the Illinois Fiduciary Obligations Act, 760 I.L.C.S. 65/1, et seq. In the above decision, the court denied the bank summary judgment and remanded to the trial court.

[60] In *Bank of America, N.A. v. First American Title Ins. Co.*, 499 Mich. 74, 878 N.W.2d 816 (Mich. 2016), the Michigan Supreme Court held that the CPL covered any fraud or dishonesty of the title agents, whether or not the claimed fraud or dishonesty related to the handling of the lender's funds or documents. It distinguished *New Freedom Mortgage Corp. v. Globe Mortgage Corp.*, 281 Mich.App. 63, 761 N.W.2d 832 (Mich.App. 2008), which held that the Letter did not cover the closer's violation of the lender's closing instructions about receipt of the down payment from the

intended to nullify some of the more absurd interpretations of the Letter, which have found actions to be covered by the Letter even when they bear only the slightest connection to the actual "fraud or dishonesty" coverage. However, Requirements 4(b) of the 2015 ALTA Closing Protection Letter continues to use the "Your Funds or documents" phrase. Thus, a key change was the addition of definitions for the two key words in that phrase. The 2015 ALTA Closing Protection Letter provides these definitions, in Conditions 2(b) and (d):

> b. "Funds" means the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction.
>
> * * * *
>
> d. "You" or "Your" means:
> (i) the Addressee of this letter;
> (ii) the borrower, if the Land is improved solely by a one-to-four family residence; and
> (iii) subject to all rights and defenses relating to a claim under this letter that the Company would have against the Addressee,

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borrower, because that instruction did not relate to the title to the real estate or the mortgage. The Letter at issue in *New Freedom* had protected against "Fraud or dishonesty of the Issuing Agent **in** handling your funds or documents in connection with such closings." In *Bank of America*, the court held that the critical difference was the omission of the word "in" from the fraud or dishonesty coverage in the Letters at issue in that case. Based solely on the omission of that one word, the court held that "the fraud or dishonesty by Westminster or Patriot need not be tied to their handling of Bank of America's funds or documents." Thus, the court ruled that the bank could collect under the closing protection letters if it could prove at trial that either title agent "engaged in fraud or dishonesty in the handling of the HUD-1 settlement statements at closing," even though the settlement statements were not the bank's documents. The high court also overturned the ruling of the appeals court that the CPL was not invoked by the actions of one of the two title agents, Westminster, because that company was a passive spectator to the loan fraud. In *Fifth Third Mortgage—MI, L.L.C. v. First American Title Ins. Co*., 2015 WL 1069341 (Mich.App.) (unpublished), rev.den. 871 N.W.2d 200 (Memorandum), 2015 WL 7574211 (Nov. 24, 2015), the court held that the assurance against fraud or dishonesty in the title agent's handling of "your funds or documents" was invoked by the borrower's misrepresentations about his intent to reside at the property, income, assets and the like, because the loan closer handled the false documents, even though the closer did not make the false statements or steal closing money. The court said: "Consequently, any fraud or dishonesty by the issuing agent who handles 'your funds or documents' will give rise to liability as long as the issuing agent handles the funds or documents in 'connection with' the closing." In *Federal Deposit Ins. Corp. v. Property Transfer Services, Inc.*, 2013 WL 5535561 (S.D.Fla.) (unpublished), the court held that the title agent's carelessness or concealment of fact from the lender invoked the assurance about "dishonesty" in the handling of money. In *Primary Residential Mortgage, Inc. v. Guarantee Title Ins. Co.*, 2005 WL 2874663 (E.D.Mo. 2005) (unpublished), a lender claimed that this protection covered the alleged forgery of the HUD-1 by the closing officer. The underwriter argued that the phrase "your funds or documents" meant that a forgery on the HUD-1 was not within the scope of the Letter. The court refused to decide the issue, which was raised on a motion to dismiss. In *Federal Deposit Ins. Corp. v. First American Title Ins. Co*., 2015 WL 1906139, 611 Fed.Appx. 522 (11th Cir. (Fla.) 2015) (unpublished), The Eleventh Circuit Court of Appeals held that a Letter was invoked solely because the closer received the borrower's down payment from a third party. It concluded that the FDIC needed to prove "at least a minimal causal relationship" between the closing agent's act and the loan loss, but no more, saying: "Property Transfer's 'failure' and 'dishonesty' undoubtedly bore at least a 'minimal causal relationship' to Old Bank's 'actual loss.'"

(A) the assignee of the Insured Mortgage, provided such assignment was for value and the assignee was, at the time of the assignment, without Knowledge of facts that reveal a claim under this letter; and

(B) the warehouse lender in connection with the Insured Mortgage.

One issue these definitions may not remove is the assertion that the Letter is invoked by the borrower's failure to deliver the down payment to closing, as was found in *Federal Deposit Ins. Corp. v. First American Title Ins. Co*.[61] The definition of "Funds" is not limited to the loan money delivered by the addressee, and "You" includes the borrower if the property is improved with a one-to-four family residence.

Early on, New Jersey took the most expansive view of the fraud or dishonesty coverage in the Letter.[62] The New Jersey Commissioner of Banking and Insurance later adopted a law that states that an attorney is not the agent of the insurer, and providing the client a remedy against the insurer if he or she elects to purchase a closing protection letter.[63] A later New Jersey decision held that the issuance of a Letter to an agent gave it apparent authority to act on behalf of the insurer.[64] However, since that decision, title insurers have developed disclaimers to be signed by clients before title is ordered, which advise them that the attorney is not the agent of the insurer and that the only form of liability the insurer will assume is by the issuance of a closing protection or closing service letter. When an attorney stole money from his clients before title was ordered or the disclaimer form was given to the clients, the insurer was not the attorney's principal and thus not liable for the theft.[65]

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[61] 2015 WL 1906139, 611 Fed.Appx. 522 (11th Cir. (Fla.) 2015) (unpublished).

[62] In *First American Title Ins. Co. v. Vision Mortgage Corp., Inc.*, 689 A.2d 154, 298 N.J.Super. 138 (N.J.A.D. 1997), a New Jersey court found that the Letter also protects against loan fraud in which the attorney participated. In *Vision*, the lender accepted a loan application submitted in the name of a real person with good credit who was impersonated at closing. The attorney notarized the impersonated signature. The insurer argued that the loss was not the result of dishonesty in the handling of the documents. The court acknowledged that the impersonation alone did not cause the lender's loss, because it successfully foreclosed the mortgage and took title. Nonetheless, the court found that the attorney, by participating in the loan scam, "took money from Vision on the pretext that it was being borrowed by" the false borrower. By issuing the Letter to the attorney, the insurer "put him in the position to steal from Vision... ." 298 N.J.Super. at 143, 144; 689 A.2d at 156. *Vision Mortgage* also ratified a broad measure of loss payable under the Letter. The property was grossly overvalued. The lender had no right to a deficiency judgment against the impersonated borrower. The court approved recovery under the Letter in the amount of the principal and interest, less the price obtained by the lender on resale, saying "Vision's losses, even those related to the careless valuation of the property, fell well within the expansive coverage of the title insurance policy."

[63] N.J.S.A. 17:46B-9.

[64] *Resolution Trust Co. v. Fidelity Nat'l Title Ins. Co.*, 58 F.Supp.2d 503 (D.N.J. 1999) held that the Letter gave at least apparent authority to an attorney title agent, who represented both buyer and seller, to close a loan for the buyer's lender, and that the insurer had a duty of care as to the title agent's negligence and legal malpractice.

[65] *New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co*., 203 N.J. 208, 1 A.3d 632 (N.J. 2010).

A striking comparison to the New Jersey approach is found in *Security Union Title Ins. Co. v. Citibank (Florida), N.A.*,[66] in which a Florida appellate court refused to impose vicarious liability on the insurer for loan fraud committed by an attorney-agent. The court specifically held that the insurer "did not put Turner in a position that enabled him to commit the frauds with regard to the loans." The *Security Union* case did not involve a closing protection letter, however. The case is further discussed at §17.3.

14.3 Parties Protected By Letter

Under some earlier versions of the Letter, the only party entitled to make a demand for payment was the addressee.[67] The 1987 ALTA Letter offered protection when the addressee was "the lessee or purchaser of an interest in land or a lender secured by a mortgage… ." Under some versions of the Letter, a remote loan assignee is not a beneficiary of the Letter and may not make a claim under it.[68]

In the 2008 ALTA Letter, the protections were expanded to say that the addressee would receive coverage when "you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land… ." The only substantive change was to add loan assignees and warehouse lenders.[69]

Requirement 2 of the 2015 ALTA Closing Protection Letter conditions the Letter's coverage by stating that addressee must be "(a) a lender secured by the Insured Mortgage on the Title to the Land or (b) a purchaser or lessee of the Title to the Land." Thus, if the addressee is neither the lender nor the purchaser or lessee in the Real Estate Transaction (also a described term), the Letter is simply not invoked as to that transaction. In addition, however, Condition 2(d) of the 2015 ALTA Closing Protection Letter goes on to define "You" or "Your" as meaning:

(i) the Addressee of this letter;
(ii) the borrower, if the Land is improved solely by a one-to-four family residence; and

[66] 715 So.2d 973 (Fla.App. 1 Dist. 1998).

[67] See James Bruce Davis, *The Law of Closing Protection Letters*, 36 Tort and Ins. L.J. 845, 853 (Spring 2001).

[68] See *PennyMac Holdings, LLC v. Fidelity Nat'l Title Ins. Co.*, 423 P.3d 608 (Table), 2018 WL 3689751 (Nev.) (unpublished), concerning a Letter issued in 2007 in Nevada. The only suggestion that the Letter could be intended to run in favor of an assignee was the use of the acronym ISAOA in the addressee's name, which stands for "its successors and/or assigns."

[69] In *GMAC Mortgage, LLC v. Flick Mortgage Investors, Inc.*, 2010 WL 2132184 (W.D.N.C.) (unpublished), Flick Mortgage made a claim against Chicago Title under a Letter after GMAC demanded that it buy back a loan but before it did so. The court rejected the insurer's argument that Flick's action was premature or moot. In a later decision, the court allowed GMAC to intervene in Flick's lawsuit, despite the insurer's protest that the assignee was not a beneficiary of the Letter but just a creditor of the originator. The court did not rule, however, that GMAC was a beneficiary of the Letter. *GMAC Mortgage, LLC v. Flick Mortgage Investors, Inc.*, 2011 WL 841409 (W.D.N.C.) (unpublished).

(iii) subject to all rights and defenses relating to a claim under this letter that the Company would have against the Addressee,

(A) the assignee of the Insured Mortgage, provided such assignment was for value and the assignee was, at the time of the assignment, without Knowledge of facts that reveal a claim under this letter; and

(B) the warehouse lender in connection with the Insured Mortgage.

As a result, *if* the Letter is invoked because the addressee was the purchaser, lender or lessee in the Real Estate Transaction, the Letter continues in effect for the benefit of the addressee and the additional parties recited in Condition 2(d), which are the borrower and also the loan assignee and warehouse lender "in connection with the Insured Mortgage."[70]

Neither Requirement 2 nor Condition 2(d) of the 2015 ALTA Closing Protection Letter identifies the former holder of the Indebtedness as a party entitled to make a claim. In addition, to reinforce that silence, Condition 7 was added in 2014 to say that a lender claimant must have held the debt both when the claim was made and when it is paid:

> If You are not a purchaser, borrower, or lessee, You must hold the Indebtedness both at the time that the Company is notified of a claim pursuant to this letter and at the time that payment is made to make a claim for indemnification under this letter.

Condition 7 was modified in 2015 to read as follows:

> The Company will be liable only to the holder of the Indebtedness at the time that payment is made. This Section 7 does not apply to a purchaser, borrower, or lessee.

The only substantive change from 2014 to the 2015 version of Condition 7 is the elimination of the requirement that the same claimant own the loan both when the claim is made and when it is paid. The elimination of that requirement was apparently done to acknowledge that, if the loan is sold after a claim is made, that loan sale does not cut off the assignee's right to collect under that claim. The 2015 ALTA Closing Protection Letter clearly states that all successor owners of the loan become beneficiaries of the Letter. Thus, if a claim is made by the then-owner of the debt, and then the loan is sold, Condition 7 as rewritten in 2015 does not bar the assignee from being paid on the claim already submitted.

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[70] The loan assignee and warehouse lender additions appear to have come about because of two court decisions. In *First Financial Savings & Loan Ass'n. v. Title Ins. Co. of Minnesota*, 557 F.Supp. 654 (N.D.Ga. 1982), a loan assignee claimed to be a third party beneficiary of a Letter. The court, on summary judgment, did not reach the question, but held the insurer not liable because there was no breach of a duty under the Letter. In *National Mortgage Warehouse v. Bankers First Mortgage Co.*, 190 F.Supp.2d 774 (D.Md. 2002), the court wrestled with but did not decide the question of whether or not the Letter benefits a warehouse lender that is not the addressee of the Letter. The court appeared inclined to rule that the warehouse lender was not a beneficiary of the Letter.

One issue that Condition 7 clarifies is that the loan originator cannot make a claim under a Letter after it assigns the loan.[71] However, Condition 7 is most clearly aimed at the Federal Deposit Insurance Corporation, which has repeatedly asserted that it retained the right to make a claim under a Letter even after assigning the loan and all attendant agreements and insurance policies, including the title insurance policy, to another institution. In construing earlier versions of the Letter, some courts accepted the FDIC's argument that a claim under the Letter can be severed from the policy to which it is appended, while others have rejected that argument, or have found that the loan assignment contract did not actually state that the FDIC retained such a claim.[72] These claims have always been fraught with peril for the insurer because, in some such situations, the assignee lender has asserted a claim under the policy while the FDIC has asserted a claim under the Letter, as if they

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[71] In *First American Title Ins. Co. v. Citizens Bank*, 466 S.W.3d 776 (Tenn.App.-Knoxville 2015), app.den. (June 15, 2015), the originating lender assigned the loan before making a claim under the Letter. The court examined the loan assignment agreement, which said that the assignee received the note, mortgage, all insurance policies and "all other documentation and information collected by Seller in connection with the Mortgage Loan." The court held that the Letter was, without dispute, an "other document" included in the assignment. Contrast this ruling with the cases discussed in this section about assignments from the FDIC to other lenders, in which the FDIC claims to retain and carve out the CPL and further asserts that the insurer has no "standing" to even debate the terms of the assignment agreement. In *Bank of America, N.A. v. Fidelity Nat'l Title Ins. Co*., 892 N.W.2d 467, 316 Mich.App. 480 (Mich.App. 2016), the court held that Bank of America could pursue claims on the Letters at issue because, although it had sold the loans, it had also bought them back. The court made the interesting ruling that the Letter travels with the loan, whether or not there is a formal assignment of a right to make a claim under it. This reasoning actually undermines the FDIC's usual position that it can assign the loan but retain a claim under the Letter. The *Bank of America* decision was on appeal to the Michigan Supreme Court as of March 1, 2018, with ALTA having been given leave to file an amicus brief.

[72] The first such decision was *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 795 F.Supp.2d 624 (E.D.Mich. 2011), aff'd 750 F.3d 573 (6th Cir. (Mich.) 2014), in which the FDIC sold the loan to JP Morgan Chase. The lender collected under the policy and the court permitted the FDIC to collect the balance of the loan amount under its claim under the Letter. The court accepted the FDIC's argument that, because the policy and the Letter "protect a lender against different risks," they are "distinct" and thus the "documents" are not "inseparable." It ignored the fact that no separate consideration was paid for the Letter, and therefore it fails as a contractual obligation if severed from the policy, asserting that the consideration for the Letter was the inducement to place a title order with the insurer's agent. [This reasoning actually proves the insurer's point, that the premium is the only consideration and thus the Letter is incidental to the policy. See *Fleet Mortgage Corp. v. Lynts*, 885 F.Supp. 1187 (E.D.Wis. 1995), which so held.] First American asserted that the loan assignment contract did not say that the FDIC retained the right to make a claim under the Letter, because there was no carve-out from the assignment of the loan and all related documents. The court said that the insurer had no standing to seek an interpretation of the loan assignment agreement, because it was not a party to that contract. In *Federal Deposit Ins. Corp. v. Attorneys' Title Ins. Fund, Inc.*, 2014 WL 4384270 (S.D.Fla.) (unpublished), the court rejected the insurer's argument that a Letter is ancillary to a policy and lacks separate consideration, parroting the reasoning of *JPMorgan*. In *Federal Deposit Ins. Corp. v. Property Transfer Services, Inc.*, 2013 WL 5535561 (S.D.Fla.) (unpublished), the court followed *JP Morgan* in holding that the insurer had no standing to debate the severing of the Letter claim from the policy, and went on to hold that the claim was retained although not specifically recited. However, in *Federal Deposit Ins. Corp. v. Floridian Title Group Inc*., 2013 WL 5346435 (S.D.Fla.) (unpublished), the court disagreed with *Property Transfer* on both points, holding that the insurer had standing to seek an interpretation about whether or not the FDIC retained the claim under the Letter and ruling that the FDIC had not retained that claim. The language of the loan assignment contract was the same in both *Property Transfer* and *Floridian Title*. The Eleventh Circuit Court of Appeals affirmed *Property Transfer* in *Federal Deposit Ins. Corp. v. First American Title Ins. Co*., 2015 WL 1906139, 611 Fed.Appx. 522 (11th Cir. (Fla.) 2015) (unpublished), and rejected the reasoning of *Floridian Title*.

are separate and distinct.[73] Condition 7 ends that claim-splitting chicanery, by clearly stating that *any* claimant under the 2015 ALTA Closing Protection Letter other than a purchaser, borrower or lessee must be the current holder of the Indebtedness.

The 2008, 2011, 2014 and 2015 versions of the ALTA Closing Protection Letter state that the borrower is protected by a Letter issued to his or her lender.[74] If the Letter does not contain such a specific assurance, however, a borrower is not protected by a Letter issued to the borrower's lender.[75] A Virginia court held that a Letter that ran in favor of an owner as "purchaser" did not protect the owner at a refinance closing.[76] When no letter was issued, the borrower had no protection under the policy from the lender's own failure to fund the mortgage loan.[77] In the companion cases of *Clients' Security Fund* and *Sears Mortgage*,[78] the New Jersey Supreme Court found the property purchaser and refinancing owner, respectively, to be beneficiaries of the Letter. The court found that a closing attorney hired by the owner/borrower was the agent of the insurer. It also found that the insurer has a duty to protect a purchaser against defalcation of the closing attorney as a matter of good faith and fair dealing. The *Clients' Security Fund* and *Sears Mortgage Corp.* decisions are largely the result of the court's scrutiny of New Jersey closing practice. The court seemed especially struck by the dichotomy between practices in the northern and southern parts of the state. In northern New Jersey,

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[73] In *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 795 F.Supp.2d 624 (E.D.Mich. 2011), the court held that the FDIC could sell the loan but keep its claim under a Letter, because the "additional assurances in a closing protection letter are separate and distinct from the coverage afforded under a title policy." The court admitted that no separate consideration had been paid for the Letter. The Sixth Circuit affirmed at 750 F.3d 573 (6th Cir. (Mich.) 2014).

[74] Condition 2(d) of the 2015 ALTA Closing Protection Letter defines "You" or "Your" to include "... the borrower if the Land is solely improved by a one-to-four family residence... ." In *Johnson v. Schultz*, 364 N.C. 90, 691 S.E.2d 701 (2010), the court held that the buyer ordinarily has more control over the selection of a closing attorney, and therefore must suffer the loss when he or she steals the purchase money. It based that ruling in part on a treatise that said that a borrower can obtain a closing protection letter.

[75] Thus, when an approved attorney properly closed the loan for which the Letter had been issued, but defalcated with the proceeds of that loan, the borrowers were not "inferential" beneficiaries of the Letter. *Nappen v. Blanchard*, 210 N.J. Super. 655, 510 A. 2d 324 (1986). Documents naming the insurer as "approved attorney" and "closing attorney" did not make it counsel to the borrowers. *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660 (Va. 1994).

[76] *Cauthorne v. American Home Mortgage Corp*., 2008 WL 4316123 (E.D.Va.) (unpublished). After noting that the letter does benefit a purchaser of real estate, the court said: "Although this Court finds it unusual, if not illogical and inequitable, that the CPL does not provide protection to the borrower in a refinance scenario, it appears that such is mandated by the language of the CPL."

[77] *Gerrold v. Penn Title Ins. Co.*, 637 A.2d 1293 (N.J.Super.A.D. 1994), distinguishing *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co.*, 634 A.2d 90 (N.J. 1993).

[78] *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co*., 634 A.2d 90 (N.J. 1993); Sears Mortgage Corp. v. Rose, 634 A.2d 74 (N.J. 1993). Those decisions relied in part on the New York case of *Meyerson v. Lawyers Title Ins. Corp*., 39 A.D.2d 190, 333 N.Y.S.2d 33 (N.Y.A.D. 1 Dept. 1972), aff'd. 33 N.Y.2d 704, 349 N.Y.S.2d 675, 304 N.E.2d 371 (1973), in which the insurer referred the purchaser to an approved attorney in order to get a title policy. The approved attorney prepared a false title commitment on commitment forms provided him by the insurer. The court found that the approved attorney was the insurer's agent, making the insurer liable for the approved attorney's fraud.

attorneys represent the insurer, lender and purchaser at closing, doing all title clearance and payoff work. In southern New Jersey, title agents clear title and disburse funds, with the attorney representing only the buyer. The court decided that the cases before it were examples of the northern New Jersey system, and thus the attorneys were the insurers' agents.[79] New Jersey has since affirmed that the issuer is not liable under the Letter to the seller or a party merely paid from, rather than a party to, the transaction.[80]

14.4 Conditions And Exclusions

The 2015 ALTA Closing Protection Letter contains 14 Conditions and Exclusions. The Exclusions are found in paragraph 3 of the Conditions and Exclusions section of the 2015 ALTA Closing Protection Letter.

14.4.1 Conditions

Condition 1 states that acceptance occurs when the lender transmits the Funds or documents to the agent. This provision is one of several that make it clear, under the 2015 ALTA Closing Protection Letter, that the Letter must be issued to the lender before closing in order to be invoked. The 2015 ALTA Closing Protection Letter begins with the statement that the insurer has issued the Letter "in consideration of your acceptance of this letter." The indemnification statement of the Letter goes on to say that it covers the "actual loss of Funds incurred by You in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney *on or after the date of this letter*." Further, Requirement 1 states that liability can exist only if "the Company issues or is contractually obligated to issue a Policy for Your protection in connection with the closing of the Real Estate Transaction." All of these terms consistently state that the lender may not order the Letter after closing and then make a claim on it. This eliminates the issue created by a decision that found that a lender was not precluded from making claims on Letters that it only asked

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[79] *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993). See also *Clients' Sec. Fund of the Bar of New Jersey v. Security Title & Guar. Co*., 634 A.2d 90 (N.J. 1993).

[80] In *Karpontinis v. First American Title Ins. Co*., 2013 N.J. Super. Unpub. LEXIS 641, 2013 WL 1150722 (N.J.Super.A.D. 2013) (unpublished), rev.den. 214 N.J. 119, 67 A.3d 1193 (Table), the court refused to extend the Closing Service Letter to benefit a seller, because the seller is neither an insured nor an addressee of the CSL. In *GE Capital Mortgage Services, Inc. v. Privetera*, 346 N.J. Super. 424, 788 A.2d 324 (2002), a lender whose mortgage loan was not paid off because the closer stole the money was found to have no protection under a closing protection letter issued to the buyer's lender. The property had been sold under a bankruptcy court order, and the proceeds were placed in an escrow held by an attorney, Mr. Privetera, who absconded with the money. The court ruled that the Letter issued to New Jersey Mortgage did not protect the plaintiff, GE Capital, whose lien was to be paid from the proceeds of sale: "[T]he closing protection letter [does not] provide a basis for concluding that plaintiff was a third-party beneficiary … The closing protection letter protects N.J. Mortgage against Privetera's conduct. This is not the protection alluded to in either *Sears* or *Client's Security* that required payment of the outstanding first lien. … Plaintiff's 'benefit' is purely incidental to that transaction." It also found that GE Capital had the ability to protect itself against Mr. Privetera, further distinguishing the earlier cases: "Unlike the parties in *Sears* and *Clients' Security,* [GE Capital] was in the best position to protect itself. It was a party to the bankruptcy proceeding …, and had the ability to control the escrow created by the sale proceeds by urging that the funds be paid into the bankruptcy court or to another appropriate escrow agent. Failing to avail itself of these options, plaintiff can not now seek recompense from the title company."

to have issued after the closings had taken place and the lender had detected a pattern of loan fraud.[81]

Condition 2 of the 2015 ALTA Closing Protection Letter defines a number of terms used in the Letter. Those definitions are discussed in various sections of this chapter. The Letter says that the terms "Indebtedness," "Insured Mortgage," "Knowledge" or "Known," "Land," and "Title" have the definitions found in the 2006 ALTA Loan Policy. The term "Real Estate Transaction" is capitalized in the 2015 ALTA Closing Protection Letter and is used repeatedly. It is not a term defined in Condition 2, but Real Estate Transaction is described at the top of the letter by the names of the seller and buyer, the street address and the loan number.

Paragraph 3 of the Conditions and Exclusions is the Exclusions, which are discussed at §14.4.2.

Condition 4 of the 2015 ALTA Closing Protection Letter states another predicate to coverage. It says that, "[i]f the closing is to be conducted by an Approved Attorney, a Commitment must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney." (The Letter also now defines the term Commitment). An approved attorney is not a title insurance agent. Delivery of a title insurance commitment to the addressee by the insurer or its agent establishes that there is a contractual relationship between the addressee and the insurer, which is the essential consideration for the Letter.

Condition 5 of the 2015 ALTA Closing Protection Letter contains a subrogation clause that is very similar to that found in the title insurance policy. It says that the insurer's "liability for indemnification shall be reduced to the extent that You have impaired the value of this right of subrogation." This type of provision in a Letter has been enforced.[82] See §2.3.3 for a complete discussion of prejudice caused by tardy tender, including the loss of subrogation rights.

Condition 6 of the 2015 ALTA Closing Protection Letter contains perhaps its most important provision, and one not found in versions of the Letter issued before 2011—a limitation on the amount of the loss payable. The Letter states:

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[81] In *Fifth Third Mortgage-MI, L.L.C. v. Hance*, 2011 WL 4501573 (Mich.App.) (unpublished), the court said that "the 'to be' clause only operates to further identify the property covered by the CPL." Also, it construed the Letter against First American as drafter. There was a dissenting opinion that accepted First American's interpretation of the Letter's syntax. The lender was not required to establish that it relied on the Letter in agreeing to close the loan with the title company, which cuts against the notion from *Sears Mortgage* and other cases that the insurer puts the title company in the position of being able to harm the lender by issuing a Letter on which the lender relies.

[82] *U.S. Bank, N.A. v. First American Title Ins. Co*., 2012 WL 1080876 (M.D.Fla.) (unpublished) (as to claims under both policy and closing protection letter containing a late notice prejudice statement, lender's tender one week before summary judgment was entered prevented insurer from asserting equitable subrogation, which would have reduced loss payable to lender; prejudice equal to amount of paid-off loan); *Retained Realty, Inc. v. Michigan Pioneer Title Co*., 2012 WL 1034638, 472 Fed.Appx. 361 (6th Cir. (Mich.)) (unpublished) (trial court ruling that lender forfeited coverage under closing protection letter by submitting claim too late reversed so trial court could take testimony about reasonableness of insured's "mitigation efforts"); *Countrywide Home Loans, Inc. v. First American Title Ins. Co*., 2012 WL 516824 (Cal.App. 1 Dist.) (unpublished) (lender that gave notice after deed of trust was wiped out by trustee's sale voided coverage). In *Fifth Third Mortgage—MI, L.L.C. v. First American Title Ins. Co.*, 2015 WL 1069341 (Mich.App.) (unpublished), rev.den. 871 N.W.2d 200 (Memorandum), 2015 WL 7574211 (Nov. 24, 2015), the court held that the lender's voluntary release of borrowers' personal liability impaired the insurer's subrogation rights and would reduce the lender's recovery under the Letters accordingly.

> The Company's liability for loss under this letter shall not exceed the least of:
> a. the amount of Your Funds;
> b. the Company's liability under the Policy at the time written notice of a claim is made under this letter;
> c. the value of the lien of the Insured Mortgage; or
> d. the value of the Title insured or to be insured under the Policy at the time written notice of a claim is made under this letter.

The importance of such a provision was highlighted in *JPMorgan Chase Bank, N.A. v. First American Title Ins. Co.*,[83] in which the court held that the FDIC could sell the loan but keep its claim under the Letter, and was entitled to collect from the insurer the difference between what the insurer had paid to buy the parcel for the insured, JPMorgan Chase, and policy limits of $5 million. The real estate was worth about $2 million. The insurer thus paid about $3 million extra because the lender accepted a fraudulent appraisal. Loss under the policy is always limited to the actual value of the real estate. Since that decision, the FDIC has argued the *JP Morgan* holding repeatedly, in a number of jurisdictions, and some courts have bought its "book value" measure of "loss" for closing protection letter claims.[84] However, under the new Condition 6, the maximum liability of an insurer in a

[83] 795 F.Supp.2d 624 (E.D.Mich. 2011).

[84] In *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 750 F.3d 573 (6th Cir. (Mich.) 2014), the title insurer had already paid several million dollars to deliver good title to the insured property to the loan purchaser-insured. Then the FDIC sued under a Letter it supposedly retained after selling the loan. The court affirmed its recovery of the difference between the loan amount and the "book value" of the loan (which the court never defined but which was apparently the true value of the real estate). It did so based solely on the FDIC's own internal spreadsheet, which was admitted as exhibit PX7. The court said "PX7 constitutes adequate proof of the FDIC's 'actual loss' based on Patriot's fraud. The parties do not dispute that WaMu wired $4,543,593.07 to Patriot in connection with the Truong transaction or that Patriot's owner, Saylor, diverted those funds for his own benefit. PX7 shows that at the time the FDIC took WaMu into receivership, the 'book value' of the loan from the Truong was $2,677,500. After the FDIC received 'book value' for the loan from Chase under the P & A Agreement, the FDIC was still $1,866,093.07 short of the amount Saylor fraudulently misappropriated. The district court therefore did not err when it found that 'Patriot Title's fraud was the most direct, natural, and foreseeable cause of WaMu's loss,' and that the jury's verdict was based on more than speculation." In *Federal Deposit Ins. Corp. v. Property Transfer Services, Inc*., 2013 WL 5535561 (S.D.Fla.) (unpublished), the court followed the same method. It said that the FDIC "need only establish a reasonable basis for calculating damages and it has done so." It provided two methods for calculating loss: "(1) the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(1), method of principal losses and interest minus any funds its received through the foreclosure proceeding; or (2) the net realized after foreclosure and sale of the property securing the loan. In either formula, the FDIC asks the Court to consider the loss at the time the properties were sold. Calculating the loss applying either formula, the FDIC contends, results in the same loss amount." The court said that formula 1 was the one followed in *JP Morgan* and formula 2 matched that used in *First American Title Ins. Co. v. Vision Mortgage Corp*., 298 N.J.Super. 138, 689 A.2d 154 (N.J.Super.Ct.App.Div.1997), in which the New Jersey court found the loss equaled the outstanding loan balance less the proceeds on the sale of the property. The *Property Transfer* judge said "the net sale proceeds provides more certainty and a more reasonable calculation of damages where, as here, the FDIC, as receiver, transferred the Loans through a P & A Agreement with New Bank at book value." In *Federal Deposit Ins. Corp. v. Attorneys' Title Ins. Fund, Inc.*, 2014 WL 4384270 (S.D.Fla.) (unpublished), the court also measured loss using the "book value" method approved in *JPMorgan*. It gave the FDIC the difference between the loan principal amount and "book value," which the court described as the amount "the FDIC

JPMorgan situation would be the value of the insured real estate.

Also, in cases decided under earlier versions of the Letter that did not contain Condition 6, courts came to different conclusions about whether or not a lender could establish a loss payable under a Letter after having successfully foreclosed on the property and recovered the value of the loan collateral, or after having been paid the value of the property by the insurer.[85] Courts have also questioned whether or not liability under the Letter automatically terminates on payment of policy limits, or when the title insurer has cleared or tendered title to the insured.[86] Also, there was some

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recovered on the loans when it sold them to JP Morgan Chase in 2008." This mysterious "book value," the court said, "comes from Chase's loan files, which show the value of the loan as of the date of sale and the book value of each loan." Rather than explain and justify "book value," the court seemingly mocked ATIF for having "posed a litany of rhetorical questions about the basis of the amounts including how the book value was calculated and what fees or expenses were applied to unpaid principal balance." Then it shifted the burden of proof to ATIF, saying that, given "the undisputed record evidence," ATIF had not met *its* burden to show that there was a genuine issue of fact for trial. The simple but inconvenient explanation for "book value" is that it represents the actual fair market value of the real estate that served as security for the loan, as of the date of the loan sale. The difference between "book value" and the loan amount is thus made up of two factors: the excess amount lent based on an inflated appraisal and the later decline in the value of the property due to the market collapse that these lenders caused by their horrendous loan underwriting. Moreover, in *Attorneys' Title*, the court gave the FDIC a significant double dip by holding that it was entitled to prejudgment interest from the dates of the loans. The granting of prejudgment interest on the net loan amount completes the fantasy that the title insurer, by issuing a Letter, becomes a complete guarantor of the loan. In *Regions Bank v. Commonwealth Land Title Ins. Co.*, 2016 WL 3753146 (N.D.Ala.) (unpublished), the title insurer obtained an equitable lien for the lender and then paid it the fair market value of the property, extinguishing its policy liability. The lender then demanded nearly policy limits, based on the closing protection letter. The court also refused to grant judgment based on the fact that the insurer had already paid the lender the value of the real estate, because Florida courts have accepted the FDIC "book value" theory of loss. Condition 6 of the 2015 ALTA Closing Protection Letter supplies the statement that the *Regions Bank* court found lacking.

[85] No matter what closing instruction the closer might violate, or what fraud or dishonesty he or she may be guilty of in relation to the loan closing, the lender has already contracted to lend money to be secured by a lien on an identified parcel of real estate before the closing takes place. If it lends more than the property is worth, that decision is based on an appraisal or other valuation suggesting that the property is worth more than its true value. A recovery against the insurer under a Letter in an amount beyond the value of the real estate transforms the Letter into value insurance, or appraiser fraud insurance. In *Fifth Third Mortgage Co. v. Kaufman*, 2016 WL 2851554 (N.D.Ill. 2016) (unpublished), the court held that a borrower's representation in a loan application that he or she would live at the property triggered the closing instruction coverage of a closing protection letter, if the closer is proven to have known that statement to be false. The lender's closing instructions told the closer to suspend the closing if "the closing agent has knowledge that the borrower does not intend to occupy the property." The court said that this instruction invoked the Letter because the residency statement somehow had to do with "the collection and payment of funds due" the lender. In *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 795 F.Supp.2d 624 (E.D.Mich. 2011), the FDIC was permitted to make a claim under a closing protection letter even after selling the loan, and after the title insurer paid several million dollars to deliver good title to the insured property to the loan purchaser-insured. The court said "there is no risk of double recovery because First American's aggregate liability" under the policy and Letter would still be less than the loan money delivered to the title agent. It said the amount of the FDIC's loss would equal the loss suffered by the FDIC under some formula to be determined by the court, but was not as FDIC had posited simply the difference between the original loan amount and the book value of the loan that FDIC had set.

[86] In *American Title Ins. Co. v. Variable Annuity Life Ins. Co.*, 1996 WL 54431 (Tex.App.-Houston (14 Dist.)) (unpublished), a payoff check sent by the title agency was returned NSF. The insurer tendered the loan balance to the lender. The old lender foreclosed and named Variable, the holder of the Letter, which demanded that the insurer defend

uncertainty as to whether or not the lender's full credit bid at foreclosure sale barred recovery under the Letter.[87] Condition 6 resolves all of those issues, by eliminating any overlapping or double recovery in excess of the loan or property value. The 2015 ALTA Closing Protection Letter even goes the ALTA policies one better, by specifying that, if loss is based on the value of the real estate, that valuation is made as of the date the claim is made.

Condition 7 of the 2015 ALTA Closing Protection Letter says that "[t]he Company will be liable only to the holder of the Indebtedness at the time that payment is made." That provision is fully discussed in §14.3.

The intentional dovetailing of policy liability with Letter indemnification liability is further reinforced by Condition 8 of the 2015 ALTA Closing Protection Letter, which states that:

> Payment to You or to the owner of the Indebtedness under the Policy or Policies or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to the Conditions of the Policy.

Condition 10 of the 2006 ALTA policies states that a payment under the policy reduces the policy amount. Thus, between Conditions 6 and 8, the 2015 ALTA Closing Protection Letter states emphatically that the combined liability under the policy and Letter is no more than the policy amount, and any payment under either instrument reduces or extinguishes the liability

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it. The insurer refused, and the lender settled with the plaintiff. The court found the insurer liable for the settlement amount because Variable's exposure was caused "either through a breach of the insured closing letter or, derivatively, through Summit's defalcation."

[87] In *New Freedom Mortgage Corp. v. Globe Mortgage Corp*., 281 Mich.App. 63, 761 N.W.2d 832 (Mich.App. 2008), the loan assignee made a full credit bid at its foreclosure sale and then required the original lender to buy back the loans. The lender was found not to be entitled to make a demand under the Letter based on the fact that the property was worth less than the debt. Rather, it was bound by the full credit bid made by the assignee. The court reasoned that "[a]lthough [the addressee] did not actually receive the payments at the foreclosure sales, it assigned both mortgages to IFC for valuable consideration. Therefore, it has already received compensation for the loans." In *Bank of America, N.A. v. First American Title Ins. Co*., 499 Mich. 74, 878 N.W.2d 816 (Mich. 2016), after the trial court used the full credit bid holding of *New Freedom* and Michigan's anti-deficiency statute to dismiss the lender's action on one of two CPLs at issue in the case, the Michigan Supreme Court reversed the trial court ruling and *New Freedom*. It said that, if the anti-deficiency law and the full credit bid barred recovery under the Letter, that rule "would impinge on the parties' ability to contract as they see fit and would nullify the protections for which Bank of America contracted." It held that the anti-deficiency rule is limited to preventing the lender from pursuing the borrower for the debt after it makes a full credit bid. In *Bank of America, N.A. v. Fidelity Nat'l Title Ins. Co*., 892 N.W.2d 467, 316 Mich.App. 480 (Mich.App. 2016), the court reversed several trial court decisions in favor of the insurer based on *New Freedom* and the full credit bid rule. The appeal of that decision has been accepted by the Michigan Supreme Court and is pending as of March 1, 2018, with ALTA having been given leave to file an *amicus* brief. In *Capital Mortgage Associates, LLC v. Hulton*, 2009 WL 567057 (Conn.Super.) (unpublished), reh.den. 2009 WL 3284241 (Conn.Super. Sept. 8, 2009), the court rejected the insurer's defense that the lender had accepted a deed in lieu of foreclosure from its borrower, which would bar it from suing the borrower on the note, akin to the full credit bid rule. However, this ruling is dicta. The court ruled that the letter was never activated, because the insurer did not issue a policy to the lender.

under the other.[88] There can be no double recovery by, for example, the splitting of the loan and policy from the Letter, as the FDIC did in the *JPMorgan* case. The loss payable under the Letter is fully discussed at §14.6.

Condition 9 of the 2015 ALTA Closing Protection Letter contains the statement that the issuance of the Letter does not create an agency between the insurer and the title agent or approved attorney for escrow and closing services or acts, and that the Letter does not indemnify against escrow acts or services performed by the title agent other than in the closing of the Real Estate Transaction. The fact that the Letter does not create an agency relationship is fully discussed at §14.1.

Condition 10 of the 2015 ALTA Closing Protection Letter requires prompt notice of a claim, stating that:

> In no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within one year from the date of the transmittal of Funds. The condition that the Company must be provided with written notice under this Section 10 shall not be excused by lack of prejudice to the Company.

Some earlier versions of the Letter contained similar notice deadlines, which have been found to be enforceable.[89] The 2015 ALTA Closing Protection Letter provides two marked improvements on

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[88] In *Regions Bank v. Commonwealth Land Title Ins. Co.*, 2016 WL 3753146 (N.D.Ala.) (unpublished), the court construed Condition C of an earlier form of the CPL, which said in part that "liability hereunder as to any particular loan transaction shall be coextensive with liability under the policy issued to [Regions] in connection with such transaction. Payment in accordance with the terms of this letter shall reduce by the same amount the liability under such policy and payment under such policy shall reduce by the same amount of Commonwealth['s] liability under the terms of this letter." The title insurer obtained an equitable lien for the lender and then paid it the fair market value of the property, extinguishing its policy liability. The lender then demanded nearly policy limits, based on the closing protection letter. Commonwealth asserted that Condition C negated any liability under the CPL, because the entire policy liability had been paid. The court disagreed, stating that "Another reasonable interpretation of the statement that liability under the CPL shall be coextensive with liability under the Title Policy is that, as clarified by the next sentence in Paragraph C, the amount of Commonwealth's potential liability under the Title Policy for any particular loan transaction is reduced by any amount Commonwealth pays to Regions under the CPL in connection with that transaction, and vice versa." Because there was more than one interpretation of the language, the court refused to grant summary judgment in the insurer's favor. Conditions 6 and 8 of the 2015 ALTA Closing Protection Letter should avoid the *Regions Bank* result. In *Federal Deposit Ins. Corp. v. Fidelity Nat'l Title Ins. Co*., 2017 WL 24872 (E.D.Mich.) (unpublished), recons.den. January 23, 2017 at 2017 WL 282210, the court rejected the insurer's argument based on this Condition that all liability under the title policies was extinguished by the release of the mortgages, and that there could be no residual liability under the CPLs after the policies were extinguished, based solely on the principle adopted by the Michigan courts that the policy and Letter are "separate contracts."

[89] Several courts have found that, when a claim was made under a Letter having a one-year bar date, no loss was payable when the insured submitted the notice after the deadline. See *National Mortgage Warehouse v. Bankers First Mortgage Co*., 190 F.Supp.2d 774 (D.Md. 2002); *Federal Agricultural Mortg. Corp. v. It's a Jungle Out There, Inc*., 2005 WL 3325051 (N.D.Cal. 2005) (unpublished). Similarly, in *Fifth Third Mortgage Co. v. Lamey*, 2013 WL 1976042 (D.Minn.) (unpublished), a Minnesota court ruled that the one-year claim bar provision is not automatic, and that the insurer must prove that it was prejudiced by the tardiness of notice given after the time had expired. Florida has produced a series of cases on the issue. In *Federal Deposit Ins. Corp. v. Stewart Title Guar. Co*., 2013 WL 1891307 (S.D.Fla.)

earlier provisions. First, it creates a bright line period of one year from the date on which the loan money was transmitted. This avoids the argument made by the FDIC and others that there should be equitable tolling of the time period until the claimant finally figured out that some horror had occurred at the loan closing. Second, the provision clearly states that the insurer is excused from

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(unpublished), however, in which the Letter had a 90-day notice limitation, the court ruled that the claims on the Letters were not tardy because the FDIC learned of facts suggesting that the title agent was complicit in loan fraud less than 90 days before the claim was submitted. However, it said that coverage *would* be lost if the insurer proved that it was harmed by the fact that the FDIC took two years after the discovery of the loan fraud to investigate the facts and uncover the alleged complicity of the title agent in the fraud. In *Federal Deposit Ins. Corp. v. Floridian Title Group Inc*., 2013 WL 5346435 (S.D.Fla.) (unpublished), the Letter said that the insurer "shall not be liable hereunder unless notice of loss in writing is received by the company within ninety (90) days from the date of discovery of such loss." The court again rejected the FDIC's argument that a prejudice clause should be implied in the time limit provision, although the court said that the "better reading" of the clause had a prejudice element: that it "bars liability absent notice of loss within 90 days of its discovery; requires prompt notice within those 90 days; and reduces liability to the extent that the notice is not prompt and causes prejudice." In *Federal Deposit Ins. Corp. v. Property Transfer Services, Inc*., 2013 WL 5535561 (S.D.Fla.) (unpublished), the Letter contained the same 90-day notice provision. Based on *Floridian Title*, the court held that the 90 days began to run when the FDIC obtained knowledge of the facts that triggered the Letter's assurances, and notice had been provided within that time. In *Federal Deposit Ins. Corp. v. Attorneys' Title Ins. Fund, Inc*., 2014 WL 4384270 (S.D.Fla.) (unpublished), the court barred claims under some of the Letters that were the subject of the suit because the FDIC had not given notice to the insurer within 90 days of "the date of discovery of such loss," as mandated by the Letters. It applied the ruling in *Property Transfer* that the clock begins running when the lender learns the facts that show that it has suffered a loss or that the agent did something that triggers the assurance of the Letter. Because *Property Transfer* had called the time limit a "bright line," the FDIC could not be saved from tardy notice by arguing a lack of prejudice. However, in the appeal of the *Property Transfer* decision, *Federal Deposit Ins. Corp. v. First American Title Ins. Co*., 2015 WL 1906139, 611 Fed.Appx. 522 (11th Cir. (Fla.) 2015) (unpublished), the Eleventh Circuit found that the FDIC had given timely notice. Although the FDIC submitted the claim three years after the properties were foreclosed, it said the notice was sent within 90 days of discovery of the facts that would trigger CPL coverage. The court said the key evidence was the testimony of the FDIC witness, who said that the fact that the borrower did not deliver the down payments was not discernible from the bank's records, and was learned from the closing agent's file. In *Regions Bank v. Stewart Title Guar. Co*., 2015 WL 433486 (D.S.C.) (unpublished), the court held that the lender's failure to submit a claim within 90 days of discovery of the problem barred its recovery under the Letter. In *Federal Deposit Ins. Corp. v. Chicago Title Ins. Co*., 157 F.Supp.3d 1331 (S.D.Fla. 2015), the court held that the FDIC's failure to make a claim within 90 days of its discovery of the facts on which the claim was based meant that the claim was barred. In *JP Morgan Chase Bank v. Old Republic Nat'l Title Ins. Co*., 2015 WL 670871 (Conn.Super.) (unpublished), the court held that the lender had raised a question of fact as to whether or not there was an equitable tolling of a standard-form provision stating that a claim must be made within 90 days of discovery of the theft, with an absolute limit of one year from closing. In *Federal Deposit Ins. Corp. v. Fidelity Nat'l Title Ins. Co*., 2017 WL 2734092 (S.D.Fla.) (unpublished), a Florida court ruled that the FDIC submitted claims on two closing protection letters more than 90 days after it discovered the claimed losses, even using the liberal "delayed discovery" rule adopted by that court for the FDIC's benefit, barring its lawsuit on those letters. The court relied on the holdings in *Federal Deposit Ins. Corp. v. Attorneys' Title Ins. Fund, Inc*., 2014 WL 4384270 (S.D.Fla.) (unpublished). In Federal Deposit Ins. Corp. v. Fidelity Nat'l Title Ins. Co., 2017 WL 24872 (E.D.Mich.) (unpublished), recons.den. January 23, 2017 at 2017 WL 282210, the court excused the FDIC's seven-year delay in bringing suit under the relaxed standard that court uses in deciding when the agency "discovered" the alleged violation of the Letter. In *Bank of America, N.A. v. Fidelity Nat'l Title Ins. Co*., 892 N.W.2d 467, 316 Mich.App. 480 (Mich.App. 2016), the court also held that private lender Bank of America was not barred from bringing suit on Letters seven years after the loans were made, finding that the insurer was required to but did not show that it was prejudiced by the delay. That decision was on appeal to the Michigan Supreme Court as of March 1, 2018, and ALTA has been given leave to file an amicus brief.

having to prove that it was harmed by tardy notice. Several courts had managed to weave a prejudice requirement into earlier notice provisions precisely because of the lack of this type of statement. Some earlier versions of the Letter contained no provision setting a claim bar date. When the Letter did not contain a bar date, or was not limited to a single transaction but continued until cancelled in writing, courts held that the Letter continued in effect until cancellation.[90]

When the Letter does not contain a bar date, a lawsuit brought to enforce the Letter is subject to the applicable statute of limitations.[91]

Condition 11 of the 2015 ALTA Closing Protection Letter informs the claimant of the address to which the notice of claim is to be sent. This paragraph contains a prejudice statement that Condition 10 seems to make unnecessary, by stating that "[i]f the Company is prejudiced by Your failure to provide prompt notice, the Company's liability to You under this letter shall be reduced to the extent of the prejudice."

Condition 12, which was added in 2015, states that the claimant must provide "all reasonable aid" in the handling of a claim under the Letter. This provision is nearly identical to Condition 6(a) of the 2006 ALTA policies.

Condition 13 of the 2015 ALTA Closing Protection Letter states that the Letter expires if the Real Estate Transaction does not close within one year after the date of the Letter or if, "at any time after the date of this letter, but before the Real Estate Transaction closes, the Company provides written notice of termination of this letter to the Addressee at the address set forth above."

Condition 14 of the 2015 ALTA Closing Protection Letter states that it is effective only as to real estate in the state or states specified in the Letter. One court found that an earlier version of the Letter covered the violation of instructions about the recording of a deed of trust in another state, although the Letter contained a number of references to the title insurance policy to be issued on a certain parcel, "the land" and identified the property by street address.[92] This is also an important

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[90] In *Mortgage Network, Inc. v. AmeriBanc Mortgage Lending, LLC*, 177 Ohio App.3d 733, 895 N.E.2d 917, 2008-Ohio-4112 (Ohio App. 10 Dist. 2008), the blanket Letter (not for a single transaction) continued until terminated, which was after the agent had been cancelled.

[91] In *Heritage Pacific Financial, LLC v. First American Title Ins. Co*., 2013 WL 4401040 (D.Md.) (unpublished), the Letter did not contain a claim bar date. Because a closing protection letter is an indemnity contract, the Maryland indemnity contract statute of limitations applied. The court held that the time to sue under the CPL did not begin running until a loss had been suffered, which in that case was when the insured deed of trust was extinguished by the foreclosure of a senior lien that violated the closing instructions. In *PennyMac Holdings, LLC v. Fidelity Nat'l Title Ins. Co*., 423 P.3d 608 (Table), 2018 WL 3689751 (Nev.) (unpublished), the court held that the Nevada six-year statute of limitations, NRS 11.190(1)(b), did not begin to run until the insurer denied the claim. In *21st Mortgage Corp. v. Chicago Title Ins. Co.*, ___ F.Supp.3d ___, 2018 WL 6716081 (D.N.J. 2018) (permanent citation not yet available), a lawsuit brought by a lender under a New Jersey closing service letter was dismissed because it was filed after the New Jersey statutes of limitation had run. The court said the time began running when the insurer informed the lender that it would deny any claim based on the subject of the CPL claim.

[92] In *Regions Bank v. Stewart Title Guar. Co*., 2015 WL 433486 (D.S.C.) (unpublished), the title agent closer failed to properly record a mortgage on a second parcel in a different state, whose title was not insured in the policy issued by the insurer. The court held that the Letter covered that breach of instruction. Despite all of the careful references to the land in the Letter, the court found "persuasive" the argument by Regions, not based on any term in the Letter, that "the language of the CPL indicates it was intended to cover the transaction as a whole, rather than any one piece of property."

control for the insurer, so that it is not liable under a Letter for the acts of a title agent concerning property in a state in which it has not been appointed by the insurer.

Finally, Condition 15 of the 2015 ALTA Closing Protection Letter contains an arbitration provision. That provision is fully discussed at §14.5.

14.4.2 Exclusions

The 2015 ALTA Closing Protection Letter contains twelve exclusions, in Conditions 3(a) through (l). Two of those exclusions were added in 2015.

Exclusion A is for the title agent or approved attorney's failure "to comply with closing instructions that require title insurance protection in connection with the Real Estate Transaction inconsistent with that set forth in the Commitment." By this exclusion, the insurer avoids the conundrum of indemnifying the assured under the Letter for the title agent's failure to obtain better or cleaner title than the policy describes. If this exclusion were not enforced, the assured might be able to get better title coverage through the Letter than through the policy, without even reforming the policy.

Exclusion B explains that the insurer does not protect against loss of Funds due to the failure of the bank in which the addressee's money has been deposited by the title agent. This provision has been found in the Letter since at least the 1987 version. This includes the bank in which the settlement agent deposits closing funds and the bank on which the lender's funds are drawn to fund the closing. However, the Letter does not exclude liability caused by the settlement agent's failure to deposit the Funds in an institution named by the addressee in its written escrow instructions.

Exclusion C states that the issuer shall have no liability under the Letter for "constitutional or statutory lien or claim of lien that arises from services, labor, materials, or equipment, if any Funds are to be used for the purpose of construction, alteration, or renovation." (The exclusion goes on to say that it does not impair any coverage given by the policy). The bookend is Exclusion K, which states that there is no coverage for "the periodic disbursement of Funds to pay for construction, alteration, or renovation on the Land relating to the Real Estate Transaction." Together, these are more inclusive than the exclusions that have appeared since the 1987 ALTA Letter concerning the acts of the title agent in serving as a construction loan disburser.

Exclusion D is for a "defect, lien, encumbrance, or other matter in connection with the Real Estate Transaction." The exclusion says it "does not affect the coverage afforded in the Policy." The purpose of the exclusion is to emphasize that the Letter does not provide any coverage that is already found in the Policy to which it is merely incidental.

Exclusion E is for the "[f]raud, theft, dishonesty or negligence by You or by Your employee, agent, attorney or broker." Paragraph 4 of the 2008 ALTA Letter also contained the following provision:

> Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction.

The reference to the borrower's creditworthiness has been moved from Exclusion D to Condition 9 of the 2015 ALTA Closing Protection Letter, which says that:

> Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

Many claims under the Letter are the result of loan fraud. These plainly-worded provisions should be found to bar any claim in which the lender's loss is actually the result of the fraud, dishonesty or negligence of its own employees or agents, including the mortgage broker. Under earlier versions of the Letter, most courts held that the lender's sloppy underwriting was not a defense to liability under a Letter.[93] However, even under those versions of the Letter, the courts found that a lender could not

[93] In two decisions, the insurer's evidence showed that the attorney did not collude with the wrongdoers and complied with New Freedom's written closing instructions in good faith as he understood them. New Freedom "presented evidence that the lawyer colluded by intentionally disregarded the written closing instructions in order to hide the fraud, and by misrepresenting information on the HUD-1." In both cases, the appeals court reversed and remanded on the narrow issue of the level of intent which the closer must demonstrate, as reflected in the jury instructions. *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp*., 288 Ga.App. 350, 654 S.E.2d 190 (Ga.App. 2007); *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp*., 285 Ga.App. 22, 645 S.E.2d 536 (Ga.App. 2007). The decision at 285 Ga.App. 22 led to Exclusion D. In that case, the court said that the Letter did not permit a contributory negligence defense: "… where, as here, an indemnification clause requires indemnification of losses that 'arise out of' certain specified events but does not explicitly mention the indemnitee's negligence, the clause still requires full indemnification although the indemnitee's negligence may have partially caused the loss. … As such, even though the CPL did not explicitly mention coverage for the negligence of New Freedom, Lawyers Title was required to indemnify New Freedom even if the loss was partially caused by New Freedom's own negligence. … [T]he comparative negligence principle allowing for a proportional reduction in a plaintiff's damages has no application in this case, since, as explained above, Lawyers Title was required under Georgia indemnity law to *fully* reimburse New Freedom even if the loss was partly attributable to New Freedom's own negligence." *New Freedom* was cited and followed in *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 795 F.Supp.2d 624 (E.D.Mich. 2011), in which First American argued that, if "WaMu's underwriting been more stringent, it would have discovered the fraud." In response, the court cited cases on fraud, contract and indemnity. It cited a case saying that "one accused of fraud may not raise as a defense the carelessness of the party defrauded." [First American did not perpetrate a fraud.] Also, it said, "contributory negligence is not a valid defense in a breach of contract case." [The court consistently called the CPL an indemnity, not a contract.] Finally, it cited *New Freedom's* holding that contributory negligence was not a defense to a claim on an indemnity. After blending all of that together, the court held simply that "WaMu's failure to discover the fraud does not provide a basis for First American to avoid its indemnity duty under the CPL." Similarly, in *Federal Deposit Ins. Corp. v. Fidelity Nat'l Title Ins. Co*., 2015 WL 2237877 (E.D.Mich. 2015) (unpublished), a Michigan federal court ruled that Washington Mutual's failure to follow "objectively reasonable underwriting standards" in making its loans, on which assumption Fidelity National issued closing protection letters, was not a viable basis on which to seek to void the Letters. The court relied on the earlier Michigan decisions as precedent, as well as two Ohio decisions about title insurance policy coverage rather than a closing protection letter: *Fifth Third Mortgage Co. v. Chicago Title Ins. Co*., 758 F.Supp.2d 476 (S.D. Ohio 2010) and 692 F.3d 507 (6th Cir. (Ohio) 2012). In *Bank of America, N.A. v. Fidelity Nat'l Title Ins. Co*., 892 N.W.2d 467, 316 Mich.App. 480 (Mich.App. 2016), the appeals court was even more vehement, holding that the lender's "underwriting practices are not material to the terms of the CPLs." The appeal of that decision has been accepted by the Michigan Supreme Court and is pending as of March 1,

recover under a Letter when the lender's own officer perpetrated or was complicit in the loan fraud.[94]

Exclusion F, for "settlement or release of any claim by You without the Company's written consent," was also introduced in the 2008 version of the Letter. In many situations, there are a series of settlements made between loan originators, assignees, mortgage insurers, brokers and others before the addressee even submits a claim under the Letter. Those settlements fix the claimed damages under the Letter.[95] Exclusion E makes it clear that any such settlement made before the tender of a claim under the Letter, and without the written consent of the insurer, will bar the claim. This will prevent the insurer from being the last resort, and should also reduce the likelihood of collusive or careless settlements.

Exclusion G, which was added in the 2008 version of the Letter, grafts in Exclusions 3(a) and 3(b) of the title insurance policy, negating coverage for "matters created, suffered, assumed, agreed to, or Known by You." Condition 2 imports the definition of "Known" from the 2006 ALTA Loan Policy. Because the Letter is incident to the issuance of the title insurance policy for the transaction, it is reasonable to find corresponding exclusions under the Letter also. This use of the same terms that are found and defined in the policies suggests that this exclusion will be interpreted based on case law construing Exclusions 3(a) and 3(b) of the policies.

Exclusion H is for "failure of the Issuing Agent or Approved Attorney to determine the validity, enforceability, or the effectiveness of a document required by Your closing instructions."

2018, with ALTA having been given leave to file an *amicus* brief. In *Federal Deposit Ins. Corp. v. Attorneys' Title Ins. Fund, Inc*., 2014 WL 4384270 (S.D.Fla.) (unpublished), the court held that the lender's negligent loan underwriting was not a defense to liability under the Letter. In Florida, a party cannot normally obtain an indemnity against its own negligence. However, the 2011 decision of *Federal Deposit Ins. Corp. v. Attorneys' Title Ins. Fund, Inc*., 10–21197–PCH, slip op. at 6 (S.D.Fla. May 17, 2011) (not the same case, and known as the *Indymac* decision), rejected that argument, saying that a Letter is "sufficiently different" from a standard indemnity contract so that it is an exception to the general rule that a party cannot get an indemnity against his own negligence. In *Federal Deposit Ins. Corp. v. Property Transfer Services, Inc.*, 2013 WL 5535561 (S.D.Fla.) (unpublished), the court held that "[t]he FDIC does not have to prove that Old Bank would not have funded the Loans" if it had been told what the closer learned at the closing table. In *Federal Deposit Ins. Corp. v. First American Title Ins. Co.*, 2015 WL 418122 (E.D.Mich.) (unpublished), a Michigan federal court held that a title insurer may not raise the lender's underwriting negligence as a defense to liability under a Letter, and refused to distinguish the form of negligence asserted in this case from the type that the court refused to consider in *JP Morgan Chase Bank, N.A. v. First Am. Title Ins. Co*., 795 F.Supp.2d 624 (E.D.Mich. 2011). The court said that the "plain language" of the Letter did not suggest a negligence defense could be asserted. However, the Letter at issue did not contain an exclusion for the lender's negligence.

[94] In *In re Taneja*, 2010 WL 4882826 (Bkcy.E.D.Va.) (unpublished), the bankruptcy trustee for a mortgage banker whose president had convinced title agents not to record the insured mortgages or make payoffs of the existing loans tried pursuing claims on closing protection letters issued to the lender. In rejecting the trustee's claims, the court described the doctrine of *in pari delicto* as "an affirmative defense that bars a wrongdoer from recovering against his alleged coconspirators." The title insurer also raised the *in pari delicto* defense in *Walsh Securities, Inc. v. Cristo Property Management, Ltd*., 2012 WL 3629045 (D.N.J.) (unpublished), in which the officers of the lender either orchestrated or were complicit in the loan fraud. The court did not reach the issue.

[95] See, for example, *New Freedom Mortgage Corp. v. Globe Mortgage Corp*., 281 Mich.App. 63, 761 N.W.2d 832 (Mich.App. 2008), in which the loan assignee had foreclosed, made a full credit bid, and then sold the loan back to the addressee, all before the claim was submitted under the Letter.

The exclusion goes on to say that it "does not affect the coverage afforded in the Policy." This exclusion was added in 2015. It provides the counterpoint to the limitation in the closing instruction covered event described at Requirements 4(a), which limits the coverage of the Letter to closing instructions having to do with title and title documents, as discussed in §14.2.

Exclusion I negates coverage for:

> Federal consumer financial law, as defined in 12 U.S.C. § 5481(14), actions under 12 U.S.C. § 5531, or other federal or state laws relating to truth-in-lending, a borrower's ability to repay a loan, qualified mortgages, consumer protection, or predatory lending, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws... .

This exclusion is very similar to, but somewhat broader than, Exclusion 5 of the 2006 ALTA Loan Policy, and plainly carves off claims in which the title agent is accused of being complicit in the violation of state or federal lending laws. Exclusion J negates coverage for another type of issue having to do with loan underwriting and not loan closings:

> federal or state laws establishing the standards or requirements for asset-backed securitization including, but not limited to, exemption from credit risk retention, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;

Exclusions I and J were not found in the 2011 or earlier versions of the Letter, and were revised in 2015.

Exclusion K is discussed above, in connection with Exclusion C. Exclusion L negates coverage for:

> Issuing Agent or Approved Attorney acting in the capacity of a qualified intermediary or facilitator for tax deferred exchange transactions as provided in Section 1031 of the Internal Revenue Code.

Exclusion L should be unnecessary belt and suspenders, because a title company's services as a qualified intermediary are not closing services. See §13.15 for a complete discussion of tax-deferred exchange intermediary service issues.

14.5 Arbitration Of Letter Disputes

Condition 15 of the 2015 ALTA Closing Protection Letter is an arbitration provision.[96] This provision is bracketed by ALTA in anticipation that it will not be used in all jurisdictions. Earlier versions of the Letter did not contain an arbitration provision. However, a claim under a Letter that does not contain an arbitration provision is arbitrable nonetheless, if the policy issued to the addressee contains an arbitration clause. The arbitration provision in the policy says that arbitrable matters include any controversy or claim arising out of the transaction giving rise to the policy.[97] The Letter is effective only when the issuing insurer has committed to issue a policy. Any obligation under the Letter is thus ancillary to the policy.[98]

Arbitration of a dispute under a Letter was permitted in *Fleet Mortgage Corp. v. Lynts*,[99] in which the court held:

> If the closing letters were a "separate contract" as Fleet urges, it would be very peculiar for Chicago Title to give such a promise without something in return. Furthermore, if the promise were considered a separate contract unsupported by consideration, Fleet would be in a worse position because such a gratuitous promise is unenforceable.[100]

The court said that the Letter is related to the policy:

> It is apparent that the general perception of closing protection letters within the industry is that they are related to the issuance of the title insurance policy and are not a separate, unrelated service.[101]

The addition of an arbitration provision to the Letter in 2011 erased any question of the parties' right to seek arbitration of a dispute concerning the Letter.

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[96] Conditions and Exclusions 15 of the 2015 ALTA Closing Protection Letter contains an arbitration provision essentially identical to that found in the 2006 ALTA policies, making arbitration mandatory when the policy amount is $2 million or less.

[97] "Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy." Condition 14, 2006 ALTA policies. A similar provision is found in Conditions & Stipulations 14 and 13, respectively, of the 1992 ALTA Owner's and Loan policies.

[98] "The protection against the risk of loss caused by attorney defalcation under the circumstances clearly is an incident to the issuance of title insurance." *Sears Mortgage Corp. v. Rose*, 634 A.2d 74, 86 (N.J. 1993).

[99] 885 F.Supp. 1187 (E.D.Wis. 1995).

[100] 885 F.Supp. at 1190.

[101] 885 F.Supp. at 1190.

14.6 Defenses To Liability And Losses Payable Under Letter

The 2015 ALTA Closing Protection Letter states that it indemnifies the addressee against "actual loss of Funds incurred by You in connection with" a closing conducted by the title agent or approved attorney. Loss is limited to the return of the Funds. The 2015 ALTA Closing Protection Letter now contains a blank space in Requirements 3, in which the insurer must insert the aggregate of the Funds to be transmitted to the issuing agent or approved attorney. Further, the 2015 ALTA Closing Protection Letter defines "Funds" as "the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction." These provisions work together in harmony to both cap the amount of liability under the Letter and to define loss as that part of the money sent to the issuing agent that was lost due to the covered event. See §14.4.1 for a complete discussion of the measure of loss provision in Condition 6.

When the issuing agent or approved attorney steals the money sent to him or her, loss is typically measured as the amount that was stolen and not recovered by the claimant.[102] When the loan was never funded and, as a result, the mortgage not recorded, the insurer was found not to be liable under the Letter. The court agreed with the insurer that:

> …the letter's plain language clearly establishes as a matter of law that the insurance covers only loss of settlement funds and no other losses. Because Heritage never provided the closing attorneys with (good) settlement funds, defendant points out, there was clearly never any loss of such funds and thus no loss compensable under the insured closing service letter.[103]

Similarly, when money was paid contrary to the lender's instruction, the addressee's claim was limited to the amount of money given to the title agency for closing.[104]

When the basis for the claim under the Letter is that the closing agent violated instructions and aided the borrower in perpetrating loan fraud, the most the lender should recover is the amount

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[102] For example, in *Lawyers Title Ins. Corp. v. Frontier Title Co.*, 1989 U.S. Dist. LEXIS 11917 (N.D. Ill., Sept. 27, 1989) (unpublished), the insurer was found liable for lender funds diverted by the title agent in the amount of $500,000, based on the Letter.

[103] *First Financial Savings & Loan Ass'n. v. Title Ins. Co. of Minnesota*, 557 F. Supp. 654, 662 (DC N.D. Ga. 1982).

[104] The lender had incurred various consequential expenses because the title agent did not pay the permanent lender's loan fee, and substitute financing had to be arranged. Nonetheless, the lender's claim was limited to the "actual settlement funds transmitted [by the Banks] to the title company." Because the lender had recouped all of the "settlement funds," it had no claim under the Letter for its consequential expenses. The appellate court quoted the trial court that "'coverage against the loss of those funds does not include damages sustained by the payment of attorney's fees, expenses incurred in connection with bringing the loan to closing, or indirect losses, such as a loss of profits.' … Accordingly, the district court concluded that the Banks were entitled to recover from USLife only loss, due to fraud or dishonesty on the part of Bluegrass, of those funds which had been advanced to Bluegrass." *Herget Nat'l Bank v. US Life Title Ins. Co.*, 809 F.2d 413, 416 (7th Cir. 1987).

of money it lent in excess of the value of the property.[105]

One commentator gave this overall statement as to the measure of damages available to a party protected by a Letter:

> [T]he measure of damages under a closing protection letter depends, at least in part, on how indemnity agreements are interpreted under the laws of different states. Other factors affecting the damages that a lender may recover under a closing protection letter include: (1) the language of the closing protection letter, which may vary from state to state; (2) whether the lender's loss arises from a title defect that would be covered by a title insurance policy; and (3) whether a closing protection letter constitutes insurance under applicable state law.[106]

Two key provisions of the 2015 ALTA Closing Protection Letter create a potent defense to liability. Requirements 4 conditions recovery for a covered event on proof that "Your loss is *solely caused by*" the acts of the issuing agent or approved attorney. That sole-causation condition is further reinforced by Exclusion E, which excludes coverage for the "fraud, theft, misappropriation, dishonesty, or negligence" of the lender's employee, agent, attorney or broker. Most loan fraud is either orchestrated by the loan broker (who is also an agent of the lender) or the lender's employee, and merely not detected by the issuing agent who closes the loan. These provisions bar recovery under the 2015 ALTA Closing Protection Letter in such cases, and reverse the holdings of a number of courts that have refused to consider the comparative or contributory fault of the lender. See §14.4.2 for a complete discussion of those cases.

Most courts have said that the claimant under the Letter may not seek bad faith damages, because the Letter is not an insurance policy.[107] Also, the Letter is a contract, and thus the economic

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[105] In *Aurora Loan Services, LLC v. Hirsch*, 170 Conn.App. 439, 154 A.3d 1009 (Conn.App. 2017), the court held that the loss payable was the difference between the principal and interest owed on the note versus the appraised value of the property on the date the lender foreclosed. It rejected the lender's claim that the property should be valued as of the date the loan was made, or based on a later resale of the property for about a tenth of its appraised value.

[106] James Bruce Davis, *The Law of Closing Protection Letters,* 36 Tort & Ins. L.J. 845, 853 (2001).

[107] In *Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co.*, 645 So.2d 295 (Ala. 1992), the Alabama Supreme Court found that no bad faith action could be brought as to a Letter, because the normal indicia of an insurance policy are missing. In *Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.*, 288 Ga.App. 642, 655 S.E.2d 269 (Ga.App. 2007), the court said: "The issue here is whether the CPL qualifies as an insurance policy, and we find that it does not. In our law, '[i]nsurance' means a contract which is an integral part of *a plan for distributing individual losses* whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies.' (Emphasis supplied.) OCGA § 33-1-2(2). … Under Lawyers Title's CPL, however, no second party assumes the risk and significantly no distribution of risk is accomplished. Therefore, the CPL is not an insurance policy within the meaning of OCGA § 33-4-6, and the trial court did not err by so ruling." In *Bancorp Bank v. Lawyers Title Ins. Corp*., 2014 WL 3325861 (E.D.Penn.) (unpublished), the court rejected the argument that the Letter is so closely related to the issuance of the policy that the Letter should be considered an endorsement to the policy. Because Pennsylvania permits a bad faith claim only in "an action arising under an insurance policy," 42 Pa. Cons.Stat. Ann. § 8371, the Letter does not support such a claim. However, in *Horvath v. Lawyers Title Ins. Corp*., 2013 WL 1294677, 2013-Ohio-1295 (Ohio App. 11 Dist.) (unpublished), the court observed that, by law, a Letter is part of the business of title insurance, so that a bad faith

loss doctrine bars tort claims premised on the Letter.[108]

A number of other defenses to or limitations on liability are found in the Letter's exclusions, all of which are discussed at §14.4.2. Other defenses and limitations, such as the claim bar date provision, are found in the Letter's Conditions, which are discussed at §14.4.1.

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claim may be brought. The court found no bad faith in that case, which may make the ruling dictum. In *Johnson v. U.S. Title Agency, Inc*., 91 N.E.3d 76, 2017 -Ohio- 2852 (Ohio App. 8 Dist. 2017), similarly, the court observed that the law makes the issuance of closing protection coverage "part of the business of title insurance for purposes of Chapter 3953 of the Revised Code." In *Aurora Loan Services, LLC v. Hirsch*, 170 Conn.App. 439, 154 A.3d 1009 (Conn.App. 2017), the court rejected a demand for punitive damages. The lender argued that such damages were payable because it sought recovery under the "fraud or dishonesty" coverage of the Letter, or that the insurer was vicariously liable for the title agent's fraud. The court responded that the insurer was merely a party to a contract, and was not guilty of fraud or dishonesty or vicariously liable for same.

[108] In *Lehman Brothers Holdings, Inc. v. Hirota*, 2007 WL 1471690 (M.D.Fla.) (unpublished), the addressee sued the insurer for the claimed participation of a title agent in a loan fraud scheme, bringing counts for fraud, negligent misrepresentation, negligence, breach of fiduciary duty and civil conspiracy. The court ruled that all non-contract counts were barred by the economic loss doctrine. It rejected Lehman's argument that fraud has been carved out of the doctrine. It ruled instead that the fraud exception is limited to acts that induced the party to sign the contract, not bad acts in the performance of the contract. The court held that the fraudulent acts alleged by Lehman were the same ones it alleged breached the contract, all of which occurred at closing and not before. Thus, it held, the tort claims were barred. Similarly, in *U.S. Bank, N.A. v. First American Title Ins. Co.*, 2011 WL 2119335 (M.D.Fla.) (unpublished), the court found a closing protection letter to be a contract, and thus the economic loss doctrine barred a suit by an assignee lender against the insurer for closing negligence. In *Fifth Third Mortgage Co. v. Kaufman*, 2016 WL 2851554 (N.D.Ill. 2016) (unpublished), the court refused to grant summary judgment to the insurer on its claim that the lender's losses were caused by the market collapse rather than the CPL. However, it said that Chicago Title could make that argument at trial.

15 "Duty to Search" and Title Searches

15.1 "Duty To Search" Theory Liability

This chapter discusses the various theories which some states have adopted creating extra-contractual duties to search and report the status of title. These theories of recovery are alternate to recovery under the policy. Also found in this chapter is the subject of liability under title searches, abstracts and guarantees, discussed at §15.13.

15.2 Search Duty Rationale

The so-called "duty to search" has been much discussed by scholars.[1] The stated justification for the search-duty theories is the proposition that the proposed insured should have a cause of action independent of the policy terms if the insurer allegedly fails to conduct a diligent examination of the

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[1] *See* James Bruce Davis, *More Than They Bargained For: Are Title Insurance Companies Liable in Tort for Undisclosed Title Defects?*, 45 Cath. U.L.Rev. 71 (1995); Boyette, *Title Insurance Liability Beyond the Policy*, Florida Bar Journal, July/August 1995, p. 24; Annotation, *Title Insurer's Negligent Failure to Discover and Disclose Defect as Basis for Liability in Tort*, 19 A.L.R.5th 786; Sweat, *Abstractor or Abstracter?*, Practicing Law Institute, Real Estate Course Handbook No. 289 (1987); Palomar, *Title Insurance Companies' Liability for Failure to Search Title and Disclose Record Title*, 20 Creighton L.Rev. 455 (1987); Levinson, *A Return to Policy Limits: Title Insurance Company Liability in California*, in *Title Insurance in Current Transactions 1983*, p. 261 (P.L.I.1983); Rubin, *Title Insurance Claims Developments in the 80's-Significant Case Law Developments Applicable to Title Insurance Claims*, in *Title Insurance in Current Transaction 1983*, p. 307 (P.L.I.1983); *Does A Title Insurer Owe A Duty to Any But Its Insured?*, 7 Okla. City U.L.Rev. 293 (1982); *Title Insurance: The Duty to Search*, 71 Yale L.J. 1161 (1962); Johnstone, *Title Insurance*, 66 Yale L.J. 492 (1957); Birnbaum and Scheurich, *The Duties of Title Insurers in the Non-Insurance Context*, ABA TIPS Title Insurance Litigation Committee Committee News, Summer 1999 [focus on Arizona law since *Luce v. State Title Agency, Inc.*, 190 Ariz. 500, 950 P.2d 159 (Ariz.App. Div. 1 1997)]; Gordon, *Title Search Liability in Virginia*, Virginia Land Title Association Examiner, Spring 1999; Jennings, *The Evolving Nature of Title Insurance as a Contract: Removing the Notions of Panacea*, 25 Real Estate Law J. 301 (Winter 1997); Hannigan and Albano, *Tort Claims Against Title Insurers Will Likely Fail*, The National Law Journal, Monday, October 12, 1998, p. B12; *Liability on Non-policy Theories: the Risks That an Underwritten Title Company and Title Insurance Company Undertake in Performing Clerical Ministerial or Escrow Services and New Theories of Liability*, by Wendy Y. Watanabe, in the 1998 edition of the Real Estate Law and Practice Course Handbook Series by Practicing Law Institute, PLI Order No. N0-001G.

public records before issuing its commitment to insure. In jurisdictions adopting the search duty, when the insurer makes a mistake, it is held responsible under both the terms of the insurance contract and for damages flowing from the failure to accurately search or report the status of title. As discussed below at §15.4, there are various theories of liability on which recovery is premised.

Most jurisdictions have rejected the proposition that a title insurer may be liable in tort under a title insurance policy.[2] *Walker Rogge Inc. v. Chelsea Title & Guaranty Co.,*[3] for example, recognized the insured's expectation of a reasonable search, but refused to create a separate tort cause of action:

> Although we recognize that an insured expects that a title company will conduct a reasonable title examination, the relationship between the company and the insured is essentially contractual. See Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555, 579-80, 489 A.2d 660 (1985). The end result of the relationship between the title company and the insured is the issuance of the policy. To this extent, the relationship differs from other relationships conceivably sounding in both tort and contract, such as the relationship between physician and patient, to which plaintiff alludes. Although the relationship between physician and patient is contractual in its origins, the purpose of the relationship is to obtain the services of the physician in treating the patient. The patient reasonably expects the physician to follow the appropriate standard of care when providing those services. By contrast, the title company is providing not services, but a policy of insurance. That policy appropriately limits the rights and duties of the parties.
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> From this perspective, the insured expects that in consideration for payment of the premium, it will receive a policy of insurance. The insurer's expectation is that in exchange for that premium it will insure against certain risks subject to the terms of the Policy. If the title company fails to conduct a reasonable title examination or, having conducted such an examination, fails to disclose the results to the insured, then it runs the risk of liability under the policy. In many, if not most, cases conduct that would constitute the failure to make a reasonable title search would also result in a breach of the terms of the policy.
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> The expectation of the insured that the insurer will conduct a reasonable search does not necessarily mean that the insurer may not limit its liability in the title commitment and policy. If the company may not so limit its liability, then it would be exposed to consequential damages resulting from its negligence. Under general contract principles, however, consequential damages are not recoverable unless they

[2] See Yorio, *Negligence Ebbs as Basis for Title Insurer Liability,* The National Law Journal, Monday, March 18, 1996, p. B8, examining *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 603 A.2d 557 (N.J. Super. 1992); *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231 (1st Cir. 1993); *Somerset Savings Bank v. Chicago Title Ins. Co.,* 420 Mass. 422 (1995); and *Citibank v. Chicago Title Ins. Co.*, 214 A.D.2d 212, 632 N.Y.S.2d 779 (A.D. 1 Dept. 1995). A state-by-state review is found in §15.12.

[3] 562 A.2d 208, 220-1 (N.J. 1989).

> were within the specific contemplation of the parties. Donovan v. Bachstadt, 91 N.J. 434, 444-45, 453 A.2d 160 (1982). Another difference is that in an action under the title policy, the insured may establish a cause of action for breach of contract without establishing that the title company breached the standard of care appropriate for a reasonable title search. In an action in tort for the failure to conduct such a search, the insured would be required to establish the appropriate standard of care applicable to title searching.[4]

Some courts have based their rejection of the tort theories on the economic loss doctrine, which bars tort claims based on contracts in which the only claimed losses are economic.[5] Courts have also consistently rejected the alternate notion that a title insurer has a fiduciary duty to accurately report the state of record title.[6]

The actual title search performed in any given case depends on a number of factors. Ideally, every title search would begin at a patent or other original government grant. However, a search may reasonably be shortened based on a marketable title act or other curative statutes.[7] A company may also establish a standard that the search may also be shortened because there is reliable title evidence such as a prior abstract or policy from a reputable company. Finally, in some cases companies will take a limited risk even without a curative law or prior title evidence by shortening the search to 30, 40 or 60 years. The insurer's practice in a particular state is also shaped by any law regarding a duty to conduct a title search. Some states require that a title search be performed that covers a specified period of time.[8]

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[4] 116 N.J. at 540, 562 A.2d at 220.

[5] See, for example, *First Midwest Bank, N.A. v. Stewart Title Guar. Co*., 218 Ill.2d 326, 300 Ill.Dec. 69, 843 N.E.2d 327 (2006); *First American Title Ins. Co. v. 273 Water Street, LLC*, 2010 WL 6496185 (Conn.Super.) (unpublished) and *Bourne v. Stewart Title Guar. Co*., 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished).

[6] See *Barstad v. Stewart Title Guar. Co.*, 145 Wash.2d 528, 39 P.3d 984 (Wash. 2002); *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982); *Williams v. Land Title Co. of Dallas*, 1997 WL 196345 (Tex.App.-Dallas) (unpublished); *Park v. First American Title Ins. Co*., 2011 WL 1991651 (Cal.App. 4 Dist.) (unpublished); *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 357 Utah Adv.Rep. 7 (1998); *Eller Media Co. v. DGE, Ltd.*, 2004 WL 2002449, 2004 Ohio 4748 (Ohio App. 8 Dist. 2004) (unpublished); *Fogg v. Fidelity Nat'l Title Ins. Co*., 89 A.3d 510 (D.C.App. 2014). The various bases for a party's assertion that a title insurer owes a fiduciary duty are discussed in §9.1.3.1.

[7] See §§3.4.7.4, 3.4.7.5 and 3.4.7.6 for a discussion of marketable title acts and title curative acts. For an extensive state-by-state discussion of these acts, see Basye, *Clearing Land Titles*, Thomson/Reuters. Also see chapter 1 of Roberts, *et al.*, *Public Regulation of Title Insurance Companies and Abstracters*, Villanova University Press 1961.

[8] Statutes requiring insurers to perform title searches are discussed below at §§15.9 and 15.12. Those statutes requiring a "reasonable" title search are: Alaska Stat. § 21.66.170; Ariz.Rev.Stat.Ann. §§ 20-1567; Colo.Rev.Stat. §10-11-106; Fla.Stat. Sec. 627.7845; Haw.Rev.Stat. §431:20-113; Kan.Stat.Ann. §40-235; Mont. Code Ann. §33-25-214; Neb.Rev.Stat. §§44-1947; Nev.Rev. Stat. §692A.220; N.H.Rev.Stat.Ann. §416-a:6; N.J.Stat.Ann. §17:46B-1 to -62; N.C.Gen.Stat. §58-26-1; N.M.Stat.Ann. Sec. 59A-30-11; Ohio Rev. Code Ann. §3953.07; Okla.Stat.Ann. title 36 §5001(C); Pa.Stat.Ann. title 40, §910-7; Tenn. Code Ann. Sec. 56-35-129; and Utah Code Ann. Sec. 31A-20-110. The following statutes require that a title search be done with each commitment, but do not impose the subjective qualitative

15.3 Abstractor Liability As A Supplement To Policy Loss

Despite the thin logic supporting the tort of a duty to search, this theory has been advocated for strategic reasons. The primary benefit to such a claim is that it may not be subject to the policy's terms, including its liability cap. One court found, for example, that the policy term permitting the insurer to clear title did not apply to an abstractor liability claim.[9] Another court held that a recovery for abstractor liability could be in excess of policy limits.[10] Also, insureds assert abstractor liability premised on damage claims that are inconsistent with the measure of loss under the policy, or that seek elements of loss not payable under the policy.

However, courts have recognized that an insured is not entitled to recover under the policy for the loss of title while also seeking damages for abstractor liability that are not only in addition to the policy measure of loss, but which are entirely inconsistent with the loss of property. For example, one court rejected abstractor liability as a basis for recovery of the costs of owning the property:

> ... Plaintiffs are fully compensated by the award of damages ... based on the difference in the fair market value of the properties with and without the defects established by the evidence. The damage awards on the negligence and breach of contract claims cannot be reconciled because they are based on two contrary assumptions. The contract award assumes that Plaintiffs retain the value of the property with the defects while the negligence award assumes Plaintiffs would never have purchased it if they had known of the defects. Because Plaintiffs retain their respective interests in the land, an award of their out-of-pocket costs associated with ownership of the units such as maintenance, mortgage interest, insurance and taxes would result in a windfall.[11]

The identical holding was made in *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co., Inc.*,[12] in which an insurer sued its policy-issuing agent for having negligently missed two easements. The court found the agent liable both on its contractual obligations and on negligent misrepresentation of title, in the form of the title insurance commitment, under §552 of the Restatement (2nd) of Torts. However, the court found awards of equal sums under both the contract and negligent misrepresentation claims were "duplicative damages arising from the same set of facts." One commentator has opined that the terms of the policy only apply when the insurer performs its obligations under the policy, but that when it breaches its duties, "the proper measure of contract

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standard of "reasonableness": Idaho Code §41-2708(1)(b); Mo.Ann.Stat. §381.071; and Tex.Rev.Civ.Stat.Ann. article 9.34.

[9] *Bank of California v. First American Title Ins. Co.*, 826 P.2d 1126 (Alaska 1992).

[10] *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1985).

[11] *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997).

[12] 968 S.W.2d 727 (Mo.App.S.D. 1998).

damages is all damages that were foreseeable as a consequence of the insurer's breach." The commentator goes on to say that, under a tort theory, "the proper measure of tort damages is all damages proximately caused by the insurer's breach of duty."[13] The elements of damage for which recovery may be sought are discussed below in §15.10.

The second strategic effect of a search duty claim is that it turns every error in the commitment into a "misrepresentation" or a failure to disclose for which tort damages may be sought. This turns the contract of indemnity into one of guaranty. In rejecting this theory, one court reasoned that this is:

> ...tantamount to a buyer of life insurance claiming that his policy is a guarantee against death. [The insured's] claim that it relied on the insurance policies as evidence that no undisclosed superior liens existed simply flies in the face of the fact that the policies were issued to protect [the insured] against losses it may suffer from undisclosed superior liens.[14]

The adoption by a state court of the search-duty theory thus multiplies the insurer's potential to pay money on each existing policy, without warning and without any additional premium.[15]

15.4 Bases For Search Duty Cause Of Action

Those states which impose a duty to search do not agree on the basis for that duty. In fact, there are six separate theories:

1. That the title insurer also has the duties imposed by law on an abstractor of title, the primary duty being to perform a diligent search of the records and make an accurate report of same;

2. That there is an implied duty to search contained in the insurance contract;

3. That the insurer is liable for negligently misrepresenting title;

4. That an error in a commitment or policy violates a deceptive trade practice act;

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[13] Joyce D. Palomar, Title Insurance Law, 2013-2014 Edition, § 12:10, West/Thomson Reuters. That statement was rejected in *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622 (Minn. 2012), as a basis for entry of a judgment against a title insurer in an amount greater than policy limits.

[14] *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231, 1237, n. 10 (1st Cir. 1993).

[15] A title insurance policy may remain in effect for decades. The policy continues as long as the insured has an insurable interest in the property, or liability on warranties, or the property is owned by a party who takes title from the named insured by operation of law. When a state adopts a search-duty theory of liability, that theory is ordinarily applied on all outstanding policies. The insurer has no right to assess any existing insured an additional premium based on the sudden imposition of additional liability on existing policies. Those insureds are given a significant additional coverage for which no premium has been paid.

5. That, "but for" the insurer's error, the lender would not have lent the money, and therefore the insurer owes the lender the amount it lent in reliance on the commitment; and

6. That statutes requiring an adequate search before the issuance of a commitment create a duty on which a private cause of action in tort may be premised.

The balance of this chapter summarizes these theories of recovery, followed by a state-by-state review of the status of the law.

15.5 Abstractor Liability

Several states have adopted the view that the insurer, in issuing the commitment to insure, is held to the same standard of care as is an abstractor of title.[16] This approach is based on the idea that the insured relies on the insurer to conduct a careful search of the records and disclosure of the search, just as does an abstractor.[17]

There is little to justify the abstractor liability cause of action. The fact that a title insurer performs many of the same tasks in its search and examination of title records as does a person preparing an abstract of title does not convert the product title insurance policy into an abstract of title. Certainly, the abstractor would have reason to complain if a court determined that he or she is a title insurer, based solely on the fact that he or she performs many of the same tasks that are performed in the issuance of a title insurance policy.

Further, the sole remedy against an abstractor is a suit in negligence, whereas recovery against the insurer is in contract, and is based on the terms of the title insurance policy. Calling the insurer an abstractor merely imposes a second form of liability for the same act, without the payment of a second type of consideration, and directly contrary to the terms of the insurance contract.

The abstractor liability theory has been rejected by the majority of jurisdictions that have considered it.[18] In addition, a number of states that formerly permitted tort actions against title insurers have since barred such claims.[19] These states find that the commitment and policy are

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[16] See *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984); *Ford v. Guarantee Abstract & Title Co., Inc.*, 220 Kan. 244, 553 P.2d 254 (1976) and cases collected at §15.12.

[17] *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984).

[18] See cases collected at §15.12, including *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423 (Idaho 1988); *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992); *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650 (Utah 1990); *Greenberg v. Stewart Title Guar. Co.*, 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992); *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516 (E.D.Mich. 1993); *Upton v. Mississippi Valley Title Ins. Co.*, 469 So.2d 548 (Ala. 1985); *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231 (1st Cir. (R.I.) 1993).

[19] Those states include Arizona, California, Connecticut, Florida, Illinois, Indiana, Massachusetts, New Mexico, New York, Ohio and Washington. See §15.12 for a state-by-state review of the subject.

strictly insurance products.[20] As is concisely stated in one legal encyclopedia, "[t]he contract of title insurance, as distinguished from that of employment to examine the title to premises, does not involve liability for negligence."[21] The commitment to insure is an offer to issue a policy insuring title in the form as shown. The policy is solely a policy of indemnity insurance. The public records search that the insurer does in preparing the title insurance commitment is done solely for the insurer's own benefit, to reduce its claims liability.[22]

15.6 Policy as Exclusive Remedy; No Implied Contract To Search Title

The Conditions section of the ALTA title insurance policies contains a provision that covers three distinct subjects: (a) that the policy terms provide the exclusive remedy for a breach of the contract, (b) that the policy and all endorsements are one integrated contract, and (c) that the title insurance commitment merges into the policy and does not survive as a separate contract after the policy's issuance. These provisions are found at Conditions 15 of the 2006 ALTA policies, which says:

> 15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT
> (a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
> (b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.
> (c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.
> (d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

The three subjects of Conditions 15 are discussed in three different chapters of this book. The merger of the title insurance commitment into the policy is discussed at §6.2. The ramifications of construing the policy and all endorsements as a whole are discussed at §9.1.3.5. This section

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[20] See, for example, *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423 (Idaho 1988); *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992); and *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650 (Utah 1990), and other cases cited below in the state-by-state analysis.

[21] 45 C.J.S. Insurance § 884, at 950.

[22] *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (N.J.A.D. 1988); *Greenberg v. Stewart Title Guar. Co.*, 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992).

discusses Conditions 15(b), which is often termed the "exclusive remedy" provision. Conditions 15(b) declares that the policy is not an abstract of title, and that there is no contract to search title implied in the issuance of the policy.

Several state courts now hold or formerly have held that a title insurer may be liable under a policy as if it were an abstract of title, premised on the notion that the title insurance policy contains an implied contract to accurately disclose all matters of record that affect the title. Those decisions have as their root the simple premise that prospective purchasers and lenders review the title insurance commitment to evaluate the state of title. However, as one commentator notes, it is difficult to imply a duty to search from the title insurance contract, because the exclusive remedy provision of the policy emphatically states that it is not a search contract or abstract of title:

> In the general case, finding an implied contract to fully search title seems difficult to justify in light of so many express assertions to the contrary in the title policy. It does not appear analytically sound to say that a title insurer impliedly agreed to search for types of defects for which the insurer expressly denies any liability under the policy.[23]

The commentator is correct that the commitment and policy expressly negate any such implied duty. To the contrary, as the commentator notes, the commitment:

> …simply notifies the applicant that after closing the insurer will issue a title policy insuring title in the applicant, subject to standard preprinted exclusions and general exceptions, and subject to the special exceptions that the insurer has typed and attached to the Commitment form.[24]

In addition to the exclusive remedy provision of Conditions 15, the policy takes pains to state that it is an indemnity contract, and not a representation of the status of title. Conditions 8 of the 2006 ALTA policies clearly states that the policy is a contract of indemnity only:

> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

Conditions 9(a) states that the insurer shall not be liable for any further damages if it establishes title or removes the defect, lien or encumbrance. These provisions have been found to be unambiguous in

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[23] Joyce D. Palomar, *Title Insurance Law*, §12.02[1], p. 12-15 (footnote omitted). In the current edition of the same book, the author makes a more limited statement. See Joyce D. Palomar, Title Insurance Law, 2013-2014 Edition, § 12:13, West/Thomson Reuters. The jurisdictions adopting and rejecting the implied contract theory are listed in the state-by-state review at §15.12.

[24] Palomar, *Title Insurance Law*, §12.02, p. 12-5.

limiting liability to the terms of the contract.[25]

15.7 Misrepresentation Of Title

Some courts adopt the view that, when the insurer mistakenly omits a title matter from its commitment, it makes a negligent misrepresentation of information. Section 552 of the Restatement (Second) of Torts capsulizes the cause of action for negligent misrepresentation of information supplied "for the guidance of others in their business transactions."

> TOPIC 3. NEGLIGENT MISREPRESENTATION
> 552. Information Negligently Supplied for the Guidance of Others
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in Subsection (8), the liability stated in Subsection (1) is limited to loss suffered
>> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

This section of the Restatement has been adopted in several jurisdictions as the basis for a tort action against the title insurer.[26] The states that have adopted the §552 rationale are identified in the state-

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[25] For example, "Nowhere in this policy does it appear that it is anything other than what it purports to be, an insurance policy." *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982). In *Chicago Title Ins. Co. v. The Huntington National Bank*, 719 N.E.2d 955, 87 Ohio St.3d 270 (1999), the court held that the exclusive remedy provision negates a cause of action for abstractor negligence under the policy, saying: "Based on the merger clause in Section 14(b) of the policy's Conditions and Stipulations section that restricts any claim of loss or damage, including negligence claims, to the policy provisions, we find that HNB's negligence claim fails. The policy language explicitly precludes an independent tort action by HNB for negligence arising out of the status of its lien or of title to the secured property. Therefore, HNB is limited to the contractual remedies available in the policy, and its negligence claim fails." See also *Reflection Townhomes, LLC v. First American Title Ins. Co.*, 2010 WL 445521 (Ariz.App. Div. 1) (unpublished) (search duty claim negated by exclusive remedy provision).

[26] See *Moore v. Title Ins. Co. of Minn.*, 148 Ariz. 408, 714 P.2d 1303 (Ariz.App. 1985); *Great American Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425 (Tex. Civil App. 1980); and other cases cited in the state-by-state review at §15.12.

by-state review at §15.12. Section 552 is also applied to abstracts of title, as discussed at §15.12.

The misrepresentation of title is found to be the implied statement that a title matter does not exist, because it is not shown in the commitment to insure. As one court stated it:

> [The title commitment] actually represented that no deed restrictions were in existence. Having made the representation the title insurer is held to the standard of reasonable care and may under the proper circumstances be liable in tort for damages caused by a negligent misrepresentation. In other words, under the proper circumstances the tort of negligent misrepresentation can apply to title insurers.[27]

As the survey below shows, most states have rejected the §552 cause of action. In *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, the New Jersey Supreme Court rejected the theory as to the insurance contract, but recognized that the insurer may assume such a duty if it enters into a separate search contract:

> Both Chelsea and amicus, New Jersey Land Title Association, recognize that negligence principles provide an alternative basis for imposing liability on Chelsea. Notwithstanding the essentially contractual nature of the relationship between a title company and its insured, the company could be subject to a negligence action if the "act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title." Brown's Tie, supra, 115 Idaho at 59, 764 P.2d at 426. As support for its negligence claim against Chelsea, Walker Rogge points to various facts. For example, Chelsea had twice insured the property in question and on four other occasions it had opened files on the property. In addition, Chelsea's own back title plant reflected that the tract comprised twelve, not eighteen, acres. One of Chelsea's employees, moreover, supervised the closing, at which time the purchase price was computed on that basis.
>
> Because it restricted plaintiff's claim to the policy, the trial court did not determine whether Chelsea knew or should have known of the difference in acreage and of its materiality to the transaction. The court did not, therefore, determine whether Chelsea assumed an independent duty to assure the quantity of acreage, whether it breached that duty, or whether the breach caused any damage to Walker Rogge. Consequently, we are obliged to remand the matter to the trial court for a determination of those issues.[28]

The *Walker Rogge* court thus adopted the reasoning of the Idaho court in *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*.[29] On later appeal in *Walker Rogge*, the Appellate Division court

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[27] *Great American Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 430 (Tex. Civil App. 1980). Also see *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973).

[28] 562 A.2d at 221.

[29] 764 P.2d 423 (Idaho 1988).

lamented that the trial judge had apparently not "considered or determined the paramount question presented on remand: Whether Chelsea voluntarily assumed any duties in addition to issuing the title policy." The court again remanded, to see if there was some "additional independent duty" assumed by the insurer, perhaps as closing agent.[30]

In jurisdictions adopting the §552 cause of action as to a title insurance policy or commitment, a common issue is whether or not the claimant is an intended beneficiary of the information. Comment (h) of the Restatement states, on this subject:

> it is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of person, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.

The class of persons intended or expected to rely on a title insurance commitment is those persons for whom the commitment is prepared, and any others whom the insurer could identify at the time the commitment was prepared as being expected to purchase an interest in the property based on the information supplied. For example, a purchaser whose agreement to purchase came into being after a commitment was issued to insure a mortgage was not an intended beneficiary of the commitment. The fact that the insurer was not told to send a copy of the commitment to the claimant was found significant by the court:

> Warrington presented absolutely no evidence to suggest that Transamerica intended anyone to see the June 13, 1973, title report other than the parties to whom copies were sent. Further, Warrington presented no evidence that Transamerica knew that any of the parties to whom copies of the report were sent would supply the report to others. Therefore, even assuming that Transamerica was negligent in the preparation of the June 13, 1973, title report, Warrington was outside of the scope of Transamerica's liability here, under the legal standard recited in the Restatement.[31]

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[30] 603 A.2d 557, 559.

[31] *Warrington v. Transamerica Title Ins. Co.*, 40 Or.App. 841, 596 P.2d 627 (1979).

A seller must show not only that he or she was intended or expected to rely on a title insurance commitment, but also that he or she actually so relied. Colorado has held that there was no justifiable reliance on a faulty title commitment when the seller contracted to give clear title before reviewing the commitment.[32]

15.8 Texas Deceptive Trade Practices Act

Texas has applied the state's Deceptive Trade Practices Act to the title insurance policy. The Texas cause of action is unique. A court rejected a similar action based on Colorado's Consumer Protection Act.[33] The DTPA is a consumer law and is not founded on common law or negligence principles.[34] The claimant must be a consumer.[35] A party may also be a consumer if the property is not the person's residence, but is bought as part of the insured's personal investment plan.[36]

The DTPA makes actionable the affirmative misrepresentation that a title defect does not exist.[37] This principle stands in apparent juxtaposition to the oft-repeated holding of Texas courts that the insurer has no duty to disclose title defects in the policy, but is strictly an indemnitor if its policy is in error.[38] However, the two rules can be rationalized.

The insurer is not responsible for a violation of the DTPA simply because the title insurance policy omits an easement, encumbrance or other matter. As an appeals court recognized,

> To hold otherwise would mean that every time there is a loss under the risks covered

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[32] *Jimerson v. First American Title Ins. Co.*, 989 P.2d 258 (Colo.App.Div. 1 1999).

[33] *Callaham v. First American Title Ins. Co.*, 837 P.2d 769 (Colo.App. 1992).

[34] "The Deceptive Trade Practices Act is not a codification of the common law. Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980). Claims under the DTPA are not based in negligence. D. Bragg, P. Maxwell, J. Langley, Texas Consumer Litigation, § 2.02 n. 90 at 34 (2d Ed. 1983). Nor is there any requirement of privity between the consumer and the defendant. 'The coverage of the Deceptive Trade Practice Act is not restricted to deceptive practices committed by parties furnishing goods or services, but rather extends to any deceptive practice made in connection with the purchase or lease of such goods or services.' Gibbs v. Main Bank of Houston, 666 S.W.2d 554, 559 (Tex. App.-Houston [1st Dist.] 1984, no writ) (citing Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 [Tex. 1981])." *Zimmerman v. First American Title Ins. Co.*, 790 S.W. 2d 690, 695 (Tex.App. 1990).

[35] "A plaintiff establishes his standing as a Consumer in terms of his relationship to a transaction, not by a contractual relationship with the defendant. The only requirement is that the goods or services sought or acquired by the consumer form the basis of his complaint." *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex. 1983). See also *3Z Corp. v. Stewart Title Guar. Co.*, 851 S.W.2d 933 (Tex.App.-Beaumont 1993).

[36] *Gibbs v. Main Bank of Houston*, 666 S.W.2d 554 (Tex.App. 1984).

[37] *Gibbs v. Main Bank of Houston*, 666 S.W.2d 554 (Tex.App. 1984).

[38] *Gibbs v. Main Bank of Houston*, 666 S.W.2d 554 (Tex.App. 1984); *Martinka v. Commonwealth Land Title Ins. Co.*, 836 S.W.2d 773 (Tex.App. 1992); *Tamburine v. Center Savings Ass'n*, 583 S.W.2d 942, 947 (Tex.App. 1979), writ ref'd n.r.e.; *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310 (Tex. 1994); *Tri-Legends Corp. v. Ticor Title Ins. Co. of California*, 889 S.W.2d 432 (Tex.App. 1994).

by the policy, an insurance company commits an unfair trade practice.[39]

However, the lack of a duty to disclose title defects is not a complete bar to liability for a misrepresentation of title that constitutes a deceptive trade practice. The court rejected this argument in *Stewart Title Guar. Co. v. Sterling*:

> Stewart cites a number of cases it asserts establish it had no duty to disclose to Sterling the results of the title search. We disagree. The authorities cited involve negligence claims, and clearly state Stewart had no duty to discover and disclose the title defects, only to act as indemnitor against failure of title. However, those holdings cannot be stretched to support Stewart's position it can not be liable under article 21.21, § 16 for misrepresentations and nondisclosures of material facts. Cf., Gibbs v. Main Bank of Houston, 666 S.W.2d 554, 560 (Tex.App.--Houston [1st Dist.] 1984, no writ) (holding the same negligence-related authorities to be inapplicable to DTPA claims for misrepresentation or nondisclosures by a title company).[40]

Thus, the DTPA may apply when an insurer intentionally or recklessly, and affirmatively, misrepresents the state of title. Thus, in *Stewart Title Guar. Co. v. Sterling*, when the insurer had evidence in its file that the seller did not own some of the land, and the insured and surveyor raised the issue before closing, the insurer's affirmative representations that the insured would receive title were found actionable:

> The survey indicated that the three water district lots did not belong to the seller with whom Sterling had been negotiating. Sterling alerted Stewart to this discrepancy. Despite the existence of three recorded general warranty deeds establishing title in persons other than the seller, and the fact that proof of such ownership was actually in Stewart's files, Stewart assured Sterling the lots would be included in the deal.
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> At the closing, Sterling was repeatedly assured by a Stewart employee, Cameron, that he would be receiving "good and indefeasible title" to all the property, including the critical water district lots. Following those assurances, Sterling proceeded with the closing.[41]

The verdict was apparently also influenced by the fact that the insurer denied the claim, based on a waiver of inspection, despite its employee's assurances. The DTPA was also applied to a State Board of Insurance rule that required insurers to affirmatively state, as to restrictions, that there were "None of Record." The rule was found to create "a duty on the insurer to discover and disclose restrictive

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[39] *Stewart Title Guar. Co. v. Cheatham*, 764 S.W.2d 315, 318 (Tex.App. 1988).

[40] 772 S.W.2d 242, 246 (Tex.App. 1989).

[41] Id.

covenants, and creates an exception to the general rule of no duty to disclose."[42] The promulgated policy forms have since been changed so that an insurer is not required to state "None of Record" when no restrictions exist. Thus, no such duty to disclose can be implied from the current policy form. The DTPA has further been found to support a cause of action against the insurer when it has participated in an unconscionable scheme, whether or not that conduct includes misrepresentation of title.[43] A wrongful act by an escrowee may also be actionable under the DTPA.[44] However, an insurer acting as escrowee is not responsible under the DTPA when its conduct is not a producing cause of the alleged damages.[45]

The alleged failure to make a reasonable examination of title, without more, is not a deceptive trade practice.

> ... Stewart Title's alleged conduct, writing a title policy without making or causing to be made a determination of insurability of title in accordance with sound title underwriting practices, is not one of the false, misleading, or deceptive acts or practices defined by Section 17.46 [of the DTPA].[46]

Thus, the failure of title to a portion of the insured land did not create a violation of the DTPA.

However, the insurer may not be liable under the DTPA for merely failing to report the existence of a recorded easement.[47] It is also not liable under the Act if an adverse party challenges the insured's title, particularly when the insurer successfully defends title.[48]

The insurer's clearing of title is permitted by the contract and its insistence on doing so rather than paying the insured is not a DTPA violation.[49] There is no liability under the DTPA unless the claimed misrepresentation is the proximate cause of damage.[50]

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[42] *First Title Co. of Waco v. Garrett*, 802 S.W.2d 254 (Tex.App. 1990).

[43] *Commercial Escrow Co. v. Rockport Rebel, Inc.*, 778 S.W.2d 532 (Tex.App. 1989).

[44] *NRC, Inc. v. Huddleston*, 886 S.W.2d 526 (Tex.App.-Austin 1994).

[45] In *Williams v. Land Title Co. of Dallas*, 1997 WL 196345 (Tex.App.-Dallas) (unpublished), the plaintiff lost his property by mortgage foreclosure. He sued the escrowee-closer on a refinance loan, alleging that the closer's failure to close the refinance in time caused him to lose the property. The court found that the borrower was aware of the pending foreclosure and his own default on that loan, and thus the closer's "failure to close the Loan could not have been the producing cause of Williams's loss of his interest in the Property."

[46] *Stewart Title Guar. Co. v. Becker*, 930 S.W.2d 748, 753 (Tex.App.-Corpus Christi 1996).

[47] *Stewart Title Guar. Co. v. Cheatham*, 764 S.W.2d 315, 318 (Tex.App. 1988).

[48] *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432, 440 (Tex.App.-Houston [14th Dist.] 1994).

[49] *Martinka v. Commonwealth Land Title Ins. Co.*, 836 S.W.2d 773 (Tex.App. 1992).

[50] *First American Title Co. of El Paso v. Prata*, 783 S.W.2d 697 (Tex.App.-El Paso 1989). In *Peace v. ITCOA, LLC*, 2018 WL 1633518 (Tex.App.-Corpus Christi) (unpublished), the insured buyer's claim of a DTPA violation by the title

Closely related to the DTPA are the Texas insurance code sections regulating deceptive acts of insurers.[51] However, a misrepresentation in a title commitment is not actionable under this statute:

> Unlike section 17.46 of the DTPA, section 4 [of the insurance code deceptive act statute] does not use the phrase "includes, but is not limited to" in defining prohibited acts. Therefore, article 21.21, section 4 is an exclusive list of actionable statutory unfair or deceptive acts or practices in the business of insurance. *Watson*, 876 S.W.2d at 147. Section 4 does not define a misrepresentation in a title commitment as an unfair or deceptive act or practice... . Thus, the 21.21 claims alleged...are not actionable, as a matter of law... .[52]

A claimed misrepresentation in the commitment is also not actionable under 28 Tex.Admin. Code §21.112, which regulates insurance advertising.[53] A non-insured has no right to assert a cause of action against an insurer under article 21.21 for unfair claim settlement practices.[54]

Once an insured obtains a judgment against the insurer, the duty of good faith and fair dealing implicit in the contract terminates. An insurer cannot be guilty of bad faith conduct toward the insured after judgment is entered on the insurance claim. Therefore, the insured may not seek recovery under either the DTPA or article 21.21 of the Insurance Code for failing to pay the judgment amount to the insured when demanded.[55]

15.9 Other Consumer Protection Statutes

Several states other than Texas have found that title insurers may be liable under general consumer protection statutes for misrepresentation of title. Each state's law is discussed in the state-by-state analysis at §15.12.

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agent in not disclosing an incipient condemnation for a road was dismissed because the buyer received the condemnation award, and had no damages.

[51] Tex.Ins. Code Ann.Art. 21.21.

[52] *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432, 440 (Tex.App.-Houston [14th Dist.] 1994).

[53] Id.

[54] *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997). This is equally true as to a non-insured easement holder claiming that the purchaser built a house which trespassed onto the easement, and the purchaser who did not obtain an owner's policy. The fact that the purchaser paid for a loan policy did not grant him additional rights to claim under article 21.21.

[55] *Stewart Title Guar. Co. v. Aiello*, 40 Tex.Sup.Ct.J. 290, 941 S.W.2d 68 (1997).

15.10 Reasonable Search Statutes

Some statutes mandate a "reasonable" examination of title before issuance of a commitment to insure.[56] One commentator has urged that these statutes be used to justify a cause of action in tort for an error on a commitment to insure.[57]

Idaho has specifically rejected the argument that its statute formed a basis for a search duty.[58] The court's specific basis, however, was that the Idaho statute does not require a reasonable search, unlike many other statutes.[59]

Only one decision has found that a "reasonable search" statute is tied to a duty to search. A Florida decision stated simply that the negligence cause of action, already recognized by the state courts, "is codified by statute in Florida."[60] Several other courts have either accepted or rejected the tort theory without even mentioning their states' "reasonable search" statutes.[61]

The New Mexico Supreme Court found such a statute to support a duty of reasonable care.[62] A later case, *Ruiz v. Garcia*,[63] held that the statute created a cause of action for a seller for the failure

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[56] Those statutes which require a "reasonable" title search are: Alaska Stat. § 21.66.170; Ariz.Rev.Stat.Ann. § 20-1567; Colo.Rev.Stat. §10-11-106; Fla.Stat. § 627.7845; Haw.Rev.Stat. §431:20-103; Kan.Stat.Ann. §40-235; Mont. Code Ann. §33-25-214; Neb.Rev.Stat. §44-1947; Nev.Rev. Stat. §692A.220; N.H.Rev.Stat.Ann. §416-a:6; N.J.Stat.Ann. §17:46B-1 to -62; N.C.Gen.Stat. §58-26-1; N.M.Stat.Ann. Sec. 59A-30-11; Ohio Rev. Code Ann. §3953.07; Okla.Stat.Ann. title 36 §5001(C); Pa.Stat.Ann. title 40, §910-7; Tenn. Code Ann. Sec. 56-35-129; and Utah Code Ann. Sec. 31A-20-110. The following statutes require that a title search be done with each commitment, but do not impose the subjective qualitative standard of "reasonableness": Idaho Code §41-2708(1)(b); Mo.Ann.Stat. §381.071; and Tex.Rev.Civ.Stat.Ann. article 9.34.

[57] Joyce Palomar, *Title Insurance Law*, §12:6, 2014-2015 Edition, Thomson Reuters.

[58] *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P. 2d 423 (Idaho 1988).

[59] "Unlike similar statutes of sister states, [footnote omitted] section 41-2708(1) of the Idaho Code does not mandate a 'reasonable search' of title. It provides only that 'a search and examination of the title' shall be made. We find it significant that the Idaho legislature, unlike other states, has chosen to omit the word 'reasonable.' It has long been the rule in Idaho that only abstractors of title may be found negligent, see Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 P. 34 (1924), and this Court has never deviated from the rule. See e.g., Anderson, supra. A familiar rule of statutory construction provides that a statute will not be construed so as to overturn long-established principles of law 'unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction.' Doolittle v. Morley, 77 Idaho 366, 372, 292 P.2d 476, 481 (1956). "No such intention plainly appears from the face of I.C. Sec. 41-2708(1)." 764 P.2d at 427 (Idaho 1988).

[60] *Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises*, 544 So.2d 1070, 1072 (Fla.App. 1989).

[61] See, for example, *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984) (adopting abstractor liability without mentioning the statute); *Arapahoe Land Title, Inc. v. Contract Financing, Ltd.*, 28 Colo.App. 393, 472 P.2d 754 (1970); and *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 222 N.J.Super. 363, 536 A. 2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992) (both rejecting the theory without addressing their states' statutes).

[62] *Cottonwood Enterprises v. McAlpin*, 781 P.2d 1156 (N.M. 1989), 810 P.2d 812 (N.M. 1991).

[63] 850 P.2d 972 (N.M. 1993).

to perform a reasonable title search. The statute was then amended to say that the law does not create a duty to parties other than the underwriter to conduct a reasonable search and examination of title. A decision issued after the law was amended correctly construed the revised law to mean that there is no statutory duty to conduct a reasonable search in preparing a policy, and that "*Ruiz* was superseded by statute."[64] Nonetheless, that court found that a title insurer may be sued for negligent *statements* about the search it conducted.

Indeed, the "reasonable search" statutes say nothing about imposing a non-policy form of liability on the insurer. Rather, they are part of the "practice and procedure" regulation of the insurance industry. The statutes are found in the title insurance section of the state insurance codes. Those statute chapters do not regulate abstractors. The statutes typically make a series of requirements in addition to the "reasonable search," all relating to the collection and retention of the evidence on which the policy was issued.[65]

Further, the "reasonable search" statutes do not need enforcement by imposition of tort liability. As with any other part of the statutes regulating the insurer, enforcement is by the insurance commissioner, not private tort suit. Insurance codes provide numerous penalties, including fines and license suspension or revocation.

Therefore, "reasonable search" statutes must be read strictly for their stated purpose: to require insurers to analyze the insurability of a title before committing to insure. The statutes instruct title insurers that they may not engage in so-called "casualty" underwriting, meaning the issuance of a policy without a search and examination of the title records.[66] The title insurance policy has always been underwritten as a risk elimination rather than risk assumption policy, with the largest share of the premium being spent on the laborious search and examination of title records. The title insurer would risk its claim reserves, hurting its existing insureds whose claims are to be paid from those reserves, if it were to issue policies without vetting risk by the search and examination of title.

In rejecting a private cause of action to enforce a "reasonable search" statute, a Texas appeals court found the consumer adequately protected by the state's powers to regulate insurer conduct:

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[64] *Barrington Reinsurance Ltd. v. Fidelity Nat'l Title Ins. Co*., 143 N.M. 31, 172 P.3d 168, 2007-NMCA-147 (N.M. 2007).

[65] Montana's law is typical. It states:

"33-25-214. Underwriting standards--record retention. (1) A title insurer may not issue a title insurance policy unless it, its title insurance producer, or an approved attorney has conducted a reasonable search and examination of the title and made a determination of insurability of title in accordance with sound underwriting practices. The title insurer or title insurance producer shall preserve and retain in its files evidence of the examination of title and determination of insurability. The title insurer or title insurance producer may keep original evidence or may establish in the regular course of business a system of recording, copying, or reproducing evidence by any process that accurately and legibly reproduces, or forms a durable medium for reproducing, the contents of the original.

* * * *

(4) An insurer issuing a policy in violation of this section is estopped, as a matter of law, to deny the validity of the policy as to any claim or demand of the insured arising under the policy.

[66] Professor Palomar acknowledges that the legislative history of these laws shows that they were intended "to prohibit the writing of title insurance on a casualty basis." Joyce Palomar, *Title Insurance Law*, §12:6, p. 1083, 2014-2015 Edition, Thomson Reuters.

> The legislature, by enacting these articles [enforcement powers of the state insurance commissioner], intended to protect every consumer and purchaser of a title insurance policy. It gave to the State the power to promulgate and enforce rules and regulations prescribing underwriting standards and practices upon which companies are to issue title insurance contracts. Article 9.28 allows the Board to punish a company that does not comply with any of the provisions or requirements of Chapter 9 [which includes the reasonable search statute, Article 9.34]. Since the enforcement scheme adequately protects the intended beneficiaries, we do not have a duty to imply a cause of action to effectuate the legislative purpose. [citation omitted] We hold that the legislature did not intend a private cause of action under Article 9.34.[67]

15.11 Damages Under Search Duty Theory

In those jurisdictions that have adopted the doctrine that a title insurer may be sued when the title insurance policy does not except a recorded instrument that affects title, the damages payable are those that were proximately caused by the breach.[68] While the causes of action for breach of policy and abstractor liability are separate, the insured may not recover the same damages twice by pleading two causes of action.[69] Further, the commitment loss provision covers costs incurred in reliance on the commitment. Many out-of-pocket expenses that the proposed insured might seek under a tort theory would be equally compensable under the commitment. The measure of loss under the title insurance commitment is discussed at §6.9.

Most decisions on abstractor liability focus on elements of damage that are not compensable under the commitment or policy. Note that some of the decision cited in this section were issued in states that have since repealed abstractor liability. They are cited as examples only, and not to suggest that they remain good law in their respective jurisdictions. See §15.12 for a state-by-state review of this doctrine.

One element of loss the insured sometimes claims is for expenses incurred while the title insurer was honoring the policy by taking action to clear title. No such damages are payable as policy loss, as is fully discussed in §§3.4.3, 3.4.5 and 3.4.9. Several courts have granted delay

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[67] *Stewart Title Guar. Co. v. Becker*, 930 S.W.2d 748, 755 (Tex.App.-Corpus Christi 1996).

[68] *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154, 158 (1984). As stated in *Transamerica Title Ins. Co. v.* Ramsey, 507 P.2d 492 (Alaska 1973): "[The insured] is entitled to be replaced as nearly as possible in the position she would have occupied had the Title Company advised her that the power of attorney had been rescinded. She is not, however, entitled to recover more than the loss actually suffered. Moreover, the loss must be proximately caused by the defendant's conduct." 507 P.2d at 497.

[69] *Shada v. Title & Trust Co. of Florida*, 457 So.2d 553, 556 (Fla. 1984): "The right of action on the contract, and the right to sue for the breach of the collateral duty are distinct, the only limitation on a suit for either or both being that the same party cannot be compensated twice over for the same wrong, once for the breach of contract and again for the tort. Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N.E. 503, 12 L.R.A. (N.S.) 924, text 933." [quoting from Parrish v. Clark, 107 Fla. 598, 603, 145 So. 848, 850 (1933)].

damages under a theory of abstractor liability.[70] Carrying costs such as taxes, mortgage interest and similar expenses have been allowed when the insured established that they were foreseeable and proximately caused by the search error.[71]

However, even under an abstractor liability cause of action, expenses of delay are not payable when the insurer did not proximately cause such damages.[72] Claims for lost profits have been denied because evidence at trial has not established proximate cause.[73] However, lost profit may be an element of damage if properly pled and proven.[74] The cost to settle a lawsuit was found recoverable, on a finding that the suit would not have existed but for the failure to disclose the title defect. However, the settlement of a second lawsuit in the same claim was not compensable, because it did not involve the title matter.[75] The insured's time spent is not recoverable, or at least not at the insured's professional hourly rate.[76]

A rational absolute cap on abstractor liability damages is the amount paid for the property or the policy amount.[77] As one commentator put it:

> In this situation, should the terms of the title insurance contract limit contract damages but not tort damages? The insured did pay only a small premium for a finite amount of title insurance. For this reason some courts do hold that the amount of insurance stated in the policy absolutely limits the title's insurer's liability.[78]

When the insured purchased land that turned out to be valueless, the court found that he was adequately compensated by the return of his purchase price plus an inflation factor, although the

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[70] *Bank of California v. First American Title Ins. Co.*, 826 P.2d 1126 (Alaska 1992); *Red Lobster Inns of America, Inc. v. Lawyers Title Ins. Corp.*, 656 F.2d 381 (8th Cir. 1981); *Chun v. Park*, 51 Hawaii 462, amended by 51 Hawaii 501, 462 P.2d 905 (1969).

[71] *Chun v. Park*, 51 Hawaii 462, amended by 51 Hawaii 501, 462 P.2d 905 (1969); *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994).

[72] *Lawrence v. Chicago Title Ins. Co.*, 192 Cal.App. 3d 70, 237 Cal.Rptr. 264 (Cal.App. 1 Dist. 1987); *Endruschat v. American Title Ins. Co.*, 377 So.2d 738 (Fla.App. 1979).

[73] *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994); *Chun v. Park*, 51 Hawaii 462, amended by 51 Hawaii 501, 462 P.2d 905 (1969).

[74] *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45 (Fla.App. 1984).

[75] *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973).

[76] *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994). The insured, a dentist, sought to be paid at the rate of $66.66 per hour. The court noted that, in dealing with the title, he was not performing the services of a dentist, and therefore struck down the trial court's award.

[77] *Lipinski v. Title Ins. Co.*, 202 Mont. 1, 655 P.2d 970 (1982).

[78] Palomar, *Title Insurance Law*, §12.05[1], pp. 12-46 to -47.

court commented that interest on the money would be more appropriate than inflation on the land value.[79]

15.12 State-By-State Review Of Abstractor Liability Law

This section provides a summary of each state's decisions and statutory law regarding what tort liability, if any, is imposed on the issuer of a title insurance policy.

Alabama

There is no statutory duty to search or examine title before the issuance of a title insurance policy. Under the title insurance code as revised in 2001, claims of negligent misrepresentation based on a title insurance policy or commitment are barred.[80] A title agent is not liable for having failed to make exception for a recorded instrument on a commitment or policy, because the search it conducts is solely for the benefit of its insurer according to the revised law.[81] Earlier decisions had found an implied duty in contract to perform a reasonable search as to the records covered by the policy.[82] An earlier case permitted recovery against an agent for the claimed intentional failure to disclose an IRS right of redemption to the purchaser.[83] Also, a 1986 decision found that a title agent that issued a policy had also been hired to search title, supporting a claim for fraud in the failure to report a recorded instrument on the commitment.[84]

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[79] *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994).

[80] In *Metro Bank v. Mississippi Valley Title Ins. Co*., 2012 WL 4344600 (N.D.Ala.) (unpublished), the court said that, while the title insurance code adopted in 2001 requires a title insurer to perform a title search before issuing a commitment or policy, the law "is equally clear that searches [for title policies] shall be solely for the benefit of the title insurance company requested to issue its policy or policies of title insurance." Ala. Code § 27-25-3(10). The court said that the title agent searched title, but "he did so solely for the benefit of" the insurer. The court rejected Metro Bank's reliance on Alabama cases decided before 2001 that suggested that a title insurance policy contains a duty to search title. The court said the better reasoning was that the law eliminated any such duty. It noted that "[s]uch a construction is consistent with the majority view… ." In *Upton v. Mississippi Valley Title Ins. Co.*, 469 So.2d 548 (Ala. 1985), the court stated: "Mississippi Valley argues that, apart from the contract of insurance, it had no other duty to search circuit court records. We agree, and we find no authority in this state for imposing a common-law duty on title insurance companies that would require them to search circuit court records." 469 So.2d 548 at 557.

[81] In *Boyce v. Cassese*, 941 So.2d 932 (Ala. 2006), the court found that a title agent may not be liable on a policy it issues for the underwriter, saying: "The Boyces have not alleged or established that Birmingham Title issued the title policy in its own name or that Birmingham Title intended to bind itself to the contract of title insurance. 'The general rule in Alabama concerning liability of an agent for the breach of contract entered on behalf of a disclosed principal is that *the agent binds either the principal or himself to the contract, but not both*.'" (emphasis in original).

[82] *Parker v. Ward*, 614 So.2d 975 (Ala. 1992); *Soutullo v. Commonwealth Land Title Ins. Co.*, 646 So.2d 1352 (Ala. 1994) (implied duty sufficient basis for tort claim for failure to disclose lack of right of access); *Steadman v. Central Alabama Title Company, Inc.*, 812 So.2d 290 (Ala. 2001), remand 2001 WL 1020981 (Ala.Civ.App.) (unpublished) (borrower permitted to sue title agency that issued title commitment for lender for having "breached their contract ... to perform a complete title search," treating commitment as an abstract of title).

[83] *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990).

[84] *Hopkins v. Lawyers Title Ins. Corp.*, 514 So.2d 786 (Ala. 1986).

Alaska

A negligent misrepresentation action is permitted based on a faulty commitment. A misrepresentation action was also permitted against an insurer alleged to have given incorrect information to a seller about the validity of her power of attorney, when there was a recorded notice of revocation of same.[85] No merger of the commitment into the policy was found to have occurred based on the commitment's statement that "[t]his report and commitment shall have no force or effect except as a basis for the coverage specified herein." There is a statutory duty to conduct a "reasonable search" before the issuance of a title insurance policy.[86]

Arizona

Arizona has declared that a title insurer is not liable as an abstractor of title, based on a 1992 revision of the title insurance code that defines a "preliminary report," "commitment" or "binder" of insurance as not being an abstract of title.[87] A prior decision that approved abstractor liability has been reversed.[88] However, the insurer was not estopped from collecting by subrogation from a seller who was overpaid for the land because the commitment failed to note a deed out of part of the land. The seller could not show any reliance on the incorrect commitment when it was the seller himself who had previously conveyed the parcel. There is a statutory duty to conduct a "reasonable" search before the issuance of a title insurance policy.[89]

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[85] *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973). However, in *Windel v. Mat-Su Title Ins. Agency, Inc*., 305 P.3d 264 (Alaska 2013), the Supreme Court held that the title insurer and its agent had no duty to advise the insured about the possible invalidity of an easement excepted in the policy that encumbered the insured parcel.

[86] Alaska Stat. § 21.66.170. *Bank of California v. First American Title Ins. Co.* said that "Alaska Statute 21.66.170 requires title insurers to conduct a 'reasonable search and examination of title' before issuing a policy of title insurance.[footnote omitted] Thus, imposing tort liability does not require conduct on the part of title insurers which is not already required by statute." 826 P.2d 1126, 1130 (Alaska 1992).

[87] See *Centennial Development Group, LLC v. Lawyers Title Ins. Corp*., 233 Ariz. 147, 310 P.3d 23 (Ariz.App. Div. 1 2013), which relied on Ariz.Rev.Stat. § 20–1562(1), (5). That law states: "'Preliminary report.' 'commitment' or 'binder' means a report that is furnished in connection with an application for title insurance and that offers to issue a title insurance policy subject to the stated exceptions set forth in the report.... The reports are not abstracts of title and the rights, duties and responsibilities relating to the preparation and issuance of an abstract of title do not apply to the issuance of a report. The report is not a representation as to the condition of title to real property but does constitute a statement of the terms and conditions on which the issuer is willing to issue its title insurance policy if the offer is accepted." The *Centennial* court noted that the Arizona law is based on the California code, and that the California courts likewise jettisoned abstractor liability when the new law was adopted. The court said that, "[u]nder the plain language of the amended statute, the title commitment that Lawyers Title issued in connection with its policy was not a representation of the condition of the title to the property." *Edwards v. First American Title Ins. Co*., 2014 WL 575953 (Ariz.App. 1 Div. 2014) (unpublished) (no tort action for failure to make exception for judgment, based on the statute and *Centennial* holding). In *Marceaux v. Baker*, 2019 WL 5701736 (Ariz.App. 1 Div.) (unpublished), the court dismissed the owner insured's abstractor negligence claim based on her policy because Arizona does not recognize that cause of action, citing *Centennial Development*.

[88] That decision was *Moore v. Title Ins. Co. of Minn.*, 148 Ariz. 408, 714 P.2d 1303 (Ariz.App. 1985). *Moore* had relied on *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984) and § 552 of the Restatement (Second)

Arkansas

There is no cause of action in Arkansas against a title insurer for abstractor negligence premised on the failure to except a recorded encumbrance in a policy.[90] An older decision stated that an insurer has a duty to search before issuing its policy, but did not declare that this duty supports a private cause of action.[91] When an insurer entered into a national agreement with a customer to provide various title policies, do closings and advise specifically of recorded restrictions, the customer was permitted to sue in negligence for breach of contract when the insurer failed to disclose a recorded restriction.[92]

California

By statute,[93] a preliminary report is not an abstract of title, but merely an offer to issue a

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of Torts.

[89] Ariz.Rev.Stat. § 20-1567.

[90] In *Chicago Title Ins. Co. v. Arkansas Riverview Development, LLC*, 573 F.Supp.2d 1152 (E.D.Ark. 2008), the court rejected the abstractor negligence theory, because Arkansas law holds that an action against an abstractor sounds in contract, not tort. It also rejected the Restatement Section 552 theory, because Arkansas does not recognize a cause of action for negligent misrepresentation. It also found that there was no separate search contract on which the insurer could be sued. In an earlier decision, *United States v. Mississippi Valley Title Ins. Co.*, 405 F.Supp. 1312 (W.D.Ark. 1975), the court stated that "doctrines of skill and negligence have no application" to title insurance contracts in Arkansas. In *Friedeberg v. Bullard*, 2019 WL 1416473 (unpublished), recommendations adopted in 2019 WL 1412106 (E.D.Ark. 2019) (unpublished), aff'd 783 Fed.Appx. 648 (8th Cir. (Ark.) 2019), the court said that "Arkansas law does not permit a negligence claim against title insurance companies "for lack of reasonable care in searching and disclosing the state of title to the property," under Ark. Code Ann. 23-103-408(e)(1). That law says that an insured's exclusive remedy "is to file a claim against the title insurance policy subject to the terms and conditions of the title insurance policy." Ark. Code Ann. 23-103-408(e)(2). The *Friedeberg* court also found that, even if a negligence claim were permitted, it would have been barred under the applicable three-year statute of limitations, Ark. Code Ann. 16-56-105.

[91] In *Bourland v. Title Insurance Co. of Minnesota*, 4 Ark.App. 68, 627 S.W.2d 567 (1982), the insureds sued under their policy, not for abstractor negligence. The court stated: "The issuance of the policy is predicated upon an examination of the public records as to the insured title for when a person seeks title insurance he expects to obtain a professional title search and opinion as to the condition of his title. Accordingly the insurer had a duty to search the records for clouds and other defects before issuing its policy." In *Arkansas Riverview*, the court said that *Bourland* did not support a negligence claims because the case was about policy liability.

[92] *Red Lobster Inns of America Inc. v. Lawyers Title Ins. Corp.*, 656 F.2d 381 (8th Cir. 1981).

[93] Insurance Code section 12340.1 defines "title insurance" as insuring, guaranteeing or indemnifying real property owners against loss or damage resulting from encumbrances on the property or the incorrectness of searches relating to property's title. Insurance Code section 12340.2 defines "title policy" as "any written instrument or contract by means of which title insurance liability is assumed." Insurance Code section 12340.10 defines "abstract of title" as "a written representation, provided pursuant to a contract, whether written or oral, intended to be relied upon by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments or documents which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein. An abstract of title is not a title policy as defined in Section 12340.2." Insurance Code section 12340.11 defines preliminary reports as "reports furnished in connection with an application for title insurance and are offers to issue a

policy.[94] No action based on negligent misrepresentation may be brought based on a commitment issued after the law's effective date, January 1, 1982.[95] The insurance contract is a contract of indemnity only.[96] The statute limits earlier decisions permitting a cause of action for negligent

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title policy subject to the stated exceptions set forth in the reports and such other matters as may be incorporated by reference therein. The reports are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy, if such offer is accepted."

[94] See *Southland Title Corp. v. Superior Ct. of California*, 231 Cal.App.3d 530, 282 Cal.Rptr 425 (Cal.App. 2 Dist. 1991). In *Lewis v. Superior Court*, 30 Cal.App.4th 1850, 37 Cal.Rptr.2d 63 (Cal.App. 2 Dist. 1994), rev.den. March 16, 1995, the court said this about the statutory framework recited above: "These statutory changes recognize a fundamental truth about title insurance as contrasted with the practice of abstracting and representing the status of title to property. Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. [Citations.] The policy of title insurance, however, does not constitute a representation that the contingency insured against will not occur. [Citations.] Accordingly, when such contingency occurs, no action for negligence or negligent misrepresentation will lie against the insurer based upon the policy of title insurance alone. Given Insurance Code sections 12340.10 and 12340.11, it is clear that 'any title search or examination is performed by the insurer solely for the purpose of seeking to evaluate its underwriting decision in issuing the policy, not for the benefit of the insured." 37 Cal.Rptr.2d at 76.

[95] Ins. Code §§12340.10, -.11. See *Crocker & Co. v. Transamerica Title Ins. Co.*, 27 Cal.App.4th 1722, 33 Cal.Rptr.2d 313, 316 (Cal.App. 1 Dist. 1994) and *Somerset South Properties, Inc. v. American Title Ins. Co.*, 873 F.Supp. 355, 357 (S.D.Cal. 1994).

[96] "Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. [citations omitted] The policy of tile insurance, however, does not constitute a representation that the contingency insured against will not occur. [citations omitted] Accordingly, when such contingency occurs, no action for negligence or negligent misrepresentation will lie against the insurer based upon the policy of title insurance alone." *Lawrence v. Chicago Title Ins. Co.*, 40 Cal.3d 870, 884, 192 Cal.App.3d 70, 237 Cal.Rptr. 264 (1987); cited in *Crocker & Co. v. Transamerica Title Ins. Co.*, 33 Cal.Rptr.2d 313, n. 6, (Cal.App. 1 Dist. 1994). *Lawrence* was distinguished in *Alliance Mortgage Co. v. Rothwell*, 32 Cal.Rptr.2d 592 (Cal.App. 1 Dist. 1994). In *Alliance*, the matter at issue was a California Land Title 116 endorsement (elsewhere commonly known as a "location" endorsement), rather than a title insurance policy or commitment. The court held that a lawsuit for intentional and negligent misrepresentation was not barred by *Lawrence*. The endorsements assured that the properties each contained a "4-unit Residence," when in fact two were single-family dwellings and one a duplex. The borrowers had conducted an elaborate fraud on the lender by misrepresenting the nature of the improvements and falsifying all loan documents. The lender realized after default that its collateral was significantly less than the debt. The court found that the endorsement and policy together "amount to a guarantee, not merely a promise to indemnify, as in the conventional title policy... . The specificity of this false description of the property, and the guarantee, together with the alleged reliance thereon, differentiates this case from the routine situation discussed in *Lawrence*." Id. at 605. *Alliance* was reversed on appeal [10 Cal.4th 1226, 900 P.2d 601, 44 Cal.Rptr.2d 352 (1995)], but the misrepresentation holding was not directly modified. A cause of action for negligent misrepresentation on a CLTA endorsement was found to fail as a matter of law in *Golden Security Thrift & Loan Ass'n v. First American Title Ins. Co.*, 53 Cal.App.4th 250, 61 Cal.Rptr.2d 442 (Cal.App. 4 Dist. 1997). The court reiterated that "[t]he policy of title insurance ... does not constitute a representation that the contingency insured against will not occur." Id. at 447. Similarly, in *Vournas v. Fidelity Nat'l Title Ins. Co.*, 73 Cal.App.4th 668, 86 Cal.Rptr.2d 490 (Cal.App. 4 Dist. 1999), the court found the insurer not liable for negligence or misrepresentation based when it allegedly failed to follow

misrepresentation to commitments before the statutory cutoff.[97] Damages under the now-prohibited negligent misrepresentation cause of action, for investment in valueless property, were limited to the investment plus inflation factor.[98] The statute of limitations for bringing an action in tort was two years from the date of discovery.[99]

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underwriting rules set out in the CLTA manual. It said: "[T]he procedures outlined in the CLTA manual appear intended to affect or benefit the title insurer. These are guidelines used by Fidelity to make its underwriting decision on whether to issue a title policy, and are designed to guide its employees on steps to take before issuing a policy. Because these steps are designed to reduce the risk to Fidelity that it will be required to pay a claim on a title policy it issues, the CLTA manual outlines duties intended to affect and benefit Fidelity rather than third parties." The court also found that *Seeley v. Seymour*, 190 Cal.App.3d 844, 237 Cal.Rptr. 282 (1987), did not support a cause of action for negligent misrepresentation: "The legislature has eliminated any duty to investigate, and we decline to undercut that legislative determination by a judicial rule that imposes on Fidelity a duty to police the activities of Skouras merely because Fidelity sold a lender's title insurance policy to Skouras." In *1500 Viewsite Terrace, LLC v. Pickford Escrow, Inc*., 2017 WL 4309755 (Cal.App. 2 Dist.) (unpublished), the insured cited *Rothwell* to support its argument that title insurance commitments made representations of fact. The court responded that the commitments "as a matter of law, those reports did not constitute representations, or conceal anything, about liens or clouds on title." In *Carr v. Chicago Title Ins. Co*., 2018 WL 6521029 (Cal.App. 2 Dist.) (unpublished), the court dismissed claims against a title insurer and its subsidiary based on the California Elder Abuse and Dependent Adult Civil Protection Act, because the title insurance code does not permit tort claims of any type premised on a title report or policy.

[97] See *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App.3d 917, 941, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975); *Banville v. Schmidt*, 37 Cal.App.3d 92, 112 Cal.Rptr. 126 (1974); *Stagen v. Stewart-West Coast Title Co.*, 149 Cal. App.3d 114, 196 Cal.Rptr. 732 (Cal.App. 2 Dist. 1983) (finding no misrepresentation liability to a seller); *Smith v. Commonwealth Land Title Ins. Co.*, 177 Cal.App.3d 625, 223 Cal.Rptr. 339 (Cal.App. 2 Dist. 1986) (finding no liability to a prior deed of trust holder); and *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P. 2d 309 (1985).

[98] *Barthels v. Santa Barbara Title Co.*, 28 Cal.App.4th 674, 33 Cal.Rptr.2d 579 (Cal.App. 2 Dist. 1994). The measure of policy loss adopted in *Overholtzer v. Northern Counties Title Ins. Co*., 116 Cal.App.2d 113, 253 P.2d 116 (Cal.App. 1 Dist. 1953) was rejected as being "not relevant" to a negligence action. The negligence action is based on Civil Code 3333, which limits damages "to the detriment proximately caused by the Title Company's act or omission." 33 Cal.Rptr.2d at 581. For further discussion of this case, see §15.10.

[99] *Crocker & Co. v. Transamerica Title Ins. Co.*, 27 Cal.App.4th 1722, 33 Cal.Rptr.2d 313, 316 (Cal.App. 1 Dist. 1994)

Colorado

There is a statutory duty to conduct a "reasonable examination of the title" before the issuance of a title insurance policy.[100] A title insurer may be sued for negligent misrepresentation when the policy fails to disclose a matter not excluded from coverage.[101] The Colorado Court of Appeals acknowledged that there can be liability to third parties such as sellers, if the insurer knows that the third party will rely on the information. However, the court declined to decide if a seller could bring a cause of action for negligent misrepresentation. It found that the seller had not justifiably relied on any misrepresentation because it was contractually obligated to deliver good title before reviewing the defective title commitment.[102] There is no implied duty in contract to disclose matters excluded from the coverage of the policy, such as building code violations. There also is no cause of action to sue in tort for matters excepted or excluded.[103]

Connecticut

The economic loss doctrine bars a claim of searching negligence premised on a title insurance policy.[104]

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[100] Colo.Rev.Stat. §10-11-106.

[101] *Callaham v. First American Title Ins. Co.*, 837 P.2d 769 (Colo.App. Div. 1 1992) (holding that cause of action arose when insureds discovered title defect and their injuries therefrom); *Jimerson v. First American Title Ins. Co.*, 989 P.2d 258 (Colo.App.Div. 1 1999) (applying §552 of the Restatement of Torts).

[102] *Jimerson v. First American Title Ins. Co.*, 989 P.2d 258 (Colo.App.Div. 1 1999).

[103] In *Arapahoe Land Title, Inc. v. Contract Financing, Ltd.*, 28 Colo.App. 393, 472 P.2d 754, 756-7 (Colo.App. 1970), the court said: "... Arapahoe Title excepted from its contract any coverage of building ordinances and compliance or noncompliance therewith. It assumed no obligation relative thereto. ... Here there was no duty and therefore no negligence. …Any liability of Arapahoe Title to Contract Financing must rest upon Arapahoe Title's express or implied contractual obligations to Contract Financing. … Viewed from such perspective, we do not find any basis for liability on the part of Arapahoe Title. Contractually, it agreed only to deliver a title insurance policy in its usual form. It was clearly established here that its usual form of policy did not insure against losses or damages arising from the consequences of governmental action and did not insure that the building complied with the ordinance. There was no express contractual basis for liability. … Further, Arapahoe Title had no implied contractual obligation to notify Contract Financing of the building code violations relating to the property described in the title insurance commitment. The obligation Arapahoe Title assumed was to insure title subject to certain exclusions and conditions. Nothing in the record discloses an express or implied undertaking on its part to warrant beyond the terms of its written contract the title Contract Financing might acquire." In *Fatell v. Stewart Title Guar. Co.*, 2009 WL 3158166 (D.Colo.) (unpublished), citing *Arapahoe*, the court found no valid cause of action in negligence as to a mining claim that was excepted from policy coverage by a general exception, and that the insured "may not circumvent [the policy exception] by asserting a claim in negligence… . "

[104] *First American Title Ins. Co. v. 273 Water Street, LLC*, 2010 WL 6496185 (Conn.Super.) (unpublished). The court relied on several cases that have held that permitting tort claims on insurance contracts could frustrate a fundamental tenet of insurance, the ability to write contracts to rationally allocate and spread risk, while making a reasonable profit. An early case held that the issuer of a certificate of title, which is not a title insurance policy, may be liable for misrepresentation of title. *Bridgeport Airport Inc. v. Title Guaranty & Trust Co.*, 111 Conn. 537, 150 A. 509 (Conn. 1930).

Delaware

A Delaware court has rejected the abstractor liability cause of action.[105]

District of Columbia

The author finds no reported decision creating a claimed duty to search.[106] The insurer has no implied contractual or tort duty to inform purchasers of the legal effect of future tax assessments, when such assessments were not liens on the date of the title certificate.[107]

Florida

In the 2007 decision of *Chicago Title Ins. Co. v. Commonwealth Forest Investments, Inc*.,[108] a federal court applying Florida law held that the economic loss doctrine bars all or most tort claims under the title insurance policy, overturning earlier decisions to the contrary. That decision has been followed.[109] *Commonwealth Forest* deemed the economic loss doctrine to supplant a 1984 opinion that recognized a cause of action based on abstractor liability under a title insurance commitment.[110]

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[105] *Ruger v. Funk,* 1996 WL 110072, 1996 Del.Super. LEXIS 34 (Del.Super.Ct. Jan. 22, 1996) (following *Walker Rogge* and rejecting decisions imposing a tort duty on a title insurance contract).

[106] In *3307 M Street Partners v. Commonwealth Land Title Ins. Co.*, 782 F.Supp. 4 (D.D.C. 1992), the District Court observed that the District of Columbia does not recognize a cause of action in tort for negligent breach of contractual duties. Nonetheless, the court was urged to recognize "a claim in contract for 'negligently confirm[ing] to Plaintiff that the title to the estate described in [the policy] was vested as stated therein.'" The court found that the D.C. Court of Appeals had not yet decided the issue. Rather than certify the question for further appeal, however, the District Court remanded to the trial court without decision.

[107] *Union Realty Co. v. Ahern*, 93 A.2d 84 (D.C. 1952). The *Union Realty* case was decided by the D.C. Circuit Court of Appeals, relying on District of Columbia law, but involved property in Montgomery County, Maryland. District of Columbia law was apparently applied because it involved an assessment by the Washington Suburban Sanitary Commission.

[108] *Chicago Title Ins. Co. v. Commonwealth Forest Investments, Inc*., 494 F.Supp.2d 1332 (M.D.Fla. 2007).

[109] *Ziemniak v. Goede & Adamczyk, PLLC*, 2012 WL 5868385 (S.D.Fla.) (unpublished). In *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175 (M.D.Fla.) (unpublished), although the court accepted without criticism Kahama's assertion that Florida's reasonable search statute translates into a cause of action for abstractor negligence in the issuance of a title insurance commitment, the court said that Old Republic had not failed to conduct a reasonable title search. It noted that the two instruments at issue were recorded prior to the root of the marketable title held by the insured, and that a court had already quieted the title based on the Florida Marketable Record Title to Real Property Act. The court ruled that "Old Republic had no obligation to research the public records before" the date of the root of title. Therefore, the insurer "did not breach its duty to conduct a reasonable title search." However, in *La Minnesota Riviera, LLC v. Lawyers Title Ins. Corp.*, 2007 WL 3024242 (M.D.Fla.) (unpublished), the court applied the economic loss doctrine to dismiss a misrepresentation claim based on the policy, but refused to dismiss abstractor liability claims premised on the title insurance commitment.

[110] *Shada v. Title & Trust Co. of Florida,* 457 So.2d 553 (Fla. 1984). "We see no reason why the principles applicable to an abstracter should not be applied to a title insurance company where it undertakes the duty to schedule record title defects. The use of a title insurance binder or commitment instead of an abstract and an attorney's opinion of title has become commonplace. A title insurance company has a duty to exercise reasonable care when it issues a title binder or commitment and its failure to do so may subject it to liability in either contract or tort." *Shada* relied in part on *First*

Another decision which the *Commonwealth Forest* court considered out of date had held that special damages such as lost profit may be recovered under the abstractor liability theory.[111] Liability extends only to those third persons whom the insurer could reasonably expect to rely on the commitment or policy.[112] There is a statutory duty not to issue a title insurance policy without due regard for matters affecting the title.[113] However, recent decisions have declared that the law does not support a private cause of action.[114]

Georgia

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute, in the State of Georgia.

American Title Ins. Co., Inc. v. First Title Service Co. of the Florida Keys, Inc., 457 So.2d 467 (Fla. 1984) and earlier decisions involving true abstractor liability. *First Title Service* did not involve liability on a commitment for abstractor negligence.

[111] *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45 (Fla.App. 1984).

[112] *Goldberg, et al. v. Chicago Title Ins. Co.*, 517 So.2d 43 (Fla.App. 1987); *First American Title Ins. Co. v. First Title Service Co. of the Florida Keys, Inc.*, 457 So.2d 467 (Fla. 1984).

[113] Section 627.784 of the Florida Statutes says that "[a] title insurance policy ... may not be issued without regard to the possible existence of adverse matters or defects of title." In *Lawyers Title Ins. Corp. v. D.S.C. of Newark Ent.*, 544 So. 2d 1070 (Fla. App. 1989), the court held: "Examination of record title or an abstract of the record title of real property is both an esoteric and a painstaking process. Evaluation of the status of title requires considerable expertise. *L. Smirlock Realty Corp. v. Title Guarantee Company*, 52 N.Y.2d 179, 418 N.E.2d 650, 437 N.Y.S.2d 57 (1981), aff'd, 63 N.Y.2d 955, 473 N.E.2d 234, 483 N.Y.S.2d 984 (1984). It was for these reasons that the concept of title insurance was developed and similar reasoning has made the furnishing of title insurance a successful business. It is also appropriate to note that title insurance is not casualty insurance. § 627.784, Fla. Stat. (1987). A policy issues based upon the informed opinion of title examining experts employed by the company that title is in the condition expressed in the policy. *Krause v. Title & Trust Company of Florida*, 390 So.2d 805 (Fla. 5th DCA 1980); § 627.7845, Fla.Stat. (1987). As a matter of public policy, a duty is imposed upon the title company to make a thorough and competent search of the record title. *Shada v. Title & Trust Company of Florida*, 457 So.2d 553, 557 (Fla. 4th DCA 1984), rev. denied, 464 So.2d 556 (Fla.1985); *McDaniel v. Lawyers Title Guaranty Fund*, 327 So.2d 852, 855 (Fla.2d DCA 1976). This duty is codified by statute in Florida. § 627.784, Fla.Stat. (1987)."

[114] *Regions Bank v. Commonwealth Land Title Ins. Co*., 977 F.Supp.2d 1237, 24 Fla. L. Weekly Fed. D 192 (S.D.Fla. 2013); *Lennen v. Marriott Ownership Resorts, Inc*., ___ F.Supp.3d ___, 2019 WL 1440092 (M.D.Fla. 2019) (permanent citation not yet available), appeal filed August 21, 2019.

Hawaii

Hawaii requires that a title insurer conduct a "reasonable" title search before the issuance of a title insurance policy.[115] The purpose of the law has been held to be to discourage title insurers from issuing policies based on indemnification and not on the results of a valid title search.[116] As to a certificate of title search, the state recognizes a cause of action for negligent misrepresentation of information, under § 552 of the Restatement (Second) of Torts.[117] The author finds no reported case involving a commitment or policy. Hawaii has both a general deceptive trade practices act[118] and a portion of the insurance code dedicated to deceptive or unfair insurance practices.[119] An insured may bring an action against an insurer under either statute.[120]

Idaho

Abstractor liability and negligence have been rejected, when the claim is based solely on a commitment or policy.[121] Relying on *Ford v. Guarantee Abstract and Title Company, Inc.*,[122] the Supreme Court has said that a negligence action may lie only for "duties voluntarily assumed by the insurer in addition to the mere contract to insure title."[123] However, neither an oral update of title nor an amended commitment assume any such duty.[124]

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[115] Haw.Rev.Stat. §431:20-113.

[116] *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 839 P.2d 10, recons.den., 74 Haw. 650, 843 P.2d 144 (Hawaii 1992); *Schmidt v. Fidelity Nat'l Title Ins. Co.*, 2008 WL 2511773 (D. Hawaii) (unpublished).

[117] *Chun v. Park*, 51 Hawaii 462, amended by 51 Hawaii 501, 462 P.2d 905 (1969).

[118] §480-2, Hawaii Rev.Stat.

[119] §431:1-104, Hawaii Rev. Stat.

[120] *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791 (9th Cir. 1996).

[121] In *Anderson v. Title Insurance Company*, 103 Idaho 875, 655 P.2d 82 (1982), the court held: "Nowhere in this policy does it appear that it is anything other than what it purports to be, an insurance policy.[footnote omitted] The fee charged was for an insurance policy, it does not appear to be for examination of title. Where title to a portion of insured property fails, the insured is entitled to recover upon the loss up to the amount of insurance coverage under the policy. [citations omitted] The full amount of the policy, $1,200 has been tendered to the insureds and deposited to the court. …[W]e decline to hold that the title insurance company was impliedly acting as an abstractor and we refuse to impose the liabilities of an abstractor upon a title insurance company merely because it issued a preliminary title report." Id. at 85-6. In *Cummings v. Stephens*, 157 Idaho 348, 336 P.3d 281 (Idaho 2014), reh.den. Nov. 5, 2014, the court held that Idaho's search statute does not transform a title commitment into an abstract of title, and thus a title agent may not be sued for faulty abstracting of title for having included in a title commitment parcels not owned by the sellers and one they did own but did not intend to sell.

[122] 220 Kan. 244, 553 P.2d 254 (1976).

[123] *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423, 426 (Idaho 1988). The negligence action in the *Ford* case was found to rest on the insurer's role as escrowee, not in the issuance of the commitment.

[124] *Brown's Tie & Lumber Company v. Chicago Title Company of Idaho*, 764 P. 2d 423 (Idaho 1988). The oral update was found to have been done without any additional consideration, thus negating any additional duty. The amended

A statute requires that the insurer conduct a search before issuing a commitment. This statute has been held not to require a "reasonable" search, and thus no separate duty in negligence is supported by the statute.[125]

Illinois

The Illinois Supreme Court has held that there is no cause of action for abstractor liability for errors in a title insurance commitment or policy.[126] The court premised its decision on the economic loss doctrine. The court found that a title insurer is not primarily in the business of supplying information, and therefore not within that exception to the application of the economic loss doctrine. The court thus reversed earlier decisions that had found an implied duty in contract to conduct a reasonable search before issuing a commitment.[127] Likewise, an escrowee has no duty to search title and report all encumbrances on title, which the court said would be merely an end-run on the

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commitment was merely incident to the issuance of the policy.

[125] I.C. Section 41-2708(l)(b) provides: "41-2708. Determination of insurability--Prohibited risks--Rebates.-(1) Insurability. No title insurance on real property in the state of Idaho shall be issued unless and until the title insurer or its agent: ... (b) Has caused to be made a search and examination of the title and a determination of insurability of title in accordance with sound title underwriting practices." The *Brown's Tie* court found that the statute had intentional been written so as not to require a "reasonable" search which would create a duty separate from the policy: "Unlike similar statutes of sister states [footnote omitted], section 41-2708(1) of the Idaho Code does not mandate a 'reasonable search' of title. It provides only that 'a search and examination of the title' shall be made. We find it significant that the Idaho legislature, unlike other states, has chosen to omit the word 'reasonable.' It has long been the rule in Idaho that only abstractors of title may be found negligent, see Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 P. 34 (1924), and this Court has never deviated from the rule. ... [A]s the trial court below wrote in its well-reasoned memorandum decision: '[A]llegations of negligent performance of duties under I.C. Sec. 41-2708 simply characterize a form of breach. Theories of malpractice sounding in negligence may be necessary where there is no contractual duty or contractual standard existent upon which to measure performance. Here, however, the duty or standard of performance is set forth by contract--the foreclosure reports and title insurance commitments--and measurement of performance can be fully accomplished by reference to the contracts. Any malpractice becomes a form of breach, rather than a separate claim for relief or cause of action.' We hold that I.C. Sec. 41-2708 does not create a duty in tort upon the part of title insurers to conduct a reasonable search and inspection of title. Further, we hold that Brown's Tie has not averred circumstances which would avoid the rule of Anderson ... ." 764 P. 2d at 426-7.

[126] *First Midwest Bank, N.A. v. Stewart Title Guar. Co*., 218 Ill.2d 326, 300 Ill.Dec. 69, 843 N.E.2d 327 (2006); followed in *Midfirst Bank v. Abney*, 365 Ill.App.3d 636, 850 N.E.2d 373, 302 Ill.Dec. 936 (Ill.App. 2 Dist. 2006); *First Magnus Financial Corp. v. Dobrowski*, 387 F.Supp.2d 786 (N.D.Ill. 2005); and *Warczak v. Attorneys' Title Guaranty Fund, Inc*., 2015 WL 3884451, 2015 IL App (2d) 140677-U (Ill.App. 2 Dist. 2015) (unpublished). The *First Midwest* decision overturned *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (Ill.App. 2 Dist. 1999), which had adopted the theory of abstractor liability. See also *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co.*, 641 N.E.2d 861 (Ill.App. 1 Dist. 1994) (exclusive remedy provision of the commitment prohibited abstractor liability on commitment); *Wheaton Theatre, LLC v. First American Title Ins. Co.*, 354 F.Supp.3d 904 (N.D.Ill. 2018) (Illinois rule that title insurer cannot be sued for negligent misrepresentation of title not evaded by argument that rule applies only to Schedule B exceptions and not mistaken inclusion of land in Schedule A).

[127] *McLaughlin v. Attorneys' Title Guaranty Fund, Inc.*, 61 Ill.App.3d 911, 18 Ill.Dec. 891, 378 N.E.2d 355 (Ill.App. 3 Dist. 1978); *Dinges v. Lawyers Title Ins. Corp.*, 106 Ill.App.3d 188, 435 N.E.2d 944 (Ill.App. 5 Dist. 1982); *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co.*, 266 Ill.App.3d 905, 641 N.E.2d 861 (Ill.App. 1 Dist. 1994).

abstractor liability prohibition and "would be an extraordinary undertaking, tantamount to a second layer of title insurance."[128]

Indiana

The Indiana Supreme Court held, in *U.S. Bank, N.A. v. Integrity Land Title Corp.*,[129] that a title agent may be directly liable to a lender insured for failing to disclose a title defect in the commitment and policy, under the Restatement (Second) of Torts Section 552. The agent was sued after the insurer failed, rendering the insurance contract worthless or void. The court agreed that the economic loss doctrine ordinarily precludes tort claims based on contracts. It held that title agents are in the business of supplying information, which is an exception to that rule. Further, the title agent was not a party to the insurance contract. The court used the lack of privity to hold that "a claim of negligent misrepresentation as an exception to the general economic loss rule where a mortgage lender not in privity of contract with a title company seeks to recover for the title company's negligence in issuing a title commitment that failed to disclose an encumbrance." Later decisions have applied this decision to permit negligent misrepresentation claims against title insurers or agents when the claimant was not in privity of contract with the insurer as to the title commitment on which the claim was based.[130] An insured is not permitted to sue its insurer for negligent misrepresentation, because insurer and insured are in privity of contract.[131]

Iowa

The author finds no Iowa appellate court decisions on the subject. The Iowa statutes do not authorize the issuance of title insurance policies in that state.

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[128] *Bridgeview Bank Group v. Stewart Title Guar. Co.*, 2011 WL 3022307 (N.D.Ill.) (unpublished).

[129] *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010). The court further said: "Integrity has argued at every stage of this litigation that it was not in contractual privity with U.S. Bank. This is a critical point. Were there to be a contract between Integrity and U.S. Bank, the parties in all likelihood would be relegated to their contractual remedies." 929 N.E.2d at 745.

[130] In *Izynski v. Chicago Title Ins. Co*., 963 N.E.2d 592 (Ind.App. 2012), a title insurance commitment had been issued to a prospective buyer who did not purchase. The broker showed it to the Izynskis when they made a later offer. The day before closing, the Izynskis learned of a dam easement not shown in the commitment. The commitment was amended, and the policy excepted the easement. The appeals court reversed the dismissal of the Izynskis' tort claims against the insurer based on the commitment. Based on *Integrity Land*, it admitted the insureds would have no tort claims based on their policy. However, it said, they might have such claims based on the first commitment, because it was *not* issued to them. *KSM, LLC v. Lighthouse Storage, LLC*, 2012 WL 892320 (Ind.App.) (unpublished) held that a seller may sue the insurer for negligent misrepresentation of title in a commitment, because the seller was *not* in privity of contract with the insurer. In *Rodriguez v. Lakeview Title, LLC*, 951 N.E.2d 310, 2011 WL 3198157 (Ind.App.) (unpublished), the court found that a seller may assert negligent misrepresentation, but that the seller in that instance had no such claim because the title agent had represented that taxes were paid, but the seller *owed* the taxes and had received notice of them.

[131] *Pearman v. Stewart Title Guar. Co.*, 108 N.E.3d 342 (Ind.App. 2018) (dismissing negligence claim against insurer brought by insured).

Kansas

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[132] An insurer or agent that acts as escrowee may be sued in tort.[133] In so holding, the court also adopted the statement in *Jarchow v. Transamerica Title Ins. Co.*[134] that the insurer assumes a separate duty as abstractor when it issues a commitment.[135] However, the latter holding was found by another court to be dictum, since the case concerned an escrow.[136] The measure of damages is based on tort theory and is not interpreted in light of the policy measure of loss. [137] The title standards promulgated by the state bar may be treated as a guide to the insurer's "reasonable performance" of its duties.[138]

Kentucky

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

Louisiana

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

Maine

The abstractor liability theory has been rejected by the Supreme Court of Maine.[139]

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[132] Kan.Stat.Ann. §40-235.

[133] *Ford v. Guarantee Abstract & Title Co.*, Inc., 220 Kan. 244, 553 P.2d 254 (1976), later proceeding *Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co.*, 228 Kan. 532, 618 P.2d 1195 (1980), later app. 232 Kan. 76, 652 P.2d 665 (1982); *Bender v. Kansas Secured Title and Abstract Co., Inc*., 34 Kan.App.2d 399, 119 P.3d 670 (Kan.App. 2005).

[134] 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975). *Jarchow* has since been nullified by statute in California.

[135] "Where a title insurer presents a buyer with both a preliminary title report and a policy of title insurance two distinct responsibilities are assumed; in rendering the first service, the insurer serves as an abstractor of title and must list all matters of public record regarding the subject property in its preliminary report." 553 P.2d at 266.

[136] *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982); *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423 (Idaho 1988).

[137] *Bender v. Kansas Secured Title and Abstract Co., Inc*., 34 Kan.App.2d 399, 119 P.3d 670 (Kan.App. 2005).

[138] *In re Lisa, Inc.*, 224 B.R. 173 (D.C.D.Kan. 1998).

[139] *N E Properties, Inc. v. Chicago Title Ins. Co*., 660 A.2d 926 (Me. 1995).

Maryland

A title insurer may not be sued for negligent misrepresentation under a title insurance policy.[140] A title agent or examiner may be liable for a search error if it contracts to discover and disclose matters of record.[141]

Massachusetts

A title insurer may not be sued for negligent misrepresentation under a title insurance policy. A negligence claim must be based on evidence "that the insurer voluntarily assumed duties in addition to issuance of a title policy."[142] The state Supreme Judicial Court ruled that there is no separate liability in tort for negligent searching of title.[143] An earlier case had held that, when an applicant never received a commitment because he told the insurer he did not need one "if the title was clear," the insurer was liable for not reporting to the applicant that the property was encumbered by an easement. The insurer was not permitted to deny liability on the basis that the policy accurately reflected all recorded matters.[144]

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[140] *Columbia Town Center Title Co. v. 100 Investment Limited Partnership*, 203 Md.App. 61, 36 A.3d 985 (Md.App. 2012). The court based its decision on case law from other states, the title insurance statute (which says that a policy is not an abstract of title), and the principle that an insurer should not be subjected to a form of liability that it did not envision and for which it was not paid. For the latter principle the court relied heavily on James Bruce Davis, *More Than They Bargained For: Are Title Insurance Companies Liable in Tort for Undisclosed Title Defects?*, 45 Cath. U.L.Rev. 71 (1995).

[141] *Lewis v. Long & Foster Real Estate, Inc.*, 584 A.2d 1325 (Md.App. 1991). In *100 Investment Limited Partnership v. Columbia Town Center Title Co*., 430 Md. 197, 60 A.3d 1 (Md. 2013), the Maryland Supreme Court determined that a title agent may be sued for title search negligence in the search performed in connection with the issuance of a title insurance policy, but that the insurer is not vicariously liable for the title company's search error.

[142] *Private Lending & Purchasing, Inc. v. First American Title Ins. Co.*, 54 Mass.App.Ct. 532, 766 N.E.2d 532 (Mass.App. 2002).

[143] *Somerset Savings Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 649 N.E.2d 1120 (Mass. 1995), held: "A title company's duty to defend the insured is governed by the terms of the policy. ... Its liability is limited to the policy, and it will not be liable for negligence in searching the records." 420 Mass. at 430.

[144] *Dorr v. Massachusetts Title Ins. Co.*, 238 Mass. 490, 131 N.E. 191 (1921) states: "The defendant contends that its sole liability is as an insurer of title, and that its obligation to the plaintiff is measured by the terms of the policy. This contention is without merit. The judge was well warranted in finding that the defendant acted not merely as insurer but as the plaintiff's paid agent in examining the title, and that although those who acted in its behalf knew that there was a right of way over the property, they negligently failed to disclose its existence to the plaintiff, who relied solely on the defendant to protect his interests and was ignorant of the existence of any incumbrance until after he had paid his money and received the deed, which was silent as to any easement in the premises conveyed. The defendant was liable to the plaintiff for the injury caused by this negligence of its authorized representatives." 131 N.E. at 192-3.

Michigan

Michigan has rejected abstractor liability on a policy or commitment,[145] a ruling affirmed by several later decisions.[146] An earlier case, sometimes cited as authority for a duty to search, involved an abstract and not a title insurance policy.[147]

Minnesota

The author finds no reported decision regarding a claimed duty to search, and no applicable statute. *Quigley v. St. Paul Title Ins. & Trust Co.*[148] is sometimes cited as having established a duty to search. However, the case actually held that an insurer has a duty to keep its "policyholder" informed of events and the company's intended course of action while the insurer is defending the insured's title.[149]

Mississippi

A federal court refused to dismiss a claim for negligent misrepresentation of title under a title insurance policy because there has been no precedential decision on the issue by a Mississippi state court.[150]

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[145] *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516 (E.D. Mich. 1993). The court noted a split of jurisdictions, but found an Idaho decision persuasive. The court gave its rationale as follows: "As in other states, parties in Michigan generally purchase title insurance, rather than relying on an abstract, because they prefer the certainty of insurance. In purchasing insurance, a buyer acquires a contractual right against the insurer for coverage of title defects. In purchasing an abstract, a buyer merely obtains an examination of title. With an abstract, a real estate buyer can obtain damages for title defects only through tort litigation. To protect the rights and expectations of the parties, a title insurer should be liable in accordance with the terms of the title policy only and should not be liable in tort. To hold otherwise does violence to the whole concept of insurance." 849 F.Supp. at 521-2.

[146] *Wormsbacher v. Phillip R. Seaver Title Co., Inc.*, 284 Mich.App. 1, 772 N.W.2d 827 (Mich.App. 2009), rev.den. 773 N.W.2d 721; *Carter v. Carter*, 2008 WL 5662081 (E.D.Mich) (unpublished), report accepted in part, 2009 WL 440968 (E.D.Mich.) (unpublished). Both decisions relied on *Mickam*. Also, *Awad v. Duke*, 1998 WL 1991731 (Mich.App.) (unpublished) (tort claim on title insurance policy dismissed, citing 1 Cameron, Michigan Real Property Law (2d Ed), §12.14, p 425 that a title insurance policy is merely "a statement by a title insurance company that, in exchange for a premium paid, it is willing to take the risk that title is as stated in the title insurance policy.").

[147] *Williams v. Polgar*, 43 Mich.App. 95, 204 N.W.2d 57 (1972). The important ruling in that case was to expand an abstractor's liability to foreseeable third party beneficiaries of the abstract.

[148] 60 Minn. 275, 62 N.W. 287 (1895), appeal after remand, 66 N.W. 364 (Minn. 1896).

[149] Id. at 366.

[150] *In re Evans*, 2011 WL 609377 (Bkcy.S.D.Miss.) (unpublished).

Missouri

There is a statutory duty to perform a title search before the issuance of a title insurance policy, but the statute does not say that the search must be "reasonable."[151] A title insurance commitment has been held to create an implied duty to search and report the status of title.[152] However, an insured is not entitled to recover separate and inconsistent damages under a tort theory as well as diminution in value under a policy claim.[153]

Montana

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[154] The party performing the title search owes a duty to conduct the search with reasonable care.[155] The insured may bring a separate cause of action in negligence.[156]

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[151] Mo.Ann.Stat. §381.071.

[152] *Evinger v. McDaniel Title Co.*, 726 S.W.2d 468, 472 (Mo.App. 1987), found the duty to make an accurate search could be "implied by entering into a contractual relationship." In *Rosenberg v. Missouri Title Guar. Co.*, 764 S.W.2d 684 (Mo.App. 1988), the court cited *Evinger* and further stated that: "While we agree that a commitment of insurance does not purpose to be an abstract title, it is for the trier of fact to determine whether the drafters of the commitment owe a contractual duty to report matters that may constitute a defect in title… . Such a duty is evidenced in the commitment itself. Under the heading "Conditions and Stipulations," the commitment states: 'Liability of the [Title Insurance Company of Minnesota] under this Commitment shall be ... for actual loss incurred in reliance hereon in undertaking in good faith ... to acquire ... the estate ... covered by this Commitment.' Also, plaintiffs' expert testified that a title insurance company in its commitment 'has an obligation, independent of this insurance, to make sure that his client is going to get a piece of property that is free of problems, claims [and defects],' so that the buyer can make 'his own independent determination of the status of the property' in deciding whether or not to purchase it."

[153] *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997).

[154] Mont. Code Ann. § 33-25-214.

[155] "Although title insurance applicants are interested in obtaining insurance coverage, their primary interest is in what the examination discloses. For this they rely on the title companies to tell them of any risks. Risks usually covered by title insurance policies include errors in the title examination, including the negligent failure to note a title defect. A title company, as insurer, owes its clients the duty of conducting a title search with reasonable care. Although liability does not attach for failure to discover defects which cannot be discovered with reasonable care, here a title examiner conducting a title search should have been alerted to the possible consequences of the recital in the 1944 warranty deed. … A title insurer cannot simply ignore a recital that puts it on notice of a possible defect in the title." *Lipinski v. The Title Ins. Co.*, 202 Mont. 1, 655 P.2d 970, 974 (1982).

[156] Relying on *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975), *Chun v. Park*, 51 Hawaii 462, 462 P.2d 905 (Hawaii 1970) and *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973), the court found a duty to conduct a reasonable title search in *Malinak v. Safeco Title Ins. Co. of Idaho*, 661 P.2d 12 (Mont. 1983). The court said: "It is within the expectations of the parties, the seller ordering the title commitment and the title insurer inspecting the public records, that the title commitment will accurately reflect the insurability of the title, or the condition of the public record, as the case may be, with respect to that title. We find a duty on the part of the title insurer when it issues a title commitment which later forms the basis for a title insurance policy, particularly where the seller relies on the title commitment, to base its title commitment and report upon a reasonably diligent title search of the public records. A breach of that duty would constitute negligence." 661 P.2d at 15-16. *Malinak* was followed by *Doble v. Lincoln County Title Co.*, 692 P.2d 1267 (Mont. 1985), which found that expert testimony is

Nebraska

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[157] An insurer may be liable as an abstractor of title for erroneous reporting of information on a commitment.[158]

Nevada

A title insurance policy is not an abstract of title and a title insurer is not required to disclose every recorded instrument in a policy it issues.[159] Nevada has adopted the definition of "title insurance" found in the California title insurance code,[160] and has adopted the construction of that definition as provided by the California courts. There is a statutory duty to perform a "reasonable" search.[161]

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required in order to establish the standard of care for title examination, due to the fact that it is "complex and intricate and beyond the common understanding of lay persons." However, in *Harpole v. Powell County Title Co*., 371 Mont. 543, 309 P.3d 34, 2013 MT 257 (Mont. 2013), the court held that the statute did not require that the title company find a 1903 municipal record suggesting that a road had been dedicated to the public. The 1903 road record had never been recorded. Also, it did not conclusively establish the status of the road, because it contained no survey or legal description, but only "vague references to landmarks that have long since disappeared."

[157] Neb.Rev.Stat. §§44-1901-1905.

[158] *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984) held that tort liability existed on a commitment: "We now hold that a title insurance company which renders a title report and also issues a policy of title insurance has assumed two distinct duties. In rendering the title report the title insurance company serves as an abstractor of title and must list all matters of public record adversely affecting title to the real estate which is the subject of the title report. When a title insurance company fails to perform its duty to abstract title accurately, the title insurance company may be liable in tort for all damages proximately caused by such breach of duty. A title insurance company's responsibility for its tortious conduct is distinct from the insurance company's responsibility existing on account of its policy of insurance. Different duties and responsibilities imposed on the title insurance company, therefore, can be the basis for separate causes of action--one cause of action in tort and another in contract." 354 N.W.2d at 158. In 1985, after *Heyd*, Nebraska passed the Abstracters Act, Neb.Rev.Stat. §§76-535-58. The Act's definition of "report of title" does not include a title insurance commitment or policy. Thus, a commitment is not an abstract. However, In *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997), the Supreme Court created a new duty of reasonable care based on §552 of the Restatement (Second) of Torts. The court formulated the duty as follows: "We therefore hold that title insurance companies and their agents are required to exercise the degree of skill and knowledge normally possessed by members of the profession in good standing in the locality concerning preliminary title information which is transmitted to their customers." 251 Neb. at 513, 557 N.W.2d at 704-5. In *Tess*, the insurer was also found to have a duty to disclose a restriction recorded after the effective date of the commitment, because it was notarized by an officer of the title agency and disclosed by other commitments to insure issued the same date. However, because the proposed insured did not see the title commitment before purchasing, he did not rely on any representations in the commitment. Therefore, any misrepresentation in the commitment was not the proximate cause of the purchaser's damage, and not recoverable.

[159] In *Huntington v. MILA, Inc.*, 119 Nev. 355, 75 P.3d 354 (Nev. 2003), the court said: "We conclude that a title insurance company is not required to disclose every encumbrance in a title policy because a title policy, unlike an abstract of title, does not impart constructive notice of encumbrances. Instead, a title company must disclose the encumbrances it is not willing to insure or indemnify against in a title policy." Earlier, in *Pioneer Title Ins. & Trust Co. v. Cantrell*, 71 Nev. 243, 286 P.2d 261 (1955), the court had held that an exception was not a representation, but merely a term of the insurance contract, saying: "In our view the proper interpretation of the expressed exception is that it

New Hampshire

The economic loss doctrine bars a claim of searching negligence premised on a title insurance policy.[162] There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[163]

New Jersey

The insurer has no tort liability for a failure to conduct an adequate search, or to report all matters found in its title search.[164] The insurer may be liable for negligent misrepresentation if it took

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purported to be only a paraphrase for purposes of identity of the defect to which it expressly referred; that it was not intended to constitute a representation or a binding expression or opinion as to the legal nature or extent of that defect."

[160] NRS § 681A.080 defines "title insurance" as a policy "insuring, guaranteeing or indemnifying owners of property or holders of liens, encumbrances or security interests on the property, and others interested therein, against loss or damage suffered by reason of: 1. Liens, encumbrances, security interests and defects in, or the unmarketability of, the title to the property; or 2. Invalidity or unenforceability of liens, encumbrances or security interests on the property, and any other activity substantially equivalent to these activities." In *Huntington v. MILA, Inc*., 119 Nev. 355, 75 P.3d 354 (Nev. 2003), the court noted that this definition is identical to that found in Cal.Ins. Code § 12340.10. It said: "Although there is no legislative history indicating that NRS 692A.023 is based on California Insurance Code § 12340.10, California's statutory distinction between an abstract of title and title insurance is identical to Nevada's. We are persuaded that the *Rice* opinion's analysis [*Rice v. Taylor*, 220 Cal. 629, 32 P.2d 381, 383 (1934), which held that a title insurance policy is not an abstract of title] is correct. Because a clear statutory distinction exists between an abstract of title and title insurance, we conclude that a title insurance company, conducting a title search on behalf of a lender, is not the lender's agent. Therefore, a title company's constructive notice may not be imputed to the lender."

[161] Nev.Rev. Stat. §692A.220.

[162] A federal court so held in *Bourne v. Stewart Title Guar. Co.*, 2011 WL 635304 (D.N.H.), 2011 DNH 29 (unpublished), citing a decision of the New Hampshire Supreme Court, *Plourde Sand & Gravel v. JGI E., Inc.*, 917 A.2d 1250, 1255 (N.H.2007). However, a second federal judge held that, "in line with Section 552 of the Restatement, …a title insurer has a common law duty to the insured… ." That judge rejected the economic loss doctrine as a bar. However, he said that, since this decision was issued on a motion to dismiss only, before he entered judgment he would certify the question of the validity of such a cause of action in New Hampshire to the state supreme court. *MacDonald v. Old Republic Nat. Title Ins. Co*., 882 F.Supp.2d 236 (D.Mass. 2012).

[163] N.H.Rev.Stat.Ann. §416-a:6.

[164] *Walker Rogge Inc v. Chelsea Title & Guaranty Co.*, 562 A.2d 208 (N.J. 1989), subsequent appeal 603 A. 2d 557 (N.J.Super.A.D. 1992). The 1989 *Walker Rogge* decision contains one of the most lucid analyses of the cases on this subject. The court rejected the abstractor liability theory, siding instead with the rationale of *Anderson v. Title Ins. Co.*, 103 Idaho 875, 655 P.2d 82 (1982). In *Walker Rogge*, the New Jersey Supreme Court concluded: "Thus, in New Jersey, as elsewhere, courts are disinclined to impose liability on the basis of tort, as distinguished from contract, principles. Although we recognize that an insured expects that a title company will conduct a reasonable title examination, the relationship between the company and the insured is essentially contractual. … The end result of the relationship between the title company and the insured is the issuance of the policy. To this extent, the relationship differs from other relationships conceivably sounding in both tort and contract, such as the relationship between physician and patient, to which plaintiff alludes. Although the relationship between physician and patient is contractual in its origins, the purpose of the relationship is to obtain the services of the physician in treating the patient. The patient reasonably expects the physician to follow the appropriate standard of care when providing those services. By contrast, the title company is

on a "special relationship" beyond the policy.[165]

New Mexico

Early decisions held that there was no duty to report matters excluded under the policy.[166] Then a reasonable-search statute was adopted.[167] The statute was found to create a duty of care in the searching of title which ran to both buyer[168] and seller.[169] However, the statute was found not to create a duty to disclose information.[170] In addition, an insurer which acts as escrowee has been

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providing not services, but a policy of insurance. That policy appropriately limits the rights and duties of the parties. From this perspective, the insured expects that in consideration for payment of the premium, it will receive a policy of insurance. The insurer's expectation is that in exchange for that premium it will insure against certain risks subject to the terms of the Policy. If the title company fails to conduct a reasonable title examination or, having conducted such an examination, fails to disclose the results to the insured, then it runs the risk of liability under the policy. In many, if not most, cases conduct that would constitute the failure to make a reasonable title search would also result in a breach of the terms of the policy." 562 A.2d at 220. *Walker Rogge* was followed in *Hawkins v. Weichert Title Agency*, 2011 WL 4466883 (N.J.Super.A.D.) (unpublished) and *Nuzzo v. Horvath*, 2011 WL 3795035 (N.J.Super.A.D.) (unpublished) to defeat negligence and tort claims based on title insurance policies. See also *Booth v. New Jersey Highway Auth.*, 60 N.J. Super. 534, 159 A.2d 460, 461-62, (1960) (title insurer not liable in negligence for failure to discover and disclose title defects); *Caravan Products Co. v. Ritchie*, 55 N.J. 71, 74, 259 A.2d 223 (1969) (under title policy, "the liability to [the insured] is contractual and does not depend on negligence"); *Enright v. Lubow*, 202 N.J.Super. 58, 67, 493 A.2d 1288 (App.Div.1985) (contractual "nature of a title insurance policy and a title report" precludes negligence liability); *Russo v. PPN Title Agency, LLC*, 2017 WL 3081709 (N.J.A.D.) (unpublished)(agent not liable to insured for title search error because commitment is strictly binder of insurance, not search product).

[165] *Walker Rogge Inc v. Chelsea Title & Guaranty Co.*, 562 A.2d 208 (N.J. 1989), subsequent appeal 603 A.2d 557 (N.J.Super.A.D. 1992).

[166] *Horn v. Lawyers Title Ins. Corp.*, 89 N.M. 709 557 P.2d 206 (1976); *Devlin v. Bowden*, 97 N.M. 547, 641 P.2d 1094 (1982); *Roscoe v. U.S. Life Title Ins. Co. of Dallas*, 105 N.M. 589, 734 P.2d 1272 (1987).

[167] N.M.S.A. 1978, Section 59A s. 30ll(A), states: "No title insurance policy may be written unless the title insurer or its title insurance agent has caused to be conducted a reasonable search and examination of the title using an abstract plant meeting the requirements of Section 59A-12-13 NMSA 1978 and has caused to be made a determination of insurability of title in accordance with sound underwriting practices."

[168] In *Cottonwood Enterprises v. McAlpin*, 781 P.2d 1156 (N.M. 1989), later decision 810 P.2d 812 (N.M. 1991), the court found that, because of the statute, "a duty of reasonable care is imposed upon title insurance agents that is independent of any duties or obligations arising out of the contract of insurance."

[169] *Ruiz v. Garcia*, 850 P.2d 972 (N.M. 1993). The *Ruiz* case extended the *Cottonwood* duty to sellers, because the New Mexico Title Insurance Law's purpose is to "provide for the protection of **consumers and** purchasers of title insurance policies... ." NMSA §59A-30-2(B) (emphasis added). It went even further, holding that the insurer/escrowee had the statutory duty to conduct a title search even though it acted solely as an escrowee. "So, even though New Mexico Title had no express contractual duty to perform a title search for Garcia [the seller] and did not undertake to act in any capacity for Garcia other than as a closing agent in a real estate transaction, it nevertheless had a statutory duty to Garcia independent of any contract. ... We hold that New Mexico Title owed a duty of reasonable care to Garcia under Section 59A-30-11(A) and that its failure to discover a defect of title is actionable for her."

[170] *Ruiz v. Garcia*, 850 P.2d 972 (N.M. 1993).

found to have a duty to disclose information acquired in its title search which it knows may affect the outcome of the transaction.[171] The statute was then amended to say that the law does not create a duty to parties other than the underwriter to conduct a reasonable search and examination of title.[172] A later case correctly construed the revised law to mean that there is no statutory duty to conduct a reasonable search in preparing a policy, and that "*Ruiz* was superseded by statute."[173] Nonetheless, that court found that a title insurer may be sued for alleged misstatements by a closer *about* the title search.

New York

New York has rejected negligent misrepresentation claims on title insurance policies.[174] Prior New York cases also made a clear demarcation between abstract and title insurance liabilities.[175] *L. Smirlock Realty Corp. v. Title Guaranty Co.* stated that there is an implied duty of title insurers to conduct "a reasonably diligent search." However, the *Smirlock* court emphasized that its statement did not create a separate duty in negligence.[176]

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[171] *Cano v. Lovato*, 105 N.M. 522, 734 P.2d 762 (N.M.App. 1986), cert.den. 104 N.M. 246, 719 P.2d 1267 (1986).

[172] The following was added to the law: "The duty to search and examine imposed by this section is solely for the purpose of enhancing the financial stability of title insurers for the benefit of insureds under title insurance policies. The New Mexico Title Insurance Law is not intended and should not be construed to create any duty to search and examine that runs to the benefit of, or to create any right or cause of action in favor of, any person other than a title insurer."

[173] *Barrington Reinsurance Ltd. v. Fidelity Nat'l Title Ins. Co*., 143 N.M. 31, 172 P.3d 168, 2007-NMCA-147 (N.M. 2007).

[174] *Citibank, N.A. v. Chicago Title Ins. Co.*, 214 A.D.2d 212, 632 N.Y.S.2d 779 (N.Y.A.D. 1 Dept. 1995), reversing 620 N.Y.S.2d 717 (S.Ct. 1994). The court held: "Under the contract of insurance no question of negligence in searching can arise... . In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. ...The doctrine of skill or negligence has no application to a contract of title insurance." 632 N.Y.S.2d at 781. See also *Sabbagh v. Pizzuro,* 2004 WL 2295824 (N.Y.Sup.Ct. July 13, 2004) (unpublished). The *Citibank* decision and other decisions in the Northeast on the so-called search duty are well analyzed in Yorio, *Negligence Ebbs as Basis for Title Insurer Liability*, The National Law Journal, Monday, March 18, 1996, p. B8. In *Washington Temple Church of God in Christ, Inc. v. Global Properties and Associates, Inc*., 37 Misc.3d 1211(A), 2012 WL 5187556, 2012 N.Y. Slip Op. 51997(U) (N.Y.Sup. 2012), the court rejected a search negligence claim based on *Smirlock* and Conditions 15(b) of the 2006 policy, which states that "[a]ny Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy." In *Emigrant Mortgage Co. v. Commonwealth Land Title Ins. Co*., 126 A.D.3d 636, 4 N.Y.S.3d 491, 2015 N.Y. Slip Op. 02684 (N.Y.A.D. 1 Dept. 2015), the court reversed a judgment based on abstractor liability, because such claims were barred in New York under *Citibank*. However, in *Sher v. Luxury Mortg. Corp*., 2012 WL 5869303 (D.Md.) (unpublished), the court said that, because the insurer "has disclaimed the validity of the title insurance policy while simultaneously relying upon it to disallow the claims in negligence," it would not dismiss the negligence claim. It said that at some point "a determination as to the validity of the Title Policy will presumably require dismissal of one set of claims or the other… ."

[175] *Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 176 N.Y. 65, 68 N.E. 132 (1903) held that "[u]nder the contract of insurance no question of negligence in searching can arise. 176 N.Y. at 75. The court distinguished a search from a policy, in that a search "is not an instrument similar in nature to a policy of title insurance and ... the obligations of one differ from the obligations of the other. ... The doctrine of skill or negligence has no application to a contract of title insurance." *Maggio v. Abstract Title & Mortgage Corp.*, 277 App. Div. 940, 98 N.Y.S.2d 1011, 1013 (1950). The *Smirlock* decision reaffirmed these earlier decisions, holding: "The contract for a title search is separate and distinct from

North Carolina

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[177]

North Dakota

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

Ohio

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[178] In *Chicago Title Ins. Co. v. The Huntington National Bank*,[179] the Fifth District court of appeals construed that statute as creating a tort cause of action. Nonetheless, the court found that the "exclusive remedy" provision of the policy precluded a tort action premised on a claimed error in the policy. On appeal, the Supreme Court agreed with the appellate court's conclusion, but did not directly overturn the appeals court's interpretation of the statute. It said:

> With respect to HNB's tort claims for failure to discover the lien, the parties' rights and remedies are exclusively contractual in nature. HNB is limited to the contractual

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the contract for insurance; liability for a negligent search arises from the former. ... Where, as here, the certificate of title has merged in the subsequently issued title insurance policy, any action for damages arising out of the search--whether sounding in tort or contract---is foreclosed." 70 A.D.2d at 465-6, 421 N.Y.S.2d at 239. New York insurers do issue various forms of searches, including "guaranteed" searches or guarantees. Negligence actions are permitted as to searches and guarantees. See *Goodman v. Title Guar. & Trust Co.*, 11 App. Div.2d 1003, 206 N.Y.S. 2d 32 (A.D. 1960) and *Udell v. City Title Ins. Co.*, 12 App.Div.2d 78, 208 N.Y.S.2d 504 (1960). The privity rule has been relaxed as to abstracts to allow those with the "functional equivalent" of privity to sue the abstractor of title. *Kidd v. Havens*, 577 N.Y.S.2d 989 (A.D.4 Dept. 1991).

[176] 52 N.Y.S.2d at 190, 437 N.Y.S. at 62, 418 N.E.2d at 655. In *Walker Rogge*, the New Jersey Supreme Court said this about the statement in the *Smirlock* opinion: "[T]he New York Court of Appeals refused to invalidate a title policy for misrepresentation absent a showing of intentional concealment by the insured. Because no such showing had been made, the court held the company liable under its policy for failure to discover records showing the condemnation of access from the property to a public street. In reaching this result, the court wrote, "because title insurance companies combine their search and disclosure expertise with insurance protection [] an implied duty arises out of the title insurance agreement that the insurer has conducted a reasonably diligent search." Id. at 190, 437 N.Y.S. at 62, 418 N.E.2d at 655. Notwithstanding that statement, the court carefully pointed out that the basis for the imposition of liability on the company was the title policy, and the court was not reaching the question whether the company was liable in negligence. Id. 418 N.E.2d at 652." 562 A.2d 208, 219 (N.J. 1989).

[177] N.C.Gen.Stat. §58-26-1.

[178] Ohio Rev. Code Ann. §3953.07.

[179] 1998 WL 548959 (Ohio App. 5 Dist.) (unpublished).

remedies in the policy.[180]

That decision was followed in *First Merit Bank, NA v. Guarantee Title & Trust Co.*[181]

Also, a number of decisions have refused to relax the privity of contract rule employed as to abstractors of title. In *Kenney v. Henry Fischer Builder, Inc.*,[182] the First District Court of Appeals concluded that a buyer had no claim against a title company because he declined to purchase a policy, although the court said "we invite our supreme court to revisit this area of the law and urge the adoption of 3 Restatement of the Law 2d, Torts, Section 552, in this context ... " In *Shearer v. Echelberger*,[183] the Fifth District Court of Appeals cited *Kenney* and also held that the borrower was not a third party beneficiary of a loan policy. Three other courts have also ruled that parties not in privity may not sue for alleged search negligence.[184]

The economic loss doctrine has been found to bar tort claims on title insurance contracts. The appeals courts have rejected the argument that title insurers fall under the exception to that rule for companies that are in the business of providing information.[185] In *McMullian v. Borean,*[186] however, an appellate court said that a title agent "may be liable for failing to disclose an encumbrance where there is privity of contract between the title examiner" and the insured. It found such privity by the agent's issuance of the title insurance policy to the claimant.

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[180] *Chicago Title Ins. Co. v. The Huntington National Bank*, 719 N.E.2d 955, 87 Ohio St.3d 270 (1999).

[181] 2006 WL 1791148, 2006-Ohio-3333 (Ohio App. 9 Dist. 2006) (unpublished) (no tort liability under title insurance policy because of exclusive remedy policy term).

[182] 129 Ohio App.3d 27, 716 N.E.2d 1189 (Ohio App. 1 Dist. 1988).

[183] 2000 WL 1663626 (Ohio App. 5 Dist.) (unpublished).

[184] "The mere fact that the homeowner was required to pay for the title examination and title insurance commitment is insufficient to establish privity of contract between the homeowner and the title insurance company." *Valentine v. Willard & Assoc. Title Search Services,* 2001 WL 733414 (Ohio App. 5 Dist.) (unpublished), app. allowed, 93 Ohio St.3d 1476, 757 N.E.2d 773 (Ohio Nov. 7, 2001). See also *Cedar Dev., Inc. v. Exchange Place Title Agency, Inc.*, 149 Ohio App.3d 588, 778 N.E.2d 136 (2002); and *Campbell v. Krupp*, 195 Ohio App.3d 573, 961 N.E.2d 205, 2011 -Ohio-2694 (Ohio App. 6 Dist. 2011). The *Campbell* court expressly refused to apply Restatement § 552 to a claim by a non-insured against an insurer under a policy.

[185] *Campbell v. Krupp*, 195 Ohio App.3d 573, 961 N.E.2d 205, 2011-Ohio-2694 (Ohio App. 6 Dist. 2011); *Hoffman v. Fraser*, 2011 WL 1782099 (Ohio App. 11 Dist.), 2011-Ohio-2200 (unpublished) (holding that the title commitment expressly stated that the agent and underwriter from liability except under a policy to be issued; plaintiff did not pay a premium or buy a policy).

[186] 167 Ohio App.3d 777, 857 N.E.2d 180, 2006-Ohio-3867 (Ohio App. 6 Dist. 2006).

Oklahoma

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[187] That statute was found by one court to mandate that the insurer examine title records in issuing a policy, but a later decision found that Oklahoma does not permit an insurer to be sued for negligence.[188]

Oregon

An insurer/escrowee may be sued for negligent misrepresentation in supplying information, such as a legal description to be used in a deed or advice as to construction lien claims.[189] The plaintiff must show a special relationship beyond the insurance contract as the basis for the duty.[190] Even if such an extra-contractual duty is found to exist, however, an insurer/escrowee is not responsible for not disclosing a matter that is unrecorded and thus not covered by the policy.[191]

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[187] Okla.Stat.Ann. title 36 §5001(C).

[188] "The contention that no duty was imposed upon American-First to check the records in Washington County or to file First Federal's mortgage there is without merit. Under the circumstances presented here, the obviousness of it being to American-First's advantage to check the records of Washington County before undertaking to insure against defects a mortgage covering property situated in such county is patent. But necessity for an insured to prove such a duty is not seen." *American-First Title & Trust Co. v. First Federal Sav. & Loan Ass'n*, 415 P.2d 930 (Okla. 1965). In *Riverbend Land, LLC v. First American Title Ins. Co.*, 2018 WL 4905353 (W.D.Okla. 2018) (unpublished), a federal court in Oklahoma dismissed a claim that a title insurer was negligent or grossly negligent in its title search, for allegedly not having found recorded evidence of a claim by the state highway department limiting access onto the adjoining state highway. Riverbend argued that First American had failed to locate an access restriction in its title examination, and that it had justifiably relied "on First American's statutorily-required title examination and disclosure." Riverbend premised its claim on Okla.Stat. tit. 36 § 5001(C)(1), and also relied on *Choate v. Lawyers Title Ins. Corp.*, 385 P.3d 670, 683 (Okla.Civ.App. 2016), for its statement that an insurer has a statutory duty to get an attorney's title opinion, and *American Title Ins. Co. v. M-H Enterprises*, 815 P.2d 1219 (Okla.Civ.App. 1991), for the assertion that a title insurer can be liable for failing to except a title encumbrance. However, the court held that *American Title* is not binding precedent "and is distinguishable on the facts." First American asserted that the reasonable search statute does not create a private cause of action, an argument the court did not squarely address. The court concluded that a title insurer may not be sued for negligence. It observed that "Oklahoma law does not provide for a negligence claim against an insurer by its insured," quoting from *Tolman v. Reassure America Life Ins. Co.*, 391 P.3d 120, 123 (Okla. Civ. App. 2017). *Tolman*, in turn, relied on *Murchison v. Progressive Northern Ins. Co.*, 572 F.Supp.2d 1281 (E.D.Okla. 2008) and *Burton v. Progressive Northern Ins. Co.*, 2010 WL 4167392, which stated that an insurer may not be sued for negligence in Oklahoma, because an insurance policy is a contract.

[189] *Lindstrand v. Transamerica Title Ins. Co.*, 127 Or.App. 693, 874 P.2d 82 (1994); *Ivy v. Transamerica Title Ins. Co.*, 90 Or. App. 511, 752 P.2d 1269 (1988), rev.den., 306 Or. 195, 759 P.2d 276 (1988); *McDonald v. Title Ins. Co.*, 49 Or.App. 1055, 621 P.2d 654 (1980).

[190] *Gebrayel v. Transamerica Title Ins. Co.*, 132 Or.App. 271, 888 P.2d 83 (Or.App. 1995).

[191] *Warrington v. Transamerica Title Ins. Co.*, 40 Or.App. 841, 596 P.2d 627 (1979) (plaintiff had no right to sue of reliance on title commitment that said it became null and void unless policy was issued and premium was paid); *Womer v. Melody Woods Homes Corp.*, 165 Or.App. 554, 997 P.2d 873 (Or.App. 2000) (no liability on title commitment, relying on *Warrington*); *Gebrayel v. Transamerica Title Ins. Co.*, 132 Or.App. 271, 888 P.2d 83 (Or.App. 1995).

<u>Pennsylvania</u>

There is a statutory duty to perform a "reasonable" search before the issuance of a title insurance policy.[192] There is a separate cause of action available for abstractor negligence on a policy defect.[193] A title insurer is not liable in tort for failure to disclose a defect in a title commitment, but an older case found that a "settlement certificate" issued in lieu of a commitment supported a cause of action for negligence.[194]

<u>Puerto Rico</u>

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

<u>Rhode Island</u>

The insurer has abstractor liability in issuing a title insurance commitment, but no such cause of action exists when no commitment to insure has been requested or issued.[195]

<u>South Carolina</u>

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

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[192] Pa.Stat.Ann. title 40, §910-7.

[193] *Royston v. Berks Title Ins. Co.*, 85 Montg. Co. Law Rep. 56 (Pa. Comm. Pleas 1964); *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757 (Pa.Super. 1999) (insurer negligent as a matter of law in not disclosing to a purchaser the prior deed in lieu of foreclosure given by seller, when insurer closed both transactions).

[194] *Henkels v. Philadelphia Title Ins. Co.*, 177 Pa.Super. 110, 110 A.2d 878, 879-80 (1955) (settlement certificate is not title insurance and may support a claim for title search error).

[195] In *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993), the loan was closed without any commitment to insure being issued. The lender received policies covering all real estate secured by its mortgages after closing. The court held that the lack of a commitment precluded an abstractor negligence claim. It reviewed the cases adopting abstractor negligence, and concluded: "In each of those cases, however, the title insurance company either had expressly agreed to provide a title report or had issued to the insured a preliminary title report which failed to disclose a title defect which was then excluded from coverage under the policy. 'In such situations, two distinct responsibilities are assumed [by the insurer]; in rendering the first service, the insurer serves as an abstractor of title and must list all matters of public record regarding the subject property in its preliminary report. When a title insurer breaches its duty to abstract title accurately it may be held liable in tort for all damages proximately caused by such breach.' "Ford, 553 P.2d at 266. (citations omitted) In the absence of an express contract or preliminary title report, however, courts have uniformly declined to hold a title insurance company liable for a negligent title search. Plaintiff's theories seek to convert the relationship of the parties to a guarantee relationship whereby the Title Company would assure that the insured would suffer no loss in the transaction. It is not only the overwhelming majority view but the eminently sensible position that title policies do not guarantee clear title. These policies only protect against loss if there is later found to be a title defect. It is the lender in this real estate mortgage transaction who undertook the responsibility of searching title. The lender in this instance did not pay for and did not receive an opinion of title. Under the circumstances, there is no rational basis for an award of damages to plaintiff for the lack of a title search. As a matter of law American Title owed no duty to Focus to conduct a title search before issuing it a title insurance policy." 992 F.2d at 1236.

South Dakota

Abstractor negligence was tacitly accepted as a valid theory of recovery against a title insurer under a title insurance policy or commitment, in *Muhlenkort v. Union County Land Trust*.[196] However, that decision denied recovery to a creditor of the seller who was attempting to enforce a lien. The creditor was unable to prove that she had relied on the title commitment, or that she was a party whom the insurer should reasonably have expected to rely on the commitment.

Tennessee

There is a statutory duty to perform a "reasonable" search.[197] In *Whaley v. First American Title Co. of the Mid-West*,[198] the court was invited to decide if a tort cause of action is valid, but elected not to decide the issue, ruling instead that the lawsuit was untimely in any event under Tennessee's three-year statute of limitation for actions involving injury to property.[199]

[196] 530 N.W.2d 658 (S.D. 1995).

[197] Tenn. Code Ann. § 56-35-129.

[198] 2004 WL 316978 (Tenn.App. 2004) (unpublished).

[199] Tenn. Code Ann. § 28-3-105 (2003).

<u>Texas</u>

A title insurer is not an abstractor of title, and has no duty to examine title.[200] The commitment is not an abstract; the policy is not a representation of the status of title.[201]

Texas courts have recognized that title insurance is "extensively regulated" by the insurance commissioner.[202] Because the title insurer's duties are so structured, the lack of a statutory obligation on a subject at least suggests that the legislature did not create a duty. For example, despite pervasive regulation of the title industry, "[t]here is no statutory requirement that the title insurance agent file the deed transferring title."[203] This fact buttressed the court's decision that no cause of action exists

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[200] *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310 (Tex. 1994) held that "issuance of a policy did not constitute a representation regarding the status of the property's title; rather, it constituted an agreement to indemnify [the insured] against losses caused by any defects." An earlier appeals court decision, *Martinka v. Commonwealth Land Title Ins. Co.*, 836 S.W.2d 773 (Tex.App. 1992), had stated: "A title insurance company is not a title abstractor and owes no duty to examine title. … Further, the only duty a title insurance company has to its insured is to indemnify him against loss suffered by defects in title; the title insurance company owes no duty to point out any outstanding encumbrances. … In other words, the title insurance company is not employed to examine title, rather it is employed only to guarantee the status of title and to insure against existing defects." Also before *McDaniel*, *Tamburine v. Center Savings Ass'n*, 583 S.W.2d 942 (Tex.App. 1979) had stated that a title insurer, "before issuing a policy of title insurance, must necessarily take steps to inform itself of the status of the title to be insured. In the search for the information upon which must depend the decision to either issue or decline to commit itself to issue a policy, the insurance company obviously investigates the title for its own use and benefit to determine whether it will undertake the risk. The title information on which the company bases its decision relates to the condition of the title held by the grantor and is not made for the prospective grantee or lienholder to whom the policy will finally issue." *McDaniel* was also presaged by *Houston Title Co. v. Ojeda de Toca*, 733 S.W.2d 325, 327 (Tex.Civ.App. 1987), *rev'd on other grounds*, 748 S.W.2d 449 (1988). *McDaniel* was followed in *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997); *Williams v. Land Title Co. of Dallas*, 1997 WL 196345 (Tex.App.-Dallas) (unpublished); *Solano v. LandAmerica Commonwealth Title of Fort Worth, Inc.*, 2008 WL 5115294, at *8 (Tex.App.-Fort Worth 2008); and *Palmer v. Chicago Title Ins. Co*., 2013 WL 3049343 (S.D.Tex.) (unpublished).

[201] *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310 (Tex. 1994); *ECC Parkway Joint Venture v. Baldwin*, 765 S.W.2d 504 (Tex.App. 1989); *Stone v. Lawyers' Title Ins. Corp.*, 537 S.W.2d 55 (Tex.Civ.App.-Corpus Christi 1983). In *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432 (Tex.App.-Houston [14th Dist.] 1994), decided a few months after *McDaniel*, the court reviewed that decision and held: "In affirming summary judgment for Chicago Title, the Texas Supreme Court held that because the only duty imposed by a title insurance policy is the duty to indemnify against losses caused by title defects, the issuance of the policy did not constitute a representation regarding the status of the property's title. Id. at 311. Rather, a title insurance policy is only an agreement to indemnify if there are any losses caused by any defects. Id. Though Tri-Legends did not sue under the title insurance policy itself, instead relying on the commitment, we see no reason to distinguish McDaniel on that basis when a title commitment, in fact, is nothing more than a document used by a title insurance company as a precursor to the issuance of the title insurance policy itself. The information in a title commitment is only relevant to whether the title company will bear the risk of defending the title. *3Z Corp. v. Stewart Title Guar. Co.*, 851 S.W.2d 933, 937 (Tex.App.-Beaumont 1993, writ denied)." 889 S.W.2d at 443. See also *Williams v. Land Title Co. of Dallas*, 1997 WL 196345 (Tex.App.-Dallas) (unpublished). In *Cao v. BSI Financial Services, Inc*., 2017 WL 5157625 (S.D.Tex.) (unpublished), recommendations adopted in 2017 WL 5133289 (S.D.Tex.) (unpublished), the insured claimed that the policy misrepresented the state of title. Citing *McDaniel* and *Martinka*, the court dismissed the insured's breach of contract claim, stating that "the law is clear that title insurance companies owe no duty to examine title and that their only role as an underwriter to a policy is to indemnify."

[202] *Alford v. Chicago Title Ins. Co.*, 3 S.W.3d 164 (Tex.App.-Eastland 2000).

[203] Id.

for failing to record a deed. Further, a private party does not have a right to sue for a violation of a statutory duty. For example, by statute, "[n]o policy or contract of title insurance shall be written unless ...there has been made a determination of insurability of title in accordance with sound title underwriting practices... ."[204] However, a court found that the statute does not create a private cause of action.[205]

Texas recognizes a cause of action for "active" or "affirmative" misrepresentation of the state of the insured title.[206] A simple omission is not an affirmative misrepresentation.[207] For example, when the insurer correctly vested title, the fact that another insurer issued a commitment showing title vested in another party did not make the first insurer's commitment a misrepresentation.[208] Rather, what is required is some positive statement in the commitment that is not true.[209] Under the "active" misrepresentation of title theory, two decisions have applied §552 of the Second Restatement of Torts as a standard.[210] The courts have adopted the Restatement concept that there can be liability to parties who are not in privity but who would foreseeably rely upon the misrepresentation.[211] There is a two-year statute of limitations on such actions.[212]

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[204] Tex.Ins. Code Ann. Art. 9.34 (Vernon Supp. 1996).

[205] *Stewart Title Guar. Co. v. Becker*, 930 S.W.2d 748, 755 (Tex.App.-Corpus Christi 1996). See the full discussion of this case at §15.9.

[206] *First Title Co. of Waco v. Garrett*, 802 S.W.2d 254, 25-58 (Tex.Civ.App. 1990); *Stewart Title Co. v. Cheatham*, 764 S.W.2d 315, 318-19 (Tex.Civ.App. 1988); *Houston Title Co. v. Ojeda de Toca*, 733 S.W.2d 325, 327 (Tex.Civ.App. 1987), *rev'd on other grounds*, 748 S.W.2d 449 (1988). However, in *Cao v. BSI Financial Services, Inc*., 2017 WL 5157625 (S.D.Tex.) (unpublished), recommendations adopted in 2017 WL 5133289 (S.D.Tex.) (unpublished), the court held that such a claim failed because the plaintiff did not identify a specific false statement made in the policy or at closing on which she had relied to her detriment. The court dismissed the insured's breach of contract claim, stating that "the law is clear that title insurance companies owe no duty to examine title and that their only role as an underwriter to a policy is to indemnify."

[207] For example, when a commitment to insure made no exception for an easement, "this silence was not an actionable affirmative representation as to the existence or non-existence" of the easement. *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997).

[208] *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432 (Tex.App.-Houston [14th Dist.] 1994).

[209] *Tri-Legends Corp. v. Ticor Title Ins. Co.*, 889 S.W.2d 432, 444 (Tex.App.-Houston [14th Dist.] 1994); *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310, 311, n. 1 (Tex. 1994) (distinguishing *Garrett*). For example, in *First Title Co. of Waco v. Garrett*, 802 S.W.2d 254 (App. 1990), the commitment stated that there were no restrictive covenants of record. There were. The court found that "when an affirmative representation is made, the law imposes a duty to know whether the statement is true. If the statement is false, it is actionable. When no such affirmative representation was made in the commitment, no cause of action could be brought based on misrepresentation."

[210] *Great American Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425 (Tex.App. 1980); *F.D.I.C. v. Calhoun*, 34 F.3d 1291 (5th Cir. 1994).

[211] *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 234-5 (Tex.App.-Dallas 1985, writ ref'd n.r.e.) (involving defective survey).

An insurer or title agent may be liable under the state Deceptive Trade Practices Act[213] (the DTPA) for an affirmative misrepresentation that a title defect does not exist.[214] The lack of an exception for a matter affecting title is not an affirmative misrepresentation under the act, however.[215] The title insurance policy is not an affirmative representation to the insureds of "good and indefeasible title." Thus, there was no misrepresentation when a policy was issued even though the insureds' deed had not been recorded.[216] An insurer was found to have liability under a State Board of Insurance rule requiring that restrictions be reported in a certain fashion, but changes in the promulgated policy forms have since negated that theory of liability.[217]

Utah

Utah has rejected the notion that a title insurer may be sued for abstractor error in the issuance of a title insurance policy.[218] There is a statutory duty to perform a "reasonable" search

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[212] *Kansa Reinsurance Co., Ltd., et al. v. Stewart Title Co.*, 20 F.3d 1362 (5th Cir. 1994); *Stewart Title Guar. Co. v. Becker*, 930 S.W.2d 748, 755 (Tex.App.-Corpus Christi 1996); *Palmer v. Chicago Title Ins. Co*., 2013 WL 3049343 (S.D.Tex.) (unpublished); *Gutierrez v. Stewart Title Co.*, 550 S.W.3d 304 (Tex.App.-Houston 2018).

[213] Texas Business & Comm. Code Ann. §17.41 et seq.

[214] In *Peace v. ITCOA, LLC*, 2018 WL 1633518 (Tex.App.-Corpus Christi) (unpublished), the insured buyer's claim of a DTPA violation by the title agent in not disclosing an incipient condemnation for a road was dismissed because the buyer received the condemnation award, and had no damages.

[215] *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342 (Tex.App.-Tyler 1997); *Palmer v. Chicago Title Ins. Co*., 2013 WL 3049343 (S.D.Tex.) (unpublished) (lien disclosed by insurer at closing but allegedly not beforehand not a DTPA violation).

[216] *Alford v. Chicago Title Ins. Co.*, 3 S.W.3d 164 (Tex.App.-Eastland 2000).

[217] In *First Title Co. of Waco v. Garrett*, 802 S.W.2d 254 (Tex.App.-Waco 1990), an insurer was held liable under the insurance regulations for improperly reporting a recorded restriction. The court reasoned: "Ordinarily, a title insurance company does not owe a duty to the insured to discover and disclose a title defect. Stewart Title Guar. Co. v. Cheatham, 764 S.W.2d 315, 319 (Tex.App.-Texarkana 1988), writ denied. However, Rule P-4 of the State Board of Insurance's rules requires a title insurer to list all restrictive covenants and where they are recorded or to affirmatively state that there are 'None of Record.' State Board of Insurance, 28 TEX.ADMIN.CODE § 9 (West 1989) (Title Insurance). This requirement places a duty on the insurer to discover and disclose restrictive covenants, and creates an exception to the general rule of no duty to disclose. … Alamo Title owed and breached a duty to the Garretts to discover and disclose the restrictive covenant." *Garrett* did not respect the precedent it cited stating that an insurer has no separate duty to disclose. The Texas Code has since been changed.

[218] *Culp Constr. Co. v. Buildmart Mall*, 795 P.2d 650 (Utah 1990). *Culp* held that "[t]he form, function, and character of a title insurer is different from that of an abstractor. One who hires a title insurance company does so for the purpose of obtaining the assurance or guarantee of obtaining a certain position in the chain of title rather than for the purpose of discovering the title status. A title insurance company's function is generally confined to the practice of insurance, not to the practice of abstracting." *Culp* was affirmed in *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265 (Utah 1998), reh.den.; and followed in *Walker v. Anderson-Oliver Title Ins. Agency, Inc*., 309 P.3d 267, 741 Utah Adv.Rep. 37, 2013 UT App 202 (Utah App. 2013), which held that a title insurance commitment is not an abstract of title, and a title agent was not liable to the neighbor of an insured for its claimed error in failing to report to the insured easements in his favor over the insured land. In *Chapman v. Uintah County*, 81 P.3d 761, 2003 UT App 383 (Utah App. 2003) cert. den., 90

before the issuance of a title insurance policy.[219] A title agent may not be sued for negligent misrepresentation on a title insurance policy,[220] but a "miscellaneous report" may be considered an abstract of title on which the agent may be sued.[221]

Vermont

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

Virginia

A circuit court has held that there is no tort liability in Virginia. In *Layman v. Friedlander*,[222] an insured sued a title insurer and its agent in tort for breaching an alleged duty to search title "skillfully, carefully, diligently, and in a workmanlike manner." He cited a case against an accountant as support. The court found no such duty, calling the claim "a breathtaking misstatement of the law." It also noted that Virginia follows the economic loss doctrine, which says that when there is a contract, and the plaintiff's only loss is money, the "plaintiff is relegated to his action in contract and a negligence action is not available." The insured also relied on Va. Code § 38.2-4601.1, a section of the Virginia title insurance law, as supporting his "duty to search" tort action. The court disagreed:

> The argument is baseless. First, the statute does not purport to create duties at all, rather by its plain language, it purports to define what "a title agency or agent" means. Second, that definition plainly does not apply to a title insurer such as First American, but rather it purports to apply to one who might serve First American as a

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P.3d 1041 (Utah 2004), the insured argued that the policy made a representation of law that a road was not public by the way in which an exception was worded. The court disagreed: "Unlike in Culp, where the title insurance company assumed a role separate and apart from the issuance of the title insurance commitment and policy [as escrowee], … Commonwealth has not assumed any additional role and did not act as an abstractor. Thus, Commonwealth is held to the standard of care of an ordinary title insurance company and is liable only under the principles of contract." Professor Palomar cites *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302 (Utah 1983), for the proposition that the issuance of a title insurance policy "do not alone impose a duty" to conduct a reasonable search and examination of title, but that a title insurance company "can assume that duty expressly or impliedly." Joyce Palomar, Title Insurance Law, § 12:3, footnote 8, p. 1048. *Christensen*, however, held only that a company hired to disburse a construction loan had a duty to the contractor not to misrepresent facts to it, even though there was no privity of contract with the workman. In *Marcantel v. Stewart Title Guar. Co*., 2017 WL 5991734 (D. Utah 2017) (unpublished), the court held that a title agent did not assume a separate contractual duty to search and abstract title by discussing a sewer easement with the proposed insured; therefore, the court dismissed the thinly-disguised abstractor negligence claim against the agent.

[219] Utah Code Ann. § 31A-20-110.

[220] *Barton v. Vallejos*, 2012 WL 2261011 (D. Utah) (unpublished).

[221] *Merchants Bonding Co. v. First American Title Ins. Agency of Utah, Inc.*, 2008 WL 3914130 (D. Utah) (unpublished).

[222] 2003 WL 1958692 (Va.Cir.Ct.) (unpublished).

> title agency or agent. Third, there is no suggestion that what Plaintiffs contend are duties are duties that by operation of law are written into all insurance policies.[223]

One commentator cites *Marandino v. Lawyers Title Ins. Corp.*[224] as having found a duty in contract or tort to make a reasonable search and disclosure.[225] The case does state that the insurer should have discovered an ordinance affecting the dimensions of the property.[226] The case involved a claim on a policy, however, and it did not establish a search-duty cause of action in tort or contract.

Washington

In 2002, the Washington Supreme Court held in *Barstad v. Stewart Title Guar. Co.*[227] that Washington's statute defining the nature of a title insurance policy precludes a tort or abstractor liability claim premised on a title insurance policy.[228]

Before *Barstad*, the Supreme Court had issued a series of decisions in which it declined to

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[223] *Id.* at *2.

[224] 156 Va. 696, 159 S.E. 181 (1931).

[225] Palomar, *Title Insurance Law*, §12.02, p. 12-7, n. 4.

[226] "The defect is one which the company should have discovered, and if discovered, good faith and honesty required that the defect should have been plainly disclosed to the plaintiff." 156 Va. 696, 159 S.E. 181, 184.

[227] 145 Wash.2d 528, 39 P.3d 984 (Wash. 2002). The *Barstad* decision was amplified in *Dave Robbins Construction, LLC v. First American Title Ins. Co.*, 158 Wash.App. 895, 249 P.3d 625 (Wash.App. Div. 1 2010), which held that "a preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a policy" and not an abstract of title" and thus, as a matter of law, First American "owed no duty of disclosure to" the insured. In *Courchaine v. Commonwealth Land Title Ins. Co*., 2012 WL 6522442 (Wash.App. Div. 3) (unpublished), the court held that the modified title insurance statute also barred a claim premised on the Washington Consumer Protection Act for the failure to except a recorded easement. In *Shepard v. Holmes*, 185 Wash.App. 730, 345 P.3d 786 (Wash.App. Div. 3 2014), the court held that the statute of limitations for claims based on negligent misrepresentation of title and under the Consumer Protection Act began running when the policy was issued. In that case, however, the insured did not sue the insurer for the claimed failure to disclose a recorded instrument, but rather asserted that the policy represented an attached map as being accurate, despite a disclaimer in the policy. The *Shepard* court did not decide the issue of whether or not such a claim is viable. In *Eleazer v. First American Title Ins. Co*., 2017 WL 1137215 (Wash.App. 1 Div.) (unpublished), the court held that a title company serving as escrowee has no duty to search title or disclose a recorded easement, absent a separate title search contract.

[228] "In applying RCW 48.29.010 retroactively, we side with the narrow majority of state courts in the Ninth Circuit that have held that title insurance companies have no general disclosure duty in preliminary commitments. Among Ninth Circuit states, California, Oregon, Idaho and Nevada [footnotes omitted], have all held that there is no general duty to disclose title defects in preliminary commitments. ...Of these states California is notable because it enacted a statute similar to RCW 48.29.010 clarifying the duties associated with preliminary commitments. ...The California statute clarified the duties associated with an abstractor as contrasted with a title insurer who issues a preliminary report. ...Many states outside the Ninth Circuit have also held that an insurance company does not have a general duty to disclose."

reach the question of whether or not a title insurer is liable for abstractor liability.[229] In a 2002 unpublished decision, a Washington appeals court found that a title insurer failed to conduct a reasonable search of the title.[230] In finding such a duty, the court relied on the statement in the 1976 appeals court decision in *Shotwell v. Transamerica Title Ins. Co*. that "a policyholder has a reasonable expectation that he will be advised of the specific impediments upon his land as revealed by a reasonable search… ."[231] In fact, the Washington Supreme Court had declined to find an abstractor search duty in *Shotwell,* stating "we find it unnecessary to reach the issue of whether a 'duty to search and specifically disclose' exists." Then, in 1997, the legislature adopted a title insurance act defining some title products, similar to the California statute, that says that "[a]n abstract of title is not a title policy," and a title commitment is a statement of the terms of the policy to be issued, but not "a representation as to the condition of the title."[232] Even before the abstractor liability issue was resolved, Washington courts had ruled that a title insurer could not be sued for the alleged duty to disclose as an exception a recorded instrument on a subject that was excluded from policy coverage.[233]

West Virginia

The author finds no reported decision regarding a claimed duty to search, and no "reasonable search" statute.

Wisconsin

The Wisconsin Supreme Court has held that the only liability assumed by the insurer in the issuance of a title insurance policy is to indemnify the insured for any covered matter. A title insurer is not obligated to search and examine title, and tort claims for negligent failure to search or examine title are barred.[234]

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[229] *Shotwell v. Transamerica Title Ins. Co.,* 91 Wash.2d 161, 588 P.2d 208 (Wash. 1978); *Lombardo v. Pierson*, 852 P.2d 308, 311 (Wash. 1993); *Klickman v. Title Guaranty Co. of Lewis County*, 105 Wash.2d 526, 716 P.2d 840 (Wash. 1986); *Transamerica Title Ins. Co. v. Johnson*, 103 Wash.2d 409 693 P.2d 697 (Wash. 1985). The court of appeals stated in *JIJ Corp. v. Yamato Development Canada, Inc.*, 1999 WL 211855 (Wash.App. 1 Div.) (unpublished), that Washington "appears to" allow suit against a title insurer on abstractor liability. It again declined to rule on whether or not the plaintiff must be in privity of contract with the insurer.

[230] *Clark v. Chicago Title Ins. Co.*, 2002 WL 15955 (Wash.App. 3 Div.) (unpublished).

[231] 16 Wn.App. 627, 631, 558 P.2d 1359 (1976).

[232] RCW § 48.29.010(3).

[233] *Klickman v. Title Guaranty Co. of Lewis County*, 105 Wash.2d 526, 716 P.2d 840 (Wash. 1986); *Lombardo v. Pierson*, 852 P.2d 308 (Wash. 1993).

[234] *Greenberg v. Stewart Title Guar. Co.*, 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992): "[A] title insurance company is not an abstractor of title employed to examine title. Rather, a title insurance company guarantees the status of title and insures up to the policy limits against existing defects. Thus, the only duty undertaken by a title insurance company in issuing a policy of insurance is to indemnify the insured up to the policy limits against loss suffered by the insured if the title is not as stated in the policy. … Similarly, the issuance of a title commitment does not, as Greenberg suggests,

Wyoming

The insurer is not liable in tort for failing to make exception for a title defect in a title insurance commitment or policy.[235] There is a statutory duty to issue a title insurance policy based on adequate evidence of the current condition of title. That statute does not create a private cause of action or a tort duty.[236]

15.13 Abstracts And Title Searches

Title insurers and agents also issue various forms of non-insurance title information products. These serve many different purposes, and are known by a variety of names, including searches, abstracts, guarantees, letters, opinions, letter reports, title reports, litigation reports, and special reports. Some such products have a "look and feel" similar to that of a title insurance contract, but they are not insurance policies.[237]

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constitute an independent undertaking by the insurer to search the title for the benefit of the insured. Rather, the title commitment "generally constitutes no more than a statement of the terms and conditions upon which the insurer is willing to issue its title policy… . Any search done by an insurer in preparation for preparing a title commitment is done to protect itself in deciding whether to insure the property and to protect against losses covered in the policy." 492 N.W.2d at 151. *Greenberg* was followed in *Countrywide Home Loans, Inc. v. Stewart Title Guar. Co.*, 2007 WL 4613046 (E.D.Wis. 2007) (unpublished). See also *Community Credit Union v. AmeriTitle & Abstract, Inc*., 344 Wis.2d 519, 822 N.W.2d 737 (Table), 2012 WL 3930615 (Wis.App.) (unpublished) (agent not liable to insured for allegedly negligent title searching or examination in issuance of title commitment).

[235] In *Hulse v. First American Title Ins. Co.*, 2001 WY 95, 33 P.3d 122 (Wyo. 2001), reh.den, the Supreme Court ruled that state statutes precluded a ruling that a title commitment is an abstract on which the issuer may be sued in tort. Wyoming has a statutory definition of a title insurance commitment, also called a "report" in the law. A commitment: "constitutes a statement of the terms and conditions upon which the insurer is willing to issue its policy but is not a title policy. Neither a title policy nor a report issued prior to the issuance of a title insurance policy is an abstract of title." After analyzing cases from other states falling on either side of the issue, the court said "the better analysis in determining whether to establish a title insurer's tort duty for reasonable search and disclosure recognizes that the relationship between the insured and the title insurance company is essentially contractual." *Hulse* was affirmed in *Sonnett v. First American Title Ins. Co*., 309 P.3d 799, 2013 WY 106 (Wyo. 2013).

[236] "Wyoming's underwriting standard statute § 26-23-308(a) (LexisNexis 2001) merely provides that '[n]o title insurance policy as to property in this state shall be written unless it is based upon adequate evidence of the current condition of title certified in writing as of the date of the policy... .' Even were we somehow to find that this statutory language imposed a duty on insurers to reasonably search the public record and disclose their findings, Wyoming Statute § 26-23-334(b) (LexisNexis 2001) precludes us from creating a private cause of action on this basis when it expressly states, '[t]his article is enforceable only by the commissioner and shall not create any private cause of action or other private legal recourse.'" *Hulse v. First American Title Ins. Co.*, 2001 WY 95, 33 P.3d 122 (Wyo. 2001), reh.den.

[237] In *United States v. Mississippi Valley Title Ins. Co.*, 405 F.Supp. 1312 (W.D.Ark. 1975), a Certificate of Title issued to the United States government was held to be a title insurance policy, at least for purposes of applying the relevant statute of limitations. The court relied on *Real Estate Title Ins. Co. v. District of Columbia*, 82 U.S.App.D.C. 170, 161 F.2d 887 (D.C.Cir. 1947). That case ruled that revenues from the sale of Certificates of Title were taxable as premiums. The court classified the Certificates as insurance because the primary difference between the two products was that the insurance policy "guaranteed" title, while the Certificate "certified" title. The court reasoned, however, that if a defect existed, the insurer would indemnify under either product. In *Kondaur Capital Corp. v. Fidelity Nat. Title Ins. Co*., 2013 WL 1908018 (Ariz.App. Div. 1) (unpublished), the court found the issuer of a Trustee's Sale Guarantee not to

Except the abstract, a full discussion of which is beyond the scope of this text, these products have spawned relatively few reported decisions and almost no scholarly comment.[238] The three principal issues are who may claim injury against the abstractor for a mistake in the report, and under what theory of recovery; whether or not an exculpatory clause or limitation of liability is enforceable; and what responsibility, if any, does the title searcher have to a party which uses the search to examine title and issue a policy? These issues are addressed below, in that order.

15.13.1 Parties To Whom Abstractor May Be Liable

An abstract of title is a contract, and privity has traditionally been essential to a suit for breach of that contract.[239] Many jurisdictions still hold to this view.[240] However, some courts have elected to view an error in the abstract as creating a cause of action in negligence. Under this analysis, the class of persons who may sue the abstractor is broadened to include parties who may be foreseen to reasonably rely on the abstract.[241] This approach was adopted in the landmark case of *Williams v. Polgar*,[242] a case of first impression in Michigan:

> Since we write on a clean slate we are free to reject traditional rule and hold that a person who is not in privity may maintain an action against an abstractor. One of the reasons given for the privity requirement is that one who is not in privity of contract should not be allowed to maintain an action on this contract. The answer to this argument is simple. This is not an action in contract, it is an action in tort. It is certainly established that a breach of contract can also be a tort and this is true of the faulty preparation of an abstract. [citations omitted]

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be liable when the claimed error was a search of the "wrong" parcel. The search was of the same parcel described in the deed of trust on which the trustee's sale would be held.

238 Payne, *From the Courts: Title Searches and Title Insurance*, Real Estate Law Journal Vol. 18, No. 3 (1990).

239 See the decisions cited in Annotation, *Liability of Abstractor--Privity*, 34 A.L.R.3d 1122; Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other Than Person Ordering Abstract*, 50 A.L.R.4th 314; Annotation, *Liability of One Preparing Abstract of Title, for Deficiencies Therein, to One Other Than Person Directly Contracting for Abstract*, 34 A.L.R.3d 1122; and an extensive review of decisions in *Williams v. Polgar*, 43 Mich.App. 95, 204 N.W.2d 57 (1972), aff'd, 391 Mich. 6, 215 N.W.2d 149 (1974).

240 See cases collected in Annotation, *Liability of One Preparing Abstract of Title, for Deficiencies Therein, to One Other Than Person Directly Contracting for Abstract*, 34 A.L.R.3d 1122. For example, Ohio, has not relaxed the privity requirement. In *Davis v. Montenery*, 2007-Ohio-6221, 173 Ohio App.3d 740, 880 N.E.2d 488 (Ohio App. 7 Dist. 2007), a buyer was denied recovery against a title abstractor who did a search for the buyer's lender.

241 See Annotation, *Liability of Abstractor-Privity*, 34 A.L.R.3d 1122; Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other Than Person Ordering Abstract*, 50 A.L.R.4th 314; *Dorr v. Massachusetts Title Insurance Co.*, 238 Mass. 490, 131 N.E. 191 (1921); *Ehmer v. Title Guarantee & Trust Co.*, 156 N.Y. 10, 50 N.E. 420 (1898); and Prosser, *Torts*, §93, p. 638.

242 43 Mich.App. 95, 204 N.W.2d 57 (1972), aff'd, 391 Mich. 6, 215 N.W.2d 149 (1974).

> Keeping in mind that this is a tort action the question is not whether or not we can find privity, but rather, it is a question of whether a subsequent purchaser or mortgagee is a member of the class to which the abstractor owes a duty. We believe that they are members of such a class. The difference between one who is in privity of contract and a subsequent purchaser or mortgagee is that the former may elect to proceed in either contract or tort while the latter is limited to a tort action.[243]

Some jurisdictions permit suit against an abstractor or title searcher based either on contract or tort.[244]

Williams v. Polgar found the negligence cause of action grounded in §552 of the Restatement of Torts, concerning misrepresentation by "one who in the course of his business or profession supplies information for the guidance of others in their business transactions." Section 552 has been applied in other jurisdictions also.[245] See a complete discussion of the Restatement above, at §15.7.

Jurisdictions that have relaxed the requirement of privity have done so in varying degrees.[246] *Williams v. Polgar* adopted the view that any subsequent purchaser or mortgagee might foreseeably rely on an abstract, and therefore would have a right to sue for negligence. Other states limit liability to claimants whom the abstractor knew would rely on the abstract at the time it was prepared.[247]

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[243] 204 N.W.2d 57 (1972).

[244] See, for example, *Lawyers Title Ins. Corp. v. Noland Co.*, 140 Ga.App. 114, 230 S.E.2d 102 (1976); *Broser v. Royal Abstract Corp.*, 46 Misc.2d 717, 260 N.Y.S.2d 487 (City Ct. 1965), modified, 49 Misc.2d 882, 268 N.Y.S.2d 594 (Sup.Ct.App.Div. 1966); and *Lattin v. Gillette*, 95 Cal. 317, 30 P. 545, approved in *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal.App.2d 116, 331 P.2d 742 (1958).

[245] *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal.App.2d 116, 125-126, 331 P.2d 742 (Cal.App. 1 Dist. 1958).

[246] In *McCrea v. Commerce Title Co.*, 2009 WL 2183476 (Tex.App.-San Antonio) (unpublished), when a title search was produced for a buyer that missed some liens, and the buyer settled the lien issue with the seller whose liens were missed, the court found that the buyer's attempted assignment to the seller of the claim against the title searcher was unenforceable, because the seller and searcher were both liable for the liens. However, when an abstract issued to a lender failed to note a use restriction that thwarted the building of the residence for which the loan was made, the borrowers were entitled to sue the abstractor for negligence, despite the lack of contract privity between them. *Hamilton v. Trans Union Settlement Solutions, Inc*., 295 S.W.3d 844 (Ky.App. 2009). In *Abengoa Bioenergy U.S. Holding, Inc. v. Chicago Title Ins. Co.*, 379 S.W.3d 864 (Mo.App. E.D. 2012), the court affirmed a jury verdict that found a title insurer liable to a property owner for $48 million in damages due to the insurer's failure to identify several property owners who were entitled to notice from a municipality about the proposed rezoning of the property. The municipality apparently ordered the title searches, not the property owner. The court did not provide an opinion along with its order, and thus did not discuss the privity issue.

[247] An example of this "middle" position is *First American Title Ins. Co., Inc. v. First Title Service Co. of the Florida Keys, Inc.*, 457 So.2d 467, 472 (Fla. 1984): "While the policy arguments put forth by the petitioner, and so well expressed in *Williams v. Polgar*, do not persuade us to adopt open-ended liability for negligence to any foreseeably relying persons, they do convince us that, when an abstract is prepared in the knowledge or under conditions in which an abstracter should reasonably expect that the employer is to provide it to third persons for purposes of inducing those persons to rely on the abstract as evidence of title, the abstracter's contractual duty to perform the service skillfully and diligently runs to the benefit of such known third parties." See citations in Annotation, *Liability of Abstractor--Privity*, 34 A.L.R.3d 1122; Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other Than Person*

New York has stated:

> As a shorthand ruled ... it has been noted that, for defendants to be liable, reliance by plaintiff upon the representation must be "the end and aim of the transaction," rather than an "indirect or collateral" consequence of it.[248]

The different standards have caused courts to split, for example, as to whether or not a bidder at a foreclosure sale may be foreseen to rely on a title search prepared for the foreclosing lender.[249] The abstractor may be liable even when it offers a title search or report at no charge.[250]

There are numerous products other than title searches and abstracts that are issued by members of the land title industry. In each case, the court must determine the benefited parties and the standard of care undertaken by the issuing company.[251] Similarly, a law firm that gives a title certification may be liable thereunder to its client, but in most states is not liable to a party that is not a client.[252]

Ordering Abstract, 50 A.L.R.4th 314.

[248] *Kidd v. Havens*, 577 N.Y.S.2d 989, 991 (A.D. 4 Dept. 1991).

[249] *Smith v. Boyd*, 639 A.2d 413 (N.J.Super. 1993) (bidder at sale not a beneficiary of search prepared for foreclosure sale); *Kovaleski v. Tallahassee Title Co.*, 363 So.2d 1156 (Fla. 1978), later opinion 391 So.2d 315 (Fla. 1980) (bidder at sale foreseeably relied when title search was available for inspection prior to sale at the tax collector's office and bidder examined erroneous search).

[250] A Colorado title company was sued when its owner issued a letter, at no charge, opining that a certain restriction in favor of the town had expired. *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581 (Colo.App. 2000). The same agency later issued a title insurance policy excepting the restriction. The insured said at closing "I'm an attorney and I know how to handle the Town." He sued to have the restriction declared void, and lost. Then he sued the agency for misrepresentation in the free opinion letter. The court said the buyer had plenty of information about the true facts, including the restriction document, the title policy, and the seller's own opinion that the restriction could be enforced. Therefore, it concluded that the buyer did not rely on the letter from the title company. The court did not hold, however, that there could be no liability on the free opinion.

[251] In *Soifer v. Chicago Title Ins. Co.*, 187 Cal.App.4th 365, 114 Cal.Rptr.3d 1 (Cal.App. 2 Dist. 2010), as modified 2010 WL 3195790 (August 13, 2010), review denied (October 27, 2010), a title company was not liable for a $1 million bid error made by a third-party bidder at a foreclosure sale based on an e-mail asking the title examiner "is this a first lien?" followed by a reply e-mail by the title examiner of "yes," for which the customer was not charged, because the e-mail was determined not to constitute an abstract of title as defined by California statute. In *Kondaur Capital Corp. v. Fidelity Nat. Title Ins. Co*., 2013 WL 1908018 (Ariz.App. Div. 1) (unpublished), the court found the issuer of a Trustee's Sale Guarantee was not liable when the claimed error was a search of the "wrong" parcel, because the search was of the same parcel described in the deed of trust on which the trustee's sale would be held.

[252] A Massachusetts law firm that gave a title certification to a lender was found not to be liable to the borrowers for negligent misrepresentation. *Houston v. Greenwald*, 11 Mass.L.Rptr. 647, 2000 WL 1273373 (Mass.Super. 2000) (unpublished). The borrowers mistakenly built a house on land they did not own. The court did not explain whether or not the title certificate showed the wrong legal description or otherwise contributed to the mistake. In any event, the borrowers failed to show that they had a right to rely on the law firm's statements or certificate, because they were not represented by the firm, and also failed to show that they in fact relied. The court also held that a title certificate is not a contract. Therefore, the borrowers had no claim for breach of warranty or breach of the covenant of good faith and fair

15.13.2 Standard Of Care And Limitations On Liability

In a state that recognizes a tort action for abstractor negligence, the plaintiff must prove that the abstractor violated its standard of care. It is commonly stated that the abstractor must examine and report title with a reasonable degree of care and skill, and is responsible for errors or omissions in the abstract that result from the abstractor's negligence.[253] One court elaborated as follows:

> An abstract of title is prepared by a skilled searcher and supposedly contains whatever appears in the records affecting the title (Smith v. Taylor, 82 Cal. 533, 23 P. 217). Whether the report was designated a preliminary title report or a litigation report, the purpose for which it was ordered and to be used was not open to doubt. Insofar as the abstracter assumes to describe instruments of record, due care and skill require that such description be accurate. The person employing the abstracter has the right to rely on the truth and accuracy of his work in regard to any essential facts of record unless a mistake is plainly apparent... .[254]

An abstractor may be liable for various errors in the abstract that result from a lack of reasonable care and skill in its preparation.[255] The abstractor is not liable if it conducted its work with due care and skill.[256] The abstractor is not liable for an inaccuracy or omission in the public records that it is asked to search.[257] Also, the choice of which parcels should be searched is not part of a search or

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dealing, both of which apply only to a contract. However, in *JBJ Investment of South Florida, Inc. v. Southern Title Group, Inc*., 251 So.3d 173 (Fla.App. 4 Dist. 2018), the court held that an attorney hired by a title company to draft a mortgage and note might be liable to the lender, with whom he never spoke, for failing to verify that the parcels encumbered by the mortgage were the right ones, even though the title company prepared the legal description exhibit.

[253] "An abstracter is liable in damages for injuries resulting from wrongful or negligent errors, defects or omissions in an abstract prepared and furnished by him." *Sickler v. Indian River Abstract & Guar. Co.*, 195 So. 195 (Fla. 1940). "One who undertakes to examine a title for compensation is bound to exercise a reasonable degree of skill and diligence in the conduct of the transaction." *Canatella v. Davis*, 264 Md. 190, 286 A.2d 122, 130 (Md. 1972) (quoting *Corcoran v. Abstract & Title Co.*, 217 Md. 633, 143 A.2d 808 (1958); *Colecchi v. Gould Title Co.*, 18 Mass.L.Rptr. 319, 2004 WL 2341568 (Mass.Super. 2004) (unpublished) (triable issue of whether or not title searcher is potentially liable for failing to identify that legal description is inadequate or ambiguous, despite its use in chain of title for many years).

[254] *Viotti v. Giomi*, 230 Cal.App.2d 730, 41 Cal.Rptr. 345, 350 (Cal.App. 1 Dist. 1964).

[255] A Minnesota abstractor was found liable for failing to detect and report a record overlap, in *Miller v. Pioneer Abst. & Title Co.*, 2005 WL 3470333 (Minn.App.) (unpublished). The court also affirmed an award of attorneys' fees incurred by the customer in quieting title, which it found to be "the natural and proximate consequence of" the agent's "tortious conduct or breach of contract." In *Razete v. Preferred Research, Inc.*, 202 Ga.App. 504, 415 S.E.2d 25 (1992), the claimed negligence was in the failure to transmit all of the pages of a title search by facsimile.

[256] In *Frye v. Monarch Title of Northern Missouri*, 565 S.W.3d 693 (Mo.App.W.D. 2018), the court held that a title agent that prepared a legal description for land to be sold was not negligent, because it obeyed the instructions given to it by the seller and was not aware that the buyers thought they were buying 200 rather than 120 acres.

[257] *Ilkowitz v. Durand*, 2018 WL 1595987 (S.D.N.Y. 2018) (unpublished) (title agent that collected searches of

examination of title, and the abstractor is not liable if its search includes more or less land than the parties intended.[258]

The searcher or abstractor is liable for reasonably foreseeable damages that are suffered by a party to whom a duty is owed, that are proximately caused by an error, and on which erroneous information the party relied.[259] In an often-cited decision, *Williams v. Polgar*,[260] the court ruled that damages are limited to those proximate caused by the error and that would be reasonably foreseeable:

> [T]here is a limit on the amount for which the abstractor may be held liable. For example, in a case where the abstractor has failed to note a deed conveying the property in fee simple absolute and the subsequent purchaser loses the property, that limit is the total value of the property. … We are aware that real property often appreciates in value and that subsequent purchasers and mortgagees may suffer damages through the loss of improvements made to the land after the date of the abstract; however, this is not sufficient reason to defeat liability.[261]

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municipal records as part of title order not liable to purchaser when searches did not disclose fact that health department had discovered existence of lead-based paint in home).

[258] In *Cummings v. Stephens*, 157 Idaho 348, 336 P.3d 281 (Idaho 2014), reh.den. Nov. 5, 2014, the court held that Idaho's search statute does not transform a title commitment into an abstract of title, and thus a title agent may not be sued for faulty abstracting of title for having included in a title commitment parcels not owned by the sellers and one they did own but did not intend to sell. Had the title company been an abstractor, it would likely have been liable for a faulty search of the parcels not owned by the seller. In *Frye v. Monarch Title of Northern Missouri*, 565 S.W.3d 693 (Mo.App.W.D. 2018), the court held that a title agent that prepared a legal description for land to be sold was not negligent, because it obeyed the instructions given to it by the seller and was not aware that the buyers thought they were buying 200 rather than 120 acres. However, in *Abengoa Bioenergy U.S. Holding, Inc. v. Chicago Title Ins. Co.*, 379 S.W.3d 864 (Mo.App. E.D. 2012), an insurer provided title searches that were used to notify neighbors of hearings for a rezoning petition. It was asked to produce searches on every parcel within a certain radius of the subject parcel. It failed to include seven such nearby parcels. The court upheld a judgment for over $48 million in damages incurred by the owner of the property when the rezoning was challenged by those people. The damages represented lost profits, increased construction costs in the other state and higher production cost for the ethanol. The court rejected the insurer's argument that the rezoning could have been salvaged at a cost of $50,000. Also, in *JBJ Investment of South Florida, Inc. v. Southern Title Group, Inc*., 251 So.3d 173 (Fla.App. 4 Dist. 2018), the court held that an attorney hired by a title company to draft a mortgage and note might be liable to the lender, with whom he never spoke, for failing to verify that the parcels encumbered by the mortgage were the right ones, even though the title company prepared the legal description exhibit.

[259] "An abstracter is liable in damages for injuries resulting from wrongful or negligent errors, defects or omissions in an abstract prepared and furnished by him." *Sickler v. Indian River Abstract & Guar. Co.*, 195 So. 195 (Fla. 1940). The Restatement (Second) of Torts §552 states that a party in the business of supplying information "is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

[260] 43 Mich.App. 95, 204 N.W.2d 57 (1972).

[261] 204 N.W.2d at 59-60.

The amount of reasonably foreseeable damages that can flow from an error may be very substantial.[262] Jurisdictions that hold that an abstract of title or title search is a contract have barred tort claims based on those contracts, when the only claimed losses are economic, which also limits the type of damage that can be claimed.[263]

Almost every abstract and title search contains an exculpatory and/or liability limitation statement. Reasonable exculpatory clauses are enforced when the court treats the title search as a contract.[264] However, such a provision may be found to be unenforceable when the court analyzes liability based on negligence principles.[265] A disclaimer may not contradict or negate the standards

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[262] In *Abengoa Bioenergy U.S. Holding, Inc. v. Chicago Title Ins. Co.,* 379 S.W.3d 864 (Mo.App. E.D. 2012), the insurer that provided searches used to notify neighbors of hearings for a rezoning petition was found liable for over $48 million in damages incurred by the owner of the property that decided to build its ethanol plant in another state when the rezoning was challenged. The damages represented lost profits, increased construction costs in the other state and higher production cost for the ethanol. The court rejected the insurer's argument that the rezoning could have been salvaged at a cost of $50,000. The appeals court affirmed the jury verdict without a written decision.

[263] *Dawson v. Chicago Title Ins. Co*., 2002 WL 80162 (Tex.App.-Dallas) (unpublished) (foreclosure title report is a contract; economic loss doctrine bars lawsuit for search negligence). See also *First Midwest Bank, N.A. v. Stewart Title Guar. Co*., 218 Ill.2d 326, 300 Ill.Dec. 69, 843 N.E.2d 327 (2006) (no tort claims on title insurance policy); *First American Title Ins. Co. v. 273 Water Street, LLC*, 2010 WL 6496185 (Conn.Super.) (unpublished); *Bourne v. Stewart Title Guar. Co*., 2011 WL 6101016 (D.N.H.), 2011 DNH 204 (unpublished). In *Razete v. Preferred Research, Inc.*, 202 Ga.App. 504, 415 S.E.2d 25 (1992), Preferred Research prepared a title search that it sent in the form of a commitment to insure to Razete, by facsimile. The last page, which listed a federal tax lien, was lost in transmission. Razete foreclosed, apparently in reliance on the title search, and was forced to pay the IRS. The trial court granted summary judgment on Preferred's argument that the commitment was an offer to insure which Razete did not accept by requesting a policy. On appeal, the court ruled that the action sounded in tort rather than contract, and that there were questions of fact to be decided as to the claimed negligence in transmitting the information.

[264] A lot book guaranty containing an exculpatory clause was found to bar an action in negligence brought by a party other than the one for whom the guaranty was issued, in *Harrison v. Commonwealth Land Title Ins. Co.*, 97 Cal.App.3d 973, 159 Cal.Rptr. 209 (Cal.App. 1 Dist. 1979). In *Fidelity Nat. Title Ins. Co. of New York v. Suburban West Abstractors*, 852 A.2d 318, 2004 PA Super 179 (Pa.Super. 2004), the search report stated that liability was limited to $25. Nonetheless, a jury verdict was affirmed permitting a title insurer to collect $176,000 against a title searcher for a missed judgment. The jury ignored the liability limitation statement on the title search. Suburban West Abstractors did a last owner search for Fidelity National Title, which the insurer used to issue a $318,750 loan policy. Suburban missed a $380,000 judgment against the seller. Fidelity paid off the insured lender in full, then settled with the judgment creditor. It sued Suburban for its net loss of about $176,000.

[265] For example, in *Southwind Exploration, LLC v. Street Abstract Co., Inc.*, 209 P.3d 728 (Kan.App. 2009), an abstractor was found liable under a title certificate prepared for a lawyer for use in obtaining an oil and gas lease because a half mineral estate, reserved in a 1949 railroad deed, was not shown on the title certificate. The lawyer had been unclear about the starting point of the search. The certificate said it was "made upon the mutual understanding that the maker thereof has not examined all instruments and proceedings in the chain of title to the above described real estate… ." However, the certificate may not have clearly recited the starting point from which the search began. The court held the abstractor liable for the cost of obtaining the half mineral estate, under Section 552 of the Restatement. In *Viotti v. Giomi*, 230 Cal.App.2d 730, 739, 41 Cal.Rptr. 345, 350 (Cal.App. 1 Dist. 1964), the court held: "The words 'Preliminary report only. No liability hereunder' printed on the litigation report are not sufficient to exculpate the title company from responsibility for its own negligent acts. An agreement insulating one from liability for his own negligence must specifically so provide and is strictly construed against the party asserting the exemption, especially

or specifications for the title examination as found in the search contract.[266]

The applicable statute of limitations for suit on a title search or abstract of title depends on the way in which the court classifies the product or service provided.[267]

15.13.3 Searcher And Title Plant Liability To Title Policy Issuer

Practice differs radically from state to state as to who performs the various functions required to issue a policy: maintaining the title plant, searching, examining, commitment and policy issuing, and closing. Whenever the company issuing a policy or performing a closing did not search and/or examine title itself, there is the possibility of a claim incurred as a result of the searcher's error. The policy-issuer will naturally wish to have the searcher pay all or part of the loss. See §17.8 regarding agent liability to the underwriter.

Some claims result from errors in the title plant used for the records search. Some companies use strictly the government records and indices. However, most maintain at least some of the records and indices themselves, belong to joint title plants, or use other companies' private title plants.

It can sometimes take considerable investigation to determine exactly whose error caused the claim. Once the cause is determined, however, the insurer will normally wish to be reimbursed for all or part of its loss. The insurer should immediately give notice to the party of the claim, and keep the party advised of the progress of the matter. The insurer should consult the party during settlement discussions, and seek to work out an allocation of payment at time of settlement, rather than seeking to recoup later. Failure to give prompt, continuing notice may prejudice the right to be reimbursed. See §17.8.2 concerning notice in the context of agent contribution to claims.

A title searcher is liable to an insurer who bought the search in order to write an insurance

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where he is the author of the agreement." 230 Cal.App.2d at 739, 41 Cal.Rptr. at 350. Likewise, in *Broser v. Royal Abstract Corp.*, 46 Misc.2d 717, 260 N.Y.S.2d 487 (City Ct. 1965), modified, 49 Misc.2d 882, 268 N.Y.S.2d 594 (Sup.Ct. App.Div. 1966), the court found that a limitation on liability would be applicable if the insurer had been sued on breach of contract, but was unenforceable when the plaintiff elected to sue in tort.

[266] In *Alamo Title Co., Inc. v. Land Resources Corp.*, 2003 WL 21010605 (Tex.App.-San Antonio) (unpublished), a disclaimer in the search report was not enforceable to negate the search standards stated in the customer's letter requesting the searches, when the customer said it was "ordering these [searches] on the understanding that the title report is of the same reliability and accuracy that is used in the title research for a title policy from your company."

[267] In *Brooks v. Terry Abstract Co.*, 2014 Ark.App. 212, 2014 WL 1327760 (Ark.App. 2014) (unpublished), the court held that a lawsuit against a title searcher who missed a recorded gas pipeline easement was filed a month late, and thus barred. Arkansas has a five year statute for written contracts and a three year statute for contracts that are not in writing. The abstractor's first position was that there was no privity of contract, since the search was delivered to the title agent, not the buyer. The court held there was an implied contract. The court said that the three-year statute for implied contracts applied. The question became the start date. The court held that a title search is, in effect, an abstract of title. Under Arkansas law, the limitations period on an abstract begins running when the abstract "is compiled and delivered and not when the error is discovered." The court concluded that the clock starts ticking on the day the search was delivered, not on the closing date, and was thus filed a month late. In *Calvert v. Swinford*, 2016 OK 100, 382 P.3d 1028 (Okla. 2016), , the Oklahoma Supreme Court ruled that the time limit for suing an abstract company for recording a defective deed began to run on the day the deed was recorded. The court said that the discovery rule did not delay the running of the statute, because the deed was not concealed but recorded, and these days a grantor can review the real estate records "anytime from one's computer in the comfort of their own home."

policy.[268] When the insurer has paid a claim of loss to the insured, it stands in the insured's shoes for purposes of subrogation to sue the title searcher whose error caused the loss.[269] As was stated in *First American Title Ins. Co., Inc. v. First Title Service Co. of the Florida Keys, Inc.*,[270] the underwriter steps into the shoes of its insured to recover from the title searcher. The *First Title Services* decision quoted above was broadened in *Safeco Title Ins. Co. v. Attorneys' Title Services, Inc.*,[271] which held that an insurer's "status as an intended beneficiary is not necessary where the insurer first satisfies a claim brought against its insured, so long as all the equitable prerequisites to subrogation are satisfied." Further, the *Attorneys' Title Services* case involved a computer plant printout which was inaccurate, not a full abstract of title. The court held that a fact question existed as to whether or not the computer plant printout was a product on which the provider had assumed the liability of an abstractor.

When a title agent further delegates search duties to third a party, the independent search company may be liable if it makes an error, to either the underwriter or the title agent, or both.[272] In *First American Title Ins. Co. v. Capri Title Services, Ltd.*, [273] a New York title agent that bought incomplete "title notes" from another company was found not to have conducted an adequate title examination, and was liable to the underwriter for the loss caused by a missed lis pendens. In *The Fountainhead Title Group Corp. v. Courthouse Search of N. Virginia*, [274] a searcher that failed to show a $1 million judgment on its title report was liable in full to the title agent for whom the search was performed, even though the agent's customer was paid primarily by the agent's errors and omissions carrier.

In some jurisdictions, the customer may sue the title searcher for negligent misrepresentation. The *First Title Services* decision was applied in *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co.*,

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[268] In *Chicago Title Ins. Co. v. Accurate Title Searches, Inc*., 173 Conn.App. 463, 164 A.3d 682 (Conn.App. 2017), the court found a title searcher liable to the title insurer that bought the search in order to write insurance, in the amount paid to settle the title claim plus what the insurer paid to defend the insured against the adverse title interest.

[269] The searcher who vested title in the wrong person was found liable to the title agent that requested the search for all the damages that flowed from the fraud that was made possible by the error, in *Southern Land Title, Inc. v. North Georgia Title, Inc.*, 270 Ga.App. 4, 606 S.E.2d 43 (Ga.App. 2004).

[270] 457 So.2d 467 (Fla. 1984).

[271] 460 So.2d 518 (Fla.App. 1984), rev.den. *Attorneys' Title Services, Inc. v. Safeco Title Ins. Co*., 467 So.2d 999 (Fla. 1985).

[272] In *Hines v. Holland*, 779 S.E.2d 63 (Ga.App. 2015), a Georgia attorney who certified title based on a defective title search had no power to sue the lay title searcher to have her substituted as defendant in the malpractice action, although the court did not decide if the searcher could be liable to the attorney for breach of the search contract. In *ALR Oglethorpe, LLC v. Henderson*, 783 S.E.2d 187 (Ga.App. 2016), the court held that a lawsuit filed by a law firm against an attorney title examiner was a valid claim, but was barred by the applicable four-year statute of limitations, which begins to run on the date the title examination is delivered.

[273] 19 A.D.3d 1062, 796 N.Y.S.2d 295, 2005 N.Y. Slip Op. 04777 (N.Y.A.D. 4 Dept. 2005).

[274] 2005 WL 176656 (4th Cir. (Va.)) (unpublished).

Inc.,[275] in which an insurer sued its policy-issuing agent for having negligently missed two easements. The court found the agent liable both on its contractual obligations and on negligent misrepresentation of title, in the form of the title insurance commitment, under §552 of the Restatement (2nd) of Torts. The agent asserted that the insurer had neglected an important element of proof by not offering into evidence the title insurance policy, and establishing a contractual subrogation right in the shoes of the insured. The court found that the insurer's rights did not depend on subrogation:

> The parties' agreement, then, was not for Defendant to issue a title insurance policy to either Plaintiff or a third party, but, rather to make "searches" and make a "title report," similar in scope, for example, with that of an attorney making a title search. [FN4] Plaintiff was therefore not required to either produce the title insurance policy or otherwise prove that it had a subrogation right precedent to establishing liability and recovering damages under the theories alleged in its petition. "A duty to exercise care may be imposed by entering into a contractual relationship." Evinger v. McDaniel Title Co., 726 S.W.2d 468, 472 (Mo.App.1987).[276]

However, the provider of a title search used for the preparation of a policy is not directly liable to persons who hold interests in the property, but for whom the title search was not prepared.[277]

As with other types of title searches, reasonable exculpatory clauses or contractual limitations on liability are enforceable, but absurdly restrictive provisions may be ignored by the finder of fact when they are at odds with the known and intended purpose for which the search is provided.[278] All such claims are subject to a statute of limitations.[279]

When a continuing stream of search business will be done with a particular policy-issuer, the parties should sign a contract. The searcher's exposure should be established and controlled by that

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[275] 968 S.W.2d 727 (Mo.App. S.D. 1998).

[276] Id. at 729.

[277] *James v. Partin*, 2002 WL 1058152 (Ohio App. 12 Dist.) (unpublished), app. den. 96 Ohio St.3d 1516, 775 N.E.2d 857 (Table), 2002-Ohio-4950 (owner may not sue on search prepared for loan policy, because action is in contract and privity is an essential element, citing *Thomas v. Guarantee Title &* Trust, 81 Ohio St. 432, 91 N.E. 183 (1910)).

[278] In *Fidelity Nat. Title Ins. Co. of New York v. Suburban West Abstractors*, 852 A.2d 318, 2004 PA Super 179 (Pa.Super. 2004), the search report stated that liability was limited to $25. Nonetheless, a jury verdict was affirmed permitting a title insurer to collect $176,000 against a title searcher for a missed judgment. The jury ignored the liability limitation statement on the title search. Suburban West Abstractors did a last owner search for Fidelity National Title, which the insurer used to issue a $318,750 loan policy. Suburban missed a $380,000 judgment against the seller. Fidelity paid off the insured lender in full, then settled with the judgment creditor. It sued Suburban for its net loss of about $176,000.

[279] In *ALR Oglethorpe, LLC v. Henderson*, 783 S.E.2d 187 (Ga.App. 2016), the court held that a lawsuit filed by a law firm against an attorney title examiner was barred by the applicable four-year statute of limitations, which begins to run on the date the title examination is delivered.

contract. The contract terms should override any exculpatory clause in the search itself.

The searcher is generally an independent contractor, and not the agent of the policy-issuer. The searcher's knowledge should not be imputed to the policy-issuer.[280]

The title plant owner's liability should also be determined by the terms of the plant access agreement, if one exists. It takes considerable courage to sue the register or recorder of deeds, but such a suit has been held to be viable because misindexing is not under the sovereign immunity umbrella.[281] A violation of a joint title plant agreement may make the participant liable to the other members.[282]

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[280] See *Lewis v. Superior Court*, 30 Cal.App.4th 1850, 37 Cal.Rptr.2d 63 (Cal.App. 2 Dist. 1994), rev.den. March 16, 1995.

[281] *First Amer. Title Ins. Co. of St. Lucie County, Inc. v. Dixon*, 603 So.2d 562 (Fla.App. 1992).

[282] The subject of joint title plant contract disputes is beyond the scope of this treatise. However, two interesting cases are *Stewart Title Co. of Memphis v. First American Title Ins. Co.*, 44 F.Supp.2d 942 (W.D.Tenn. 1999); and *Inter-County Title Co. v. Data Trace Information Services, LLC*, 259 F.Supp.2d 1107 (D.Nev. 2003), aff'd 105 Fed.Appx. 136, 2004 WL 1238266 (9th Cir. (Nev.) Jun. 3, 2004) (unpublished) (joint title plant consortium did not violate antitrust laws by setting price of $1 million for back plant, which was estimated cost to create plant by overseas data entry, when no compelling testimony that price kept competitors from entering market).

16 Bad Faith and Tort Liability

Some claimants make demands for extra-contractual damages. This chapter covers the three main issues in this realm: bad faith, punitive damages, and reckless misrepresentation. Two other non-policy duties are discussed elsewhere: escrow (Chapter 13), and abstractor liability on policies and commitments--the so-called "duty to search" (Chapter 15).

16.1 Tort Of Bad Faith

In some jurisdictions, the insured may recover damages beyond the policy loss formula based on proof that the insurer acted in bad faith in handling the claim. Other states have rejected the cause of action, or have adopted a different formulation or theoretical basis for it. A complete discussion of the history and nuances of this doctrine is beyond the scope of this work, but has been thoroughly analyzed elsewhere.[1]

The modern bad faith cause of action is rooted in the judicial invention that every insurance contract contains an implied covenant of good faith and fair dealing.[2]

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[1] A fairly comprehensive and practical analysis is found in Barbara O'Donnell, *Preparing for and Defending Against Bad Faith Claims*, in *The Brief*, American Bar Association Tort Trial & Insurance Practice Section, Summer 2016, p. 44, which discusses the advice of counsel defense, use of coverage expert witnesses, and the defenses of insured comparative bad faith and the insured's failure to cooperate. A good but outdated state-by-state analysis of the bad faith cause of action is found in Stephen S. Ashley, *Bad Faith Liability: A State-by-State Review*, which is now out of print. Other good sources include: Anderson, *Placing a Check on an Insured's Bad-Faith Conduct: The Defense of Comparative Bad Faith*, 35 South Texas L.Rev. 485-534 (1994); and *Symposium on the Law of Bad Faith in Contract and Insurance*, 72 Texas L.Rev. 1203-1680 (1994). Bad faith cases in the title insurance field are discussed in Hosack, *Bad Faith and Related Problems: The Title Insurer's Perspective*, in A.B.A. Real Property & Trust Law Section, *Title Insurance: The Lawyer's Expanding Role*, p. 496 (1985); Homburger, *Insurance Overlay on Title Insurance*, in Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders, Practicing Law Institute N-448, p. 587 (discussion of bad faith and other insurance issues).

[2] This implied covenant was first described in *Brassil v. Maryland Casualty Co.*, 210 N.Y. 235, 104 N.E. 622 (1914). It was first applied to the duty to settle third party claims against the insured in *Hilker v. Western Auto Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1931). The California courts extended the covenant to permit a bad faith cause of action to the insurer's duty to indemnify and defend the insured (so-called first party bad faith). *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (Cal.App. 4 Dist. 1970); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480,

> "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. …" (Comunale v. Traders & General Ins. Co., supra, 50 Cal.2d at p. 658, 328 P.2d 198.) This principle applies to insurance policies. … Stated another way, the insurer must give the interests of the insured at least as much consideration as its own interests.[3]

Bad faith melds contract and tort law. The fundamental premise of the claim is that a covenant of good faith and fair dealing is implied in every insurance contract, and that an egregious breach of that covenant by the insurer can support a separate claim against the company. In most states, the suit is founded in tort. Bad faith falls into two categories: third party and first party.

16.1.1 Third Party Bad Faith

Third party bad faith is the insurer's tortious refusal to settle a lawsuit brought by a third party against the insured within policy limits, when the failure to settle exposes the insured to liability in excess of policy limits. The idea is that the insurer has a duty to give appropriate consideration to the insured's interest in having the matter settled rather than being exposed to personal liability on a judgment for more than policy limits. If the insurer rejects a settlement offer for policy limits or less in bad faith, the insurer may be sued for the excess judgment amount.[4]

Third party bad faith compensates the insured when the insurer has wrongly put its own interest ahead of that of the insured in declining to settle before trial. The standard liability policy puts the insurer in control of the litigation and settlement. A policy-limits offer to the insured from the plaintiff creates a conflict of interest between insured and insurer:

> The insured obviously wants the insurer to accept the third party's offer because the insured bears the risk of having to pay the portion of the judgment exceeding the policy limits. The insurer wants to reject the offer because by trying the case the insurer might, by some fluke, obtain a verdict in the insured's favor and avoid liability altogether and, if it loses, it will have to pay no more than the policy limits anyway.[5]

The covenant of good faith and fair dealing gives the insurer the duty to weigh the insured's peril of an excess judgment as it evaluates settlement opportunities.

States have adopted a variety of standards to which the insurer is held. Some have ruled that the insured's interest must be given "equal," "fair" or "some" consideration. Others state that the

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510 P.2d 1032 (1973). See discussion in Ashley, *Bad Faith Liability: A State-by-State Review*, §§1:03-6.

[3] *Stalberg v. Western Title Ins. Co.*, 230 Cal.App.3d 1223, 282 Cal.Rptr. 43, 50 (Cal.App. 6 Dist. 1991).

[4] Ashley, *Bad Faith Liability: A State-by-State Review*, §1:05, pp. 12-20.

[5] Ashley, *Bad Faith Liability: A State-by-State Review*, §1:08, pp. 26-7.

insurer must "disregard the limits" of the policy in considering whether or not the settlement offer should be accepted.[6]

16.1.2 First Party Bad Faith

First-party bad faith concerns the insurer's breach of the covenant of good faith and fair dealing in its conduct toward the insured. The three types of first party bad faith are for the failure to indemnify, a refusal to defend or a bad faith investigation of the claim.

The cause of action for first party bad faith does not have the same root as third party bad faith. When the insurer is asked to defend or pay the insured, there is no conflict of interest. The insured is not subject to the insurer's control, as with third-party litigation. The insured also has no risk of liability beyond policy limits over which the insurer has control. Rather, the duty to indemnify or defend may be objectively determined. If the insurer breaches its duty, the insured may recover the benefits of the policy by suit for that breach. An insurer whose denial of defense or indemnity is not wrongful, of course, has not acted in bad faith.[7]

Most states have adopted the tort of first party bad faith.[8] A few have not. In rejecting first party bad faith in the context of a refusal to defend, one court compared the two bad faith doctrines and said:

> The duty to defend, however, arises solely from the language of the insurance contract. A breach of that duty can be determined objectively, without reference to the good or bad faith of the insurer. If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach.[9]

To be considered a bad faith act, most states say that the insurer's denial must be both incorrect and also without an objectively reasonable basis, with some states holding in addition that the insurer must be proven to have been reckless, wanton, intentional, malicious, or fraudulent.[10] One

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[6] See Ashley, *Bad Faith Liability: A State-by-State Review*, §§1:08 to -.12, pp. 26-47.

[7] See, for example, *Fidelity Nat'l Title Ins. Co. v. National Westminster Bank, U.S.A.*, 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. (Cal.)) (unpublished).

[8] *First Party Bad Faith*, by Dianne K. Dailey and Linda M. Bolduan, is a good summary of the theory, plus a discussion of defenses and damages in such actions. It is found at Volume 29 of The Brief, No. 2, Winter 2000, p. 44. The Brief is published by the ABA Tort & Insurance Practice Section.

[9] *Stockdale v. Jamison*, 416 Mich. 217, 330 N.W.2d 389 (1982) (quoted in Ashley, *Bad Faith Liability: A State-by-State Review*, §2.06, p. 66.

[10] An oft-quoted formula for first party bad faith conduct comes from *Anderson v. Continental Ins. Co*., 85 Wis.2d 675, 271 N.W.2d 368 (1978), in which the court said: "To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i. e., would a reasonable

case recited that bad faith refusal to pay or defend requires proof of the following five elements:

> 1) the existence of an insurance contract between the parties and a breach by the insurer; 2) intentional refusal to pay the claim; 3) the non-existence of any reasonably legitimate or arguable reason for the refusal (debatable reason) either in law or fact; 4) the insurer's knowledge of the absence of such a debatable reason or 5) when the plaintiff argues that the intentional failure results from the failure of the insurer to determine the existence of an

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insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances. 271 N.W.2d at 376-77. In Arizona, a claim of bad faith arises "when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such action." *Noble v. Nat'l Am. Life Ins. Co*., 128 Ariz. 188, 624 P.2d 866, 868 (1981). Under the Pennsylvania bad faith statute, 42 Pa.C.S.A. § 8371, the insurer acts in bad faith if it acts with "reckless disregard" for the insured's rights, which the insured must prove by clear and convincing evidence. See *Morrison v. Wells Fargo Bank, N.A.*, 711 F.Supp.2d 369 (M.D.Pa. 2010). Section 8371 does not define "bad faith." As was reported in *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co*., 2011 WL 611802 (E.D.Pa.) (unpublished), Pennsylvania courts have accepted the following definition: "'Bad faith' on the part of the insurer is any frivolous or unfounded refusal to pay proceeds of policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith." *Adamski v. Allstate Ins. Co*., 738 A.2d 1033, 1036 (Pa.Super.Ct.1991) (quoting BLACK'S LAW DICTIONARY 139 (9th ed.1990)) (emphasis added). Thus, to establish bad faith under the statute, Pennsylvania has a two-part test, both parts of which must be established by clear and convincing evidence: "(1) the insurer lacked a reasonable basis for denying coverage; and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis." *Adamski*, citing *Terletsky v. Prudential Prop. and Cas. Ins. Co*., 437 Pa.Super. 108, 649 A.2d 680, 688 (Pa.Super.Ct.1994). Under Pennsylvania law, the presence or absence of bad faith does not depend on the legal correctness of the basis for an insurer's denial of an insured's claim. *Jung v. Nationwide Mut. Fire Ins. Co*., 949 F.Supp. 353, 359–60 n. 7 (E.D.Pa.1997). "If it did, the need for an independent analysis of an insured's bad faith claim would disappear, as the applicable section 8371 claim would turn specifically on the underlying coverage determination." *Employers Mut. Cas. Co. v. Loos*, 476 F.Supp.2d 478, 496 (W.D.Pa.2007). The Third Circuit has thus held that "[a] reasonable basis is all that is required to defeat a claim of bad faith." *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d Cir. 2004). "[Q]uestionable conduct giving the appearance of bad faith is not sufficient to establish a bad faith refusal to provide coverage if the insurer had a reasonable basis for denying the claim." *Post v. St. Paul Travelers Ins. Co*., 609 F.Supp.2d 382, 385 (E.D.Pa.2009). Similarly, Connecticut requires proof of "tortious conduct which is motivated by a dishonest or sinister purpose," or allegations of facts that "reasonably infer an improper motive or reckless indifference of the interest of others." *U.S. Bank, N.A. v. Lawyers Title Ins. Corp.*, 2010 WL 1629942 (Conn.Super.) (unpublished). Another Connecticut court dismissed a claim of bad faith failure to investigate, stating that "[w]hile a jury might find that Chicago Title unreasonably delayed resolution of Bristol Heights' claim, there is no evidence submitted by Bristol Heights that it did so with a 'dishonest purpose.'" *Chicago Title Ins. Co. v. Bristol Heights Ass'n, LLC*, 2009 WL 5698103 (Conn.Super.) (unpublished). In Arkansas, in a first party bad faith claim, the insured must prove "affirmative misconduct by the insurance company, without a good faith defense, and that the misconduct must be dishonest, malicious, or oppressive in an attempt to avoid liability under an insurance policy." *Robertson Brothers Farms v. Farmers Mutual Hail Ins. Co.*, 2010 WL 2471911, 2 (E.D. Ark. 2010), *Aetna Casualty & Surety Co. v. Broadway Arms Corp*., 281 Ark. 128, 664 S.W.2d 463 (1984); *Friedeberg v. Bullard*, 2019 WL 1416473 (unpublished), recommendations adopted in 2019 WL 1412106 (E.D.Ark. 2019) (unpublished), aff'd 783 Fed.Appx. 648 (8th Cir. 2019). In *Banner Bank v. First American Title Ins. Co.*, 916 F.3d 1323 (10th Cir. (Utah) 2019), the court held that First American did not act in bad faith in denying a defense, because it "reached the correct legal conclusion that it did not owe a duty to defend or indemnify; it reached this conclusion after complying with its duty to 'diligently investigate the facts to enable it to determine whether a claim is valid,' 'fairly evaluate the claim,' and 'act promptly and reasonably in rejecting or settling the claim.' *Prince v. Bear River Mut. Ins. Co*., 56 P.3d 524, 533 (Utah 2002)."

> arguable basis, the plaintiff must prove the insurer's intentional failure to determine the existence of such a debatable reason.[11]

Similarly, the insurer's refusal to pay for the insured's defense in litigation is not in bad faith if that decision is based on a "reasonably legitimate or arguable reason."[12] However, in some states the fact that a claim is "fairly debatable" is not a complete bar to recovery for bad faith.[13] Many states have adopted the principle that an insurer can be guilty of conducting a bad faith claim investigation, which commonly is evidenced by efforts to steer the investigation away from coverage and toward a set of facts supporting a denial of the claim.[14]

Some states have adopted the principle that an insurance company must give due consideration to the rights of its insured in making decisions about the claim, including responding to or making settlement offers and in paying a loss to the insured.[15]

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[11] *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F. 2d 307 (8th Cir. 1991) (citing *Justin v. Guardian Ins. Co.*, 670 F.Supp. 614, 617 (D.C. Virgin Islands 1987)).

[12] *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F. 2d 307, 314 (8th Cir. 1991). In accord are *Fraley v. Allstate Ins. Co.*, 81 Cal.App.4th 1282 (2000) and *Rappaport-Scott v. Interinsurance Exch. of Auto. Club*, 146 Cal.App.4th 831 (2007).

[13] *State Farm Mutual Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (1995).

[14] California holds that an insurer must act fairly and in good faith in conducting its investigation of a claim. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal.2d 654, 657 (1958). The insurer acts in bad faith when it conducts a biased investigation slanted away from a finding of coverage. *Chateau Chamberay Homeowners Assn. v. Associated International Ind. Co*., 90 Cal.App.4th 335 (2001); *Moore v. American United Life Ins. Co*., 150 Cal.App.3d 610 (1984).

[15] In the California decision of *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966, 135 Cal.Rptr.2d 718, the court gave this synopsis of that state's doctrine: "An insurer is not a fiduciary, and owes no obligation to consider the interests of its insured above its own. (Love v. Fire Ins. Exchange (1990) 221 Cal.App.3d 1136, 1148, 271 Cal.Rptr. 246.) 'An insurer ... may give its own interests consideration equal to that it gives the interests of its insured (Egan v. Mutual of Omaha Ins. Co., supra, 24 Cal.3d at pp. 818–819, 169 Cal.Rptr. 691, 620 P.2d 141); it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims (Austero v. National Cas. Co., supra, 84 Cal.App.3d at p. 30, 148 Cal.Rptr. 653); and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured (Native Sun Investment Group v. Ticor Title Ins. Co. (1987) 189 Cal.App.3d 1265, 1278, 235 Cal.Rptr. 34.)' (Id. at pp. 1148–1149, 271 Cal.Rptr. 246.)" In *Anguiano v. Allstate Ins. Co.*, 209 F.3d 1167 (9th Cir. (Cal.) 2000), the court gave this summary of that state's equal consideration doctrine in the context of settlement offers and third party bad faith: "California law requires that an insurer 'take into account the interest of the insured and give it at least as much consideration as it does to its own interest' when evaluating settlement offers. Walbrook Ins. Co. v. Liberty Mutual Ins. Co., 5 Cal.App.4th 1445, 7 Cal.Rptr.2d 513, 521 (1992) (quoting Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 328 P.2d 198, 201 (1958) … As a result, the implied covenant of good faith and fair dealing imposes a duty upon insurers to give an 'offer its intelligent and informed consideration; that the insurer advise the insured of any settlement offers, together with the results of its investigations; and that the insurer give equal consideration to the interests of its insured.' Cain v. State Farm Mutual Auto. Ins. Co., 47 Cal.App.3d 783, 121 Cal.Rptr. 200, 205 (1975). A breach of any of these obligations coupled with a refusal to settle within policy limits may render an insurer liable for any judgment against its insured, including any portion in excess of the policy limits." In a leading Arizona case, *Farmers Ins. Exchange v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (Ariz. 1957), the court said: "The principal difficulty experienced by the courts has been in fixing a test for the degree of consideration the insurer must give the insured's interests in order to have met its legal obligation in this respect. Different standards have been adopted.

There are a number of ways in which the insurer may signal its good faith effort and motivation in the handling of a claim. A healthy attitude toward the insured is perhaps paramount. One very good treatise offers a number of attitudinal pointers, including:

1. Respond to claims notices promptly.

2. Request information from the insured with a view toward granting coverage, not merely toward finding a basis to deny coverage.

3. Adopt a positive attitude that the claim will be paid unless there is a valid reason to deny payment.

4. Complete the investigation before making any decision on the claim.

5. Consider advancing policy benefits and/or defense even while coverage litigation is proceeding.[16]

16.1.3 Insurance Claim Penalty Statutes

A number of states have adopted unfair claims practice acts, many modeled on the NAIC model act, as more fully discussed at §2.1. The majority view is that these statutes do not create private causes of action.[17] However, the existence of such a statute, and its dictates, may be permitted as evidence of the insurer's good faith or lack thereof:

> The fact of [the regulations'] adoption, Safeco's presumed awareness of their provisions, and the specificity of their commands, all have a bearing on whether Safeco acted in good faith and, if not, the extent to which punitive damages, if any,

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There is authority to the effect that the insurer may give paramount consideration to its interests. *Wisconsin Zinc Co. v. Fidelity & D. Co*., 162 Wis. 39, 155 N.W. 1081; *Hillker v. Western Auto. Ins. Co*., 204 Wis. 1, 231 N.W. 257, 235 N.W. 413. Other jurisdictions have said paramount consideration must be given to protect the insured. *Tyger River Pine Co. v. Maryland Casualty Co*., 170 S.C. 286, 170 S.E. 346. A third position is that the insurer must give equal thought to the end that both the insured and the insurer shall be protected. *American Fidelity & Casualty Co. v. G. A. Nichols Co*., 10 Cir., 173 F.2d 830; *National Mutual Casualty Co. v. Britt*, 203 Okl. 175, 200 P.2d 407, 218 P.2d 1039. The latter standard was adopted by the trial court and we approve. It occurs to us that when the insurer is defending litigation against the insured, employs attorneys to represent the interests of both and has sole power and opportunity to make a settlement which would result in the protection of the insured against excess liability, common honesty demands that it not be moved by partiality to itself nor be required to give the interests of the insured preferential consideration. A violator of this rule of equality of consideration cannot be said to have acted in good faith." 313 P.2d at 406.

[16] Cushman, *et al., Prosecuting and Defending Insurance Claims*, John Wiley & Sons, §18.5, pp. 474-5.

[17] See, for example, *Moradi-Shalal v. Fireman's Fund Ins. Co's*, 46 Cal.3d 287, 758 P.2d 58, 250 Cal.Rptr. 116 (1988); *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 498 N.W.2d 905 (Wis.App. 1 Dist. 1993); Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, §§ 9:25 and 9:26, Thomson Reuters.

> are warranted. [The regulation] is therefore relevant ... and, accordingly, admissible as substantive evidence... .[18]

Also, some states have enacted statutes making insurers liable for bad faith acts or a "vexatious refusal to pay" a covered claim. These statutes permit an insured to sue the insurer for bad faith refusal to pay a covered claim.[19] The standard by which the insurer's conduct is judged may be set by the statute or by resort to judicially-imposed "reasonable man" standards.[20] State consumer fraud acts do not support claims alleging bad faith acts in the handling of an insurance claim.[21]

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[18] *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 522, 498 N.W.2d 905 (Wis.App. 1 Dist. 1993).

[19] The Missouri vexatious refusal to pay law is Mo.Rev.Stats. §375.420. Florida has two such laws, Fla. Stats. §§624.155 and 627.727(10). The Florida statutes were construed in *State Farm Mutual Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (1995) and *Stewart Title Guar. Co. v. The Machado Family Limited Partnership*, 2017 WL 3622006 (M.D.Fla.) (unpublished), and discussed in Preston and Vaka, *First Party Bad Faith: State Farm v. Laforet*, Fla. Bar Journal July/August 1995, p. 52. Illinois has adopted an insurer bad faith statute, Section 155 of the Illinois Insurance Code. However, that statute does not apply to title insurers, as found in *Azran v. Fidelity National Financial, Inc*., 2016 WL 4124286 (N.D. Ill. Aug. 3, 2016) (unpublished). In *Bank of America, N.A. v. Chicago Title Ins. Co*., 2017 WL 2215012 (N.D.Ill.) (unpublished), the court cited *Azran* and went further, holding that "title insurance companies are governed by the Illinois Title Insurance Act, 215 ILCS 155/3, which contains no equivalent to § 155." Georgia has a statute on bad faith, and a similar standard. "To prevail on a claim for an insurer's bad faith under OCGA § 33-4-6, the insured must prove: (1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer within 60 days prior to filing suit, and (3) that the insurer's failure to pay was motivated by bad faith." *Bayrock Mortgage Corp. v. Chicago Title Ins. Co.*, 286 Ga.App. 18, 19, 648 S.E.2d 433 (2007). "Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact." *Assurance Co. v. BBB Serv. Co.*, 259 Ga.App. 54, 58(2), 576 S.E.2d 38 (2002). "Bad faith is shown by evidence that under *the terms of the policy* under which the demand is made and under the facts surrounding the response to that demand, the insurer had no 'good cause' for resisting and delaying payment." *Lawyers Title Ins. Corp. v. Griffin*, 302 Ga.App. 726, 730-1, 691 S.E.2d 633, 636-7 (Ga.App. 2010). In *Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016), the court ruled that OCGA § 33-4-6 (a) is a penalty statute, and therefore must be strictly construed. It said that, although generally a question of good or bad faith is for the jury to decide, the court should make the ruling when the insurer had reasonable grounds for denying the claim. The court ruled that the insurer had denied the claim based on such reasonable grounds, and therefore had not acted in bad faith as a matter of law. In *Harrigan v. Fidelity Nat'l Title Ins. Co*., 2018 WL 6016719 (Conn.Super.) (unpublished), the court observed that there is no private cause of action under the Connecticut Unfair Insurance Practices Act, because that law is enforced by the insurance commissioner. However, in *Mead v. Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986), the court held that an insured may bring an action under the Connecticut Unfair Trade Practices Act for violations of CUIPA. In *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co*., 317 Conn. 602, 623, 119 A.3d 1139 (2015), the court said that, "to sustain a CUIPA cause of action under CUTPA, a plaintiff must allege conduct that is proscribed by CUIPA."

[20] *Rosenberg v. Missouri Title Guar. Co.*, 764 S.W.2d 684 (Mo.App. 1988).

[21] *In re Pazzo Pazzo, Inc*., ___ B.R. ___, 2019 WL 6699694 (Bkcy.N.J. 2019) (not yet released for publication) (New Jersey Consumer Fraud Act does not apply to an insurer's denial of a policy claim. The consumer fraud act applies to an insurer only if it misrepresents the terms of the policy in selling the insurance).

16.1.4 Damages For Bad Faith Acts

In both first- and third-party bad faith suits, the insured may recover incidental expenses and, in many cases, attorneys' fees incurred in the bad faith suit.[22]

Central to the cause of action for third-party bad faith is the premise that the insured has been found liable for a money judgment in excess of policy limits, which the insurer could have prevented had it settled the suit for policy limits. If bad faith is proven, therefore, the primary element of damage is the excess judgment.

By contrast, there is a certain straining for elements of damage under first party cases. Unlike third-party bad faith, in first-party bad faith suits the insured is not out of pocket anything more than its policy benefits. Consequently, in first-party bad faith, the two primary sources of damage in addition to the amounts payable for breach of contract are for emotional distress and punitive damages.[23] These damages are in addition to recovery for breach of policy, and the insured has not made an election of remedies by first pursuing breach of contract, and then bad faith damages.[24]

16.1.4.1 Emotional Distress

The insured bears a heavy burden of proof in establishing that the insurer's employees, such as its claim administrators, intentionally inflicted mental distress on the insured, if such a cause of action is even available in the jurisdiction.[25] A New York court ruled that, while a title company's

[22] For example, in *White v. Western Title Ins. Co.*, 710 P. 2d 309 (Cal. 1985), the court held: "'[W]hen the insurer's conduct is unreasonable, a plaintiff is allowed to recover for all detriment proximately resulting from the insurer's bad faith, which detriment ... includes those attorney's fees that were incurred to obtain the policy benefits and that would not have been incurred but for the insurer's tortious conduct.' [citation omitted] The same reasoning supports inclusion of witness fees and other litigation expenses as an element of damage." California's position was further explained in *Brandt v. Superior Court*, 693 P.2d 796, 798 (Cal. 1985), which permitted the insured to recover its attorney fees incurred in bringing the bad faith and coverage suit based on the idea that "[t]he attorney's fees are an economic loss--damages--proximately caused by the tort" of bad faith refusal to pay the loss. This rule has also been adopted in numerous other jurisdictions. See, for example, *Hayseed's, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73 (W.Va. 1986); *Farmers Group, Inc. v. Trimble*, 768 P.2d 1243 (Colo.App. 1988); *Filasky v. Preferred Risk Mutual Ins. Co.*, 734 P.2d 76 (Ariz. 1987); and *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559 (1996). A collection of these cases is found in Windt, *Insurance Claims and Disputes*, 3rd Ed., §9.24, fn. 181.

[23] In fact, the California courts adopted first party bad faith as a cause of action in part so that an insured could recover damages for emotional distress, which otherwise had not been recognized in breach of contract actions. In the seminal case of *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (Cal.App. 4 Dist. 1970), the court reasoned that allowing the insured to sue for emotional distress in a bad faith suit would simply avoid forcing the insured to sue for both breach of contract and intentional infliction of emotional distress: "A rule placing the emphasis where it belongs and permitting recovery of all proximately caused detriment in a single cause of action is more likely to engender public respect for and confidence in the judicial process than a rule which would require attorneys, litigants and judges to force square pegs into round holes." 10 Cal.App.3d at 402, 89 Cal.Rptr. at 94.

[24] *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 520, 498 N.W.2d 905 (Wis.App. 1 Dist. 1993).

[25] For example, New Jersey law allows recovery of such damages in the context of a contract action only "if the breach involves conduct that is both intentional and outrageous and proximately causes severe, foreseeable emotional distress." In *Granelli v. Chicago Title Ins. Co.*, 2012 WL 2072648 (D.N.J.) (unpublished), the court dismissed a claim for emotional distress because the insured had established nothing worse than delay in the handling of her claim.

failure to pay taxes on time may have been upsetting, the property owner was not entitled to damages for the emotional distress that he claimed to have suffered as a result. Damages were limited to interest and penalties owed the taxing authority.[26] Alabama permits recovery for mental anguish caused by a title insurer's bad faith acts, without requiring proof of physical impact or injury.[27] The Virginia standard for proof of emotional distress damages is as follows:

> The general rule in tort cases is that, in the absence of accompanying physical harm or wanton and willful conduct, emotional distress damages are not recoverable. [Citations omitted] There are a small number of exceptions to this rule and we have allowed recovery of emotional distress damages based on appropriately pled facts.[28]

An insured was awarded damages for intentional infliction of emotional distress in *Jarchow v. Transamerica Title Ins. Co.*[29] The insureds did not establish physical impact or injury, and based their claim on worry and aggravation caused by the title insurer's failure to take action to clear title.[30] A later decision overturned *Jarchow* to the extent that it suggested that an insurer could be liable for emotional distress without having acted in bad faith.[31] Another decision held that an insured may not recover for emotional distress based on the insurer's negligent bad faith, unless the insured is a foreseeable victim of trauma caused by that negligence.[32] Yet another California decision ruled that a claimed insured did not have a cause of action against the insurer for alleged infliction of emotional distress based on the fact that the lawsuit to clear title was brought on behalf of another insured.[33] Finally, *Jarchow* has been held not to create a duty under the implied covenant to establish title for the insured's encroaching improvements, when the policy terms do not so obligate the insurer.[34] Thus, after *Jarchow*, California has adopted the more conventional doctrine that an insurer may not

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[26] *Gluck v. First Equity Abst. Corp.*, 17 Misc.3d 1114(A), 851 N.Y.S.2d 63 (Table), 2007 WL 3023059, 2007 N.Y. Slip Op. 52007(U) (N.Y.Dist.Ct.) (unpublished).

[27] Lawyers Title Ins. Corp. v. Vella, 570 So. 2d 578 (Ala. 1990).

[28] *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 668 (Va. 1994).

[29] 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (Cal.App. 1 Dist. 1975).

[30] *Jarchow* rested on the California Supreme Court decision of *Crisci v. Security Ins. Co.*, 66 Cal.2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967), which had first departed from the requirement that the insured show physical impact or injury.

[31] *Quezada v. Hart*, 67 Cal.App.3d 754, 136 Cal.Rptr. 815 (Cal.App. 2 Dist. 1977).

[32] *Soto v. Royal Globe Ins. Corp.*, 184 Cal.App.3d 420, 229 Cal.Rptr. 192 (Cal.App. 4 Dist. 1986)

[33] *Van de Bovenkamp v. United Title Co.*, 2006 WL 3530473 (Cal.App. 2 Dist.) (unpublished). In that case, a person claiming to be an insured was found not to be entitled to sue the insurer for emotional distress caused by the lawsuit against him that was financed by the title insurer on behalf of its other insured, the plaintiff.

[34] *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771, 777 (Cal.App. 2 Dist. 1994).

be sued for emotional distress unless the insured can prove intentional conduct and malice or physical injury. *Jarchow* was rejected as precedent for negligent intentional infliction of emotional distress in the Arizona case of *Deno v. Transamerica Title Ins. Co.*,[35] decided after *Jarchow* had been limited by the California courts.

16.1.4.2 Punitive Damages

If an insurer has acted in bad faith toward its insured, it can be liable to the insured for punitive damages. Punitive damages are punishment for outrageous conduct. The purpose of punitive damages is to punish and deter reprehensible conduct; such an award is not considered to represent compensation to the insured:

> Punitive damages are not intended to compensate the plaintiff, but rather are awarded "to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct." … "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[36]

Thus, simple negligence or breach of contract is not sufficient to support punitive damages.[37] Rather, something *more* than a showing of bad faith conduct is required to entitle the insured to an award of punitive damages.[38] A punitive damage award may be reviewed and struck if it is so excessive as to

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[35] 126 Ariz. 57, 617 P.2d 35 (Ariz.App. 1980).

[36] *Kimble v. Land Concepts, Inc.*, 353 Wis.2d 377, 845 N.W.2d 395 (Wis. 2014), cert.den., 135 S.Ct. 359, Oct. 14, 2014, quoting *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co*., 2003 WI 46, 47, 261 Wis.2d 333, 661 N.W.2d 789 and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). "Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money." Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." Prosser, *Law of Torts*, §2, p. 9 (1971) (footnotes omitted). See also, Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 9:26, *Bad faith and punitive damages*, Thomson Reuters.

[37] See Restatement of Torts 2d, § 908, Comment d. at 466 (1977). The Restatement was cited in *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987), which held: "It is error to award punitive damages if there has been no bad motive or wanton indifference. Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence, nor are they permitted merely for a breach of contract."

[38] "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," …which occasionally…has been stretched to include the elements of conscious indifference to consequences, and so to justify punitive damages." Prosser, *Law of Torts*, §2, pp. 9-10 (1971) (footnotes omitted) [cited in *Enright v. Lubow*, 215 N.J. Super. 306, 521 A.2d 1300 (1987)]. An Indiana decision said: "Plaintiff must establish by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness. [citation omitted] …[W]e have required that there be evidence which is 'inconsistent with the

violate constitutional Due Process.[39] Some states have adopted statutes limiting awards for bad faith conduct and specifying the exact conditions under which such an award may be entered.[40]

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hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence, or other such noniniquitous human failing.' [citation omitted]" *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244 (Ind. 1992).

[39] Since the purpose is to punish rather than compensate, punitive damages are awarded only when the insurer's conduct was reprehensible, malicious, or showed intentional disregard for the rights of the insured. Most states apply a set of factors to be reviewed by the courts to determine if the amount awarded by a jury was so large as to violate the insurer's constitutional rights under the state constitution or the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment imposes substantive limits on the size of a punitive damages award. The United States Supreme Court has applied a three-part test to determine whether an award of punitive damages is excessive. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). This test asks the reviewing court to weigh: "(1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct." *BMW*, 517 U.S. at 575. A punitive damage award of ten times the amount of the compensatory award or more is constitutionally suspect. "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. In *Kimble v. Land Concepts, Inc*., 353 Wis.2d 377, 845 N.W.2d 395 (Wis. 2014), cert.den., 135 S.Ct. 359, Oct. 14, 2014, the court found that an award of 33 times the compensatory damage award violated the state constitution's due process protection, which has been interpreted using the United States Supreme Court analysis under the Fourteenth Amendment.

[40] Georgia caps punitive damages at 25%. "To prevail on a claim for an insurer's bad faith under OCGA § 33-4-6, the insured must prove: (1) that the claim is covered under the policy, (2) that a demand for payment was made against the insurer within 60 days prior to filing suit, and (3) that the insurer's failure to pay was motivated by bad faith." *Bayrock Mortgage Corp. v. Chicago Title Ins. Co.*, 286 Ga.App. 18, 19, 648 S.E.2d 433 (2007). "Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact." *Assurance Co. v. BBB Serv. Co.*, 259 Ga.App. 54, 58(2), 576 S.E.2d 38 (2002). "Bad faith is shown by evidence that under *the terms of the policy* under which the demand is made and under the facts surrounding the response to that demand, the insurer had no 'good cause' for resisting and delaying payment." *Lawyers Title Ins. Corp. v. Griffin*, 302 Ga.App. 726, 730-1, 691 S.E.2d 633, 636-7 (Ga.App. 2010). In *Wilmington Plantation, Inc. v. Fidelity Nat'l Title Ins. Co.*, 2011 WL 5102622 (M.D.Tenn.) (unpublished); recommendations adopted, 2011 WL 5117765 (M.D.Tenn.) (unpublished), the insured blew Tennessee's law, Tenn. Code Ann. § 56-7-105, which says a court may impose a penalty of up to 25% plus attorney's fees when an insurer refuses in bad faith to pay a loss. As the court explained, the law is to be strictly construed, and requires the insured wait at least sixty days after making a formal demand for payment before suing for bad faith. The insured filed suit less than 60 days after it submitted its claim notice, precluding the insurer from responding to the claim and making a mockery of its allegation that the insurer had denied the claim in bad faith. Wisconsin caps punitive damage awards also. See Wis.Stat. § 895.043. For a further collection of penalty statutes, see Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 9:25, Thomson Reuters. Utah has declared that a claim for breach of contract does not support a demand for punitive damages. *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989); *Black v. Allstate Ins. Co*., 2004 UT 66, 100 P.3d 1163 (Utah 2004). In *Johnsen and Allphin Properties, LLC v. First American Title Ins. Co.*, 2016 WL 6459579 (D. Utah 2016) (unpublished), the court held that the same principle applies to a title insurance contract.

16.1.5 Title Cases On Bad Faith Failure To Indemnify Or Clear Title

Under the bad faith doctrine, an insurer may be sued if it breaches the covenant of good faith and fair dealing as to the duty to indemnify the insured for actual loss. Several courts have found that an insurer that takes action to clear title is operating under a separate policy covenant, the breach of which is akin to bad faith. See §3.4.1 for a discussion of those cases.

The doctrine of first party bad faith failure to indemnify the insured typically requires that an insured prove that the insurer denied a claim without a reasonable basis, contrary to settled law, and exhibited conduct evidencing a malicious intent or special ill will toward the insured.[41] There is no breach of the duty to indemnify, and no bad faith conduct, when the insured has not sustained a loss.[42] Similarly, there could be no bad faith failure to indemnify when the insurer successfully defended title, because no loss is payable to an insured when title is established as being in the condition in which it was insured.[43] Also, an insurer has not acted in bad faith by failing "to attempt in good faith to effect a prompt, fair, and equitable settlement of the claim" (a phrase borrowed from the Unfair Claims Practices Act discussed at §2.1) when the amount of the loss it pays is based on a rational formula or an appraisal.[44] Further, an insurer does not act in bad faith by denying a claim

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[41] In *REVI, LLC v. Chicago Title Ins. Co*., 290 Va. 203, 776 S.E.2d 808 (Va. 2015), the jury determined that the insurer acted in bad faith by denying a claim because the insured had not established that a use restriction caused any loss in value, whereas the insured put on evidence that the restrictions diminished the value of the property by $1.6 million. See also *Kimble v. Land Concepts, Inc*., 353 Wis.2d 377, 845 N.W.2d 395 (Wis. 2014), cert.den., 135 S.Ct. 359, Oct. 14, 2014, which affirmed a finding that a title insurer wrongly denied a claim of a lack of access to the property, based largely on the claim that the insurer knew that "there was no reasonable alternative access point" and "withheld" information from the insureds that suggested that the access right held by the insured was defective.

[42] In *Youngblood v. Lawyers Title Ins. Corp.*, 923 F.2d 161, 164 (11th Cir. 1991), an undisclosed easement came to light after the insured had sold the property and assigned the purchase money mortgage. The grantee from the insured did not sue for breach of warranty. The (former) insured told the insurer to "fix it or pay him." The insurer refused, on the basis that the insured had suffered no loss. The court entered a directed verdict on the breach of contract claim and an award of punitive damages was struck on appeal. The appeals court found no evidence of bad faith, ruling that the insurer had at least an arguable basis for denying the claim. Similarly, in *Stewart Title Guar. Co. v. The Machado Family Limited Partnership*, 2017 WL 3622006 (M.D.Fla.) (unpublished), the court abated an insured's claim that a title insurer acted in bad faith by not clearing its title faster, because the insured had not yet proven either that the insurer had a duty to act or that the loss it had already paid was less than the full loss.

[43] "Under the title insurance policy, appellee was obligated to defend appellant's title against adverse claims, and in the event a court of last resort adjudicated such a claim meritorious, to indemnify appellant for his property loss. Precise language to this effect allows appellee the opportunity to defend a suit brought by an adverse claimant before having to pay the insured. Southern Title Guarantee Co. v. Prendergast, 494 S.W.2d 154, 156 (Tex. 1973). In this case, appellee successfully defended appellant's title against Piotrowski's adverse claim, thus by the terms of the policy, appellee was never obligated to pay any proceeds." *Martinka v. Commonwealth Land Title Ins. Co.*, 836 S.W.2d 773, 776 (Tex.App. 1992). In *Gillard v. Fidelity Nat'l Title Ins. Co.*, 2017 WL 345086 (Cal.App. 4 Dist.) (unpublished), the court dismissed the insured's bad faith claim because, in a prior lawsuit, the court had determined that the insured had good title.

[44] In *First American Title Ins. Co. v. Patriot Bank*, 2015 WL 2228549 (Tex.App.-Houston 2015) (unpublished), the court affirmed the dismissal of the insured's claim of bad faith after finding no evidence that First American's loss payment was irrational. First American's appraiser found the two lots whose title had failed to be worth $205,000. The insurer tendered that amount twice. The bank then produced an appraisal saying the lots were worth $1,695,000. First American's claim handler sent the bank's appraisal report to the company's appraiser, who "concluded that the appraisal

when its reason for doing so is reasonable, not contrary to controlling precedent, and not clearly motivated by ill will or reckless indifference.[45]

An insured may allege that a title insurer acted in bad faith in seeking to clear title, by acting without diligence, or by asserting a defense to the adverse claim that lacked a good faith basis in fact or law, refusing to settle the dispute for a reasonable amount when the prospect of vindicating the insured's title were bleak, or taking action that would never adequately clear the title.[46] See the cases at §3.4.1 that discuss the so-called covenant to clear title with reasonable diligence.

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was not credible and based on unsupported assumptions." The bank's bad faith claim rested solely on the assertion that the insurer failed to pay the amount the bank claimed to be the value of the property. The court noted that a mere disagreement about the amount of loss owed does not rise to the level of bad faith. The court said that the claim administrator's affidavit "established that First American reasonably investigated Patriot's claim and determined that title to the Property had failed, and First American attempted to promptly effect what it reasonably considered to be a fair and equitable settlement of the claim based upon First American's understanding of the Policy and its reliance upon an independent appraisal, within a reasonable time after it collected and evaluated the necessary information."

[45] In *FV-1, Inc. v. Commonwealth Land Title Ins. Co*., 2015 WL 1611144 (M.D.Tenn. 2015) (unpublished), the court dismissed the bad faith claim because it found that the insurer had a plausible basis for denying the claim, though its decision was incorrect, and thus Tennessee's statutory standard for a bad faith claim could not be met. Also, in *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co*., 2015 WL 4647894 (D. Utah 2015) (unpublished), the court found that the insurer had not denied the claim in bad faith. Utah decisions say that the implied covenant of good faith and fair dealing is a promise not to intentionally thwart "the other party's right to receive the fruits of the contract." However, that covenant is not a device to be used to establish new rights or duties not found in the insurance contract, or to insert terms that are inconsistent with the contract's express provisions. Also, the covenant cannot compel a party to act "to its own detriment for the purpose of benefitting another party to the contract." The court said that the lack of policy coverage was clear, and the insurer's position was based on sound precedent and a fair reading of the policy's terms. To find that it had acted in bad faith, the court said, would give the insured "rights not provided for in the contract, contradict the express terms of the contract, and compel Old Republic to involuntarily benefit Plaintiffs to its own detriment." The rulings on policy coverage by the district court were affirmed on appeal, in *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co*., 830 F.3d 1195 (10th Cir. (Utah) 2016).

[46] In *Transamerica Title Ins. Co. v. San Benito Bank and Trust Co.*, 756 S.W.2d 772 (Tex.App. 1988), when a lender was in third position instead of second as insured, and the insurer elected to clear title, the court found that the insurer breached the covenant of good faith and fair dealing even though it obtained a release of the competing mortgage. It followed a convoluted path in removing the other lien, and the insured lender eventually had its lien extinguished. The court found that the insurer's pattern of inactivity and delay evidenced reckless disregard of the insured's rights. In *Anastasi v. Fidelity Nat'l Title Ins. Co*., 137 Hawai'i 104, 366 P.3d 160 (Hawaii 2016), the Hawaiian Supreme Court ruled that a title insurer defending under a reservation of rights has an "enhanced" duty of good faith, which it can breach if it continues to defend the insured in litigation after it determines there is no meritorious defense, and that defense to delays payment to the insured. The court did not find that Fidelity acted in bad faith, but only that there was a genuine issue of material fact "as to whether Fidelity met the enhanced standard of good faith." Thus, it sent the case back down to the trial court. In *Bar-K, Inc. v. Security Title Corp*., 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished), by contrast, the court found that the insurer acted in good faith and with great diligence in the successful clearing of the insured's title, and that the insured breached the policy by his failure to cooperate in that effort. See §3.4.1.2 concerning the insured's contractual duty to cooperate in the clearing of title.

16.1.6 Title Cases On Bad Faith Failure To Defend

An insurer's unjustified and malicious rejection of a tender of defense may make it liable to the insured for punitive damages.[47] However, when there is no duty to defend, the rejection of the defense is not wrongful, and thus cannot lead to bad faith damages. The mere assertion that the duty to defend is broader than the duty to indemnify does not create coverage.[48] Likewise, when the insurer's refusal to defend a count in the action was "reasonably legitimate," its rejection of the defense was not in bad faith.[49]

Several courts have held that the ALTA policies contain a covenant to clear title diligently, which can be violated by the insurer's failure to take action promptly or to complete the title clearance within a reasonable period of time. See §3.4.1 and §16.1.5 concerning that issue.

16.1.7 Breach Of Covenant Of Good Faith By Insured

The covenant of good faith and fair dealing is supposed to be a two-way street. An insured violates that covenant if it engages in inequitable conduct in the claim process, the underlying litigation or in coverage litigation. This is often termed "comparative bad faith."[50] However, this doctrine has gained little traction with courts since the concept was introduced.[51]

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[47] *Lipinski v. Title Ins. Co.*, 202 Mont. 1, 655 P.2d 970 (1982) awarded bad faith damages when the insurer's rejection of its insured's defense was "without justification, was willful, malicious, oppressive, and constituted bad faith." In *Brown v. Guarantee Title & Trust/ARTA*, the insurer's acceptance of some claims only, and apportionment of fees, was found to be a bad faith act. In *Brown*, the insured's experts opined that all of the action was covered by the policy, and further that the refusal to accept the full defense "was unreasonable, contrary to industry standards, and constituted bad faith." To this, the experts added that the insurer had failed to "meaningfully respond" to the insured's demand for payment. The insured was awarded the defense costs in the underlying action which the insurer had not paid, and the attorneys' fees incurred in bringing the bad faith action. In *Lehman Commercial Paper Inc. v. Fidelity Nat'l Title Ins. Co.*, 2013 WL 26741 (C.D.Cal.) (unpublished), an insurer was found not entitled to dismissal of a bad faith claim despite the fact that it was defending the insured, because it could possibly be liable for a bad faith investigation, the court said. See also Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds*, Sixth Edition, § 9:26, *Bad faith and punitive damages*, Thomson Reuters.

[48] *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 666 (Va. 1994).

[49] "The district court found that LTIC's refusal was an honest one, ...based on LTIC's belief that its policy did not cover the sham claim. Although on remand the district court may determine that LTIC's belief was incorrect, LTIC still had a reasonably legitimate or arguable reason for refusing to pay the defense costs." *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F. 2d 307, 314 (8th Cir. 1991).

[50] In *Peckham v. Continental Casualty Co.*, 895 F.2d 830 (1st Cir. 1990), the court said "Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator." See also, Anderson, *Placing a Check on an Insured's Bad-Faith Conduct: The Defense of Comparative Bad Faith*, S. Texas L.Rev. Vol. 35, pp. 485-534 (1994). The subject of setting up the insurer for damages and a bad faith cause of action are fully discussed in Ashley, *The Ethics of Setting Up Insurance Companies*, Bad Faith Law Report, Vol. VI, No. 3, pp. 45-9.

[51] See Barbara O'Donnell, *Preparing for and Defending Against Bad Faith Claims*, in *The Brief*, American Bar Association Tort Trial & Insurance Practice Section, Summer 2016, p. 44, discussing more recent decisions that have rejected the doctrine of comparative bad faith, including *Kransco v. American Empire Surplus Lines Ins. Co.*, 2 P.3d 1 (Cal. 2000) and *Kim v. Allstate Ins. Co.*, 223 P.3d 1180 (Wash.App. 2010).

However, other doctrines bar the insured from colluding against or defrauding the insurer. A collusive settlement agreement between the insured and the plaintiff may be found to be unenforceable.[52] Also, in California and other states, the insured may not assign to the plaintiff its cause of action for breach of the covenant of good faith and fair dealing as part of a stipulated judgment against the insured, when that assignment is coupled with a covenant not to execute against the insured.[53] See §2.14 concerning voluntary settlement by the insured, which discusses decisions involving collusive settlements.

16.1.8 Bad Faith And Closing Protection Letters

The tort of first-party bad faith does not apply to a claimed breach of a closing protection letter, because it is not an insurance policy. See the discussion of this subject at §14.6, regarding defenses that may be claimed liability under a closing protection letter.

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[52] In *Fidelity Nat'l Title Ins. Co. v. Centerpoint Mechanic Lien Claims, LLC*, 238 Ariz. 135, 357 P.3d 170, 720 Ariz. Adv. Rep. 7 (Ariz.App. 1 Div. 2015), the insureds formed an entity to purchase the mechanics' lien claims that were the subject of the claim. They then demanded that the insurer pay more to release the liens than the insureds had paid to buy them. The court held that the insureds vitiated policy coverage by making the settlements, and that the arrangement was a collusive settlement that did not fit within an Arizona rule that allows an insured to settle a lawsuit without the insurer's consent when it is being defended under a reservation of rights. Also, see *Sisco v. Nations Title Ins. Co.*, 278 A.D.2d 479, 718 N.Y.S.2d 82, 2000 N.Y. Slip Op. 11841 (N.Y.A.D. 2 Dept. 2000) (possible collusive settlement after premature retender of defense) and the discussion of collusive settlement agreements in Kahn and Nemirow, *Unauthorized Settlement Agreements in a Reservation of Rights Context*, 34 Tort & Insurance Law J. No. 3 (Spring 1999).

[53] In *Somerset South Properties, Inc. v. American Title Ins. Co.*, 873 F.Supp. 355, 358 (S.D.Cal. 1994) (citing *Smith v. State Farm*, 5 Cal.App.4th 1104, 1114, 7 Cal.Rptr.2d 131 (1992)), the court said that such arrangements create "certain risks ... which override the policies of encouraging settlements and equalizing an insured's bargaining power." With such a no-pay judgment, "the insured is shielded from any liability which would trigger the duty to indemnify." Given these circumstances, the court said, it would be inequitable for the insured's cause of action for bad faith to survive the stipulated judgment.

16.1.9 Discovery In And Conduct Of Bad Faith Lawsuits

Bad faith litigation presents a number of procedural and discovery issues. In the bad faith suit, the insurer's claim file is a key element of discovery. The insurer may claim that parts of the file are privileged but, in most states, the bulk of the claim file is considered to be discoverable.[54] Some documents are entitled to either the attorney-client or the "prepared in anticipation of litigation" privileges.[55]

An insurer often defends a bad faith claim, at least in part, by asserting that it adopted its coverage position based on the advice of outside coverage counsel.[56] Coverage opinions issued to insurance companies by outside counsel are generally deemed to be privileged, and protected from discover unless the insurer-client waives the privilege.[57] The insurer does not waive the privilege by making a demand in the lawsuit with the insured for reimbursement of the fees incurred from the coverage counsel for the opinion.[58] An outside adjuster's file was found privileged, when the court

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[54] See Kaplan, *Discoverability of Claim Files in Bad Faith Litigation*, For the Defense, February 1991, p. 9; Windt, *Insurance Claims and Disputes*, Second Edition, §§ 9.19, 9.20, pp. 477-81; T. Sukel & M. Pipkin, *Discovery and Admissibility of Reserves*, 34 Tort & Ins. L.J. 191, 208 (1998); Medaglia, Uttrich and Love, *Privilege, Work Product, and Discovery Issues in Bad Faith Litigation*, 32 Tort & Insurance Law Journal 1, p. 1. In *U.S. Bank, N.A. v. Lawyers Title Ins. Corp.*, 2010 WL 1629942 (Conn.Super.) (unpublished), the court provided an erudite canvass of the law concerning discovery of the claim file and loss reserves. It concluded that an insurer's loss reserve information was not discoverable because the insured had not alleged bad faith conduct, but that the claim file was all or mostly discoverable despite the assertion of privilege. In *Little Italy Development, LLC v. Chicago Title Ins. Co.*, 2011 WL 4944259 (N.D. Ohio) (unpublished), the court followed the Ohio rule that attorney-client communication is not privileged, when the insurer is accused of bad faith, until the time the coverage determination is made; the privilege does apply after that date.

[55] See Windt, *Insurance Claims and Disputes*, Second Edition, §§9.19, 9.20, pp. 477-81; Medaglia, Uttrich and Love, *Privilege, Work Product, and Discovery Issues in Bad Faith Litigation*, 32 Tort & Insurance Law Journal 1.

[56] The advice of counsel defense to a bad faith claim has become so commonplace that plaintiffs have suggested the notion that coverage counsel can be sued for what is termed aiding and abetting insurer bad faith if coverage counsel is less than unequivocal in opining that there is no coverage. See Gena L. Sluga and Cara L. Christian, *Defense of the Emerging Claim of Aiding and Abetting Bad Faith*, in *The Brief*, American Bar Association Tort Trial & Insurance Practice Section, Fall 2016, p. 40, citing among other decisions *Chalpin v. Snyder*, 207 P.3d 666 (Ariz.App. 2008). In that decision, coverage counsel Snyder was sued for aiding and abetting an insurance company's claim denial and stonewalling of the insured's claim of bad faith. Snyder had written an internal memorandum admitting that the insured could prevail under the reasonable expectations doctrine, despite having opined that there was no coverage under a strict legal interpretation of the policy.

[57] In *Umpqua Bank v. First American Title Ins. Co.*, 2011 WL 997212 (E.D.Cal.) (unpublished), although an outside coverage counsel had blurred the lines between claim adjuster functions and coverage advice, his primary role had been as coverage counsel, and thus his communications with the insurer were privileged. However, the attorney's communication was before litigation and thus did not fall under the separate work product doctrine. Finally, most communication between the outside coverage counsel and a coverage consultant he hired was discoverable, but not any that would disclose privileged communication between the counsel and the insurer. In *Anastasi v. Fidelity Nat'l Title Ins. Co*., 134 Hawai'i 400, 341 P.3d 1200 (Haw.App. 2014), cert. granted, 2015 WL 3384471 (May 22, 2015), the court ruled that certain documents prepared by outside counsel and claims counsel were privileged, but others were not.

[58] In *Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156 (R.I. 2000), the Rhode Island supreme court held that a demand for attorneys' fees is not an implicit waiver of the attorney-client privilege. In a case of first impression, it adopted the Connecticut decision of Metropolitan Life Ins. Co. v. Aetna Cas. & Surety Co., 249 Conn. 36, 730 A.2d 51

surmised that the intent in seeking the file was to get letters to the adjuster from the insurer's coverage counsel.[59] An insurer that relies on the "advice of counsel" defense to a bad faith claim does not thereby waive the attorney-client privilege. The insured is not entitled to view all communication with the attorney, even during the course of the bad faith suit, to find out if the insurer actually followed the attorney's advice. For example, a court found that disclosure of such documents would "not significantly further the Bank's case but will surely impinge on Transamerica's ability to freely and openly communicate with its attorneys matters about the ongoing lawsuit."[60]

Attorney work product of an insurer's in-house counsel should be considered privileged.[61] The in-house attorney claims adjuster is counsel to the insurer, and in most cases takes the role of coverage counsel to the insurer as well as claim investigator. California recognizes "the unique and complicated nature of title insurance, requiring, according to Chicago Title, the hiring of attorneys to perform claims handling roles." Thus, in-house counsel's legal advice to the client-employer is entitled to privilege.[62] However, California also follows the "dominant purpose" rule, looking to the person's role in preparing a document in order to determine whether or not it is entitled to claim a privilege. Thus,

> Where an attorney is hired both to investigate and to advise the client, the court may have to review the attorney's files in camera to determine which documents reflect investigative work and which reflect the rendering of legal advice.[63]

(1999), which held that the privilege is waived "only when the contents of the legal advice is integral to the outcome of the legal claims of the action."

[59] *State Farm Fire & Cas. Co. v. Superior Court*, 216 Cal.App.3d 1222, 265 Cal.Rptr. 372 (Cal.App. 4 Dist. 1990).

[60] *Transamerica Title Ins. Co. v. Superior Court*, 188 Cal.App.3d 1047, 233 Cal.Rptr. 825 (Cal.App. 6 Dist. 1987).

[61] See *Ruger v. Commonwealth Land Title Ins. Co.*, 1996 WL 769793 (Del.Super.) (unpublished), in which the insured sought to discover both an opinion letter of outside coverage counsel and in-house counsel's file notes, correspondence and research materials. The discovery request was withdrawn as to the in-house counsel's material, however, so the court did not directly address the issue. Also see Young, *The Work Product Doctrine: Functional Considerations and the Question of the Insurer's Claim File*, 64 U. Chicago L.R. 1425 (Fall 1997).

[62] *Chicago Title Ins. Co. v. Superior Court*, 174 Cal.App.3d 1142, 220 Cal.Rptr. 507 (Cal.App. 1 Dist. 1985) held that a title claim administrator's legal work is "so intertwined with activities which were wholly business or commercial that a clean distinction between the two roles became impossible to make."

[63] *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal.App.4th 1377, 7 Cal.Rptr.3d 197 (Cal.App. 4 Dist. 2003), mod. on reh. (Jan. 5, 2004). The court noted with apparent agreement the statement by amicus CLTA that "due to the unusual nature of title insurance, claim administrators must make legal judgments, which is why the industry employs attorneys in the position." The California Supreme Court criticized *2,022 Ranch* in *Costco Wholesale Corp. v .Superior Court*, 47 Cal.4th 725, 733, 101 Cal.Rptr.3d 758, 219 P.3d 736 (2009), saying that what matters is the nature of the relationship between the lawyer and the insurer, not the subject of the communication. If the relationship is as attorney-client, even non-legal communications are privileged. In *Umpqua Bank v. First American Title Ins. Co.*, 2011 WL 997212 (E.D.Cal.) (unpublished), relying on both *2,022 Ranch* and *Costco*, the court found that, although an outside coverage counsel had blurred the lines between claim adjuster functions and coverage advice, his primary role had been as coverage counsel, and thus his communications with the insurer were privileged.

Second, an insured sometimes seeks the insurer's manuals and bulletins to establish bad faith conduct by a violation of company guidelines. Courts have held that company manuals are subject to discovery.[64] For example, one court found these documents relevant to the insurer's good faith in the claim at issue:

> ...Commonwealth argues that documents pertaining to Commonwealth's internal policies are not relevant and inadmissible to show defendant's negligence in performing its responsibilities. Commonwealth cites Virginia precedent for restricting the use of internal guidelines to show negligence. Commonwealth also cites the unpublished decision of the Fourth Circuit in Strayer v. Halterman, 725 F.2d 677 (4th Cir.1984). The Strayer case deals with the admission of internal guidelines and policy at trial, and thus can be distinguished. Relevancy in discovery is to be broadly construed. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Information which is not admissible at trial is not necessarily protected from discovery. See Smith v. Schlesinger, 513 F.2d 462, 473 (D.C.Cir. 1975). Accordingly, the Court does not find that the magistrate's Order is clearly erroneous or contrary to law. l28 U.S.C. § 636(b)(1)(A). Therefore, defendant's appeal is denied.[65]

An agent's willful disregard of the insurer's form of exception as published in its manual was evidence of the agent's reckless indifference.

> Finally, Williams testified that he deliberately disregarded the recommended language in the manual provided to his company by Lawyers for writing exceptions. He testified that his title examiners were instructed not to use the language in the manual and that he thought the manual's recommended exception would "only clutter the commitment." The jury found that "exception 11" in the title commitment and policy did not inform the Vellas that the I.R.S. had an outstanding right of redemption. Moreover, Williams testified that Realty and Lawyers had actual knowledge of the I.R.S.'s right of redemption. This evidence, in light of the fact that Realty disregarded the warning and recommendation of the manual that the I.R.S.'s right of redemption be clearly excepted, supported the jury's finding that Realty and Lawyers recklessly misrepresented the facts to the Vellas.[66]

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[64] In *Umpqua Bank v. First American Title Ins. Co.*, 2011 WL 997212 (E.D.Cal.) (unpublished), the insurer was required to produce its claims manual and memos. The court addressed the insurer's objection that the manual is proprietary by saying that the parties should work out a protective order. It required the company to produce company policies involving the underwriting issue in the claim, but not to locate and produce other claim files involving similar facts.

[65] *Federal Sav. & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co.*, 130 F.R.D. 507 (D.D.C. 1990).

[66] *Lawyers Title Ins. Corp. v. Vella*, 570 So. 2d 578 (Ala. 1990).

A third related issue is how long the covenant of good faith and fair dealing continues in effect. In California, the covenant of good faith and fair dealing has been held to continue even after suit has been filed claiming first party bad faith. In Texas, the duty of good faith and fair dealing terminates when an insured obtains a judgment against the insurer.[67] An insurer cannot be guilty of bad faith conduct in the payment of the judgment. The court noted that, once an insured has obtained a judgment against the insurer, "the disparity of bargaining power inherent in the insurer-insured relationship," which is the source of the good faith covenant, no longer exists.[68] Therefore, the insured also may not seek recovery under either the DTPA or article 21.21 of the Insurance Code for failing to pay the judgment amount to the insured when demanded.[69] Ohio has refused to find that a title insurer has a fiduciary duty to the insured in investigating a claim.[70]

16.2 Fraudulent Or Reckless Misrepresentation In Title Or Escrow

Several courts have found insurers responsible for punitive damages for intentional or reckless misrepresentation of title. For example, when a title agency conspired to defraud the purchasers of a note and mortgage by misrepresenting the status of title and of the borrower's financial condition, the agency and its successor in interest were liable for punitive damages.[71]

Punitive damages were also awarded against an agent and its underwriter when the agent misrepresented title by using a misleading exception in Schedule B. The insured bought at a foreclosure sale. Schedule B made exception for the borrower's right of redemption, but not the IRS's. The evidence of reckless misrepresentation was the agent's intentionally failure to use the promulgated exception that would have identified the IRS redemption right, plus indications that the agent purposefully held back the existence of those rights.

> Punitive damages may be awarded on proof of reckless misrepresentation. "[I]t is the finding of intent to deceive, which must be based upon the initial finding of knowledge of the falsity of the material misrepresentation, that triggers the discretionary power of the factfinder to award punitive damages." [Citation omitted] ... An intent to deceive may be found from a reckless misrepresentation. Punitive damages may be awarded where there is a misrepresentation that is made so

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[67] *Stewart Title Guar. Co. v. Aiello*, 40 Tex.Sup.Ct.J. 290, 941 S.W.2d 68 (1997), reversing 911 S.W.2d 463 (Tex.App.-El Paso 1995).

[68] "[T]hese concerns simply do not arise in the judgment creditor--judgment debtor context. The Aiellos were not left vulnerable by Stewart Title's exclusive control of the situation. Rather, as judgment creditors, they had available a variety of legal remedies by which to collect the money owed them, including execution, garnishment, turnover, or attachment." 941 S.W.2d at 71.

[69] 941 S.W.2d at 72.

[70] *Schwartz v. Stewart Title Guar. Co.*, 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999).

[71] *Moe v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 289, 98 Cal.Rptr. 547 (1971).

> recklessly and heedlessly as to amount to the same thing as knowledge of its falsity.[72]

As with any other suit for punitive damages, there must be a showing that the misrepresentation of title was committed intentionally or recklessly. See the discussion at §16.1.4.2 above regarding the rule that punitive damages are awarded only to punish gross wrongdoing. Abstracting mistakes do not justify awards for punitive damages.[73] Similarly, there can be no misrepresentation by the insurer as to off-record facts that it did not know, since misrepresentation requires that the representing party know the falsity of the asserted fact.[74]

An escrowee may be liable for punitive damages when its conduct shows a wanton disregard of its duties.[75]

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[72] *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990).

[73] *Youngblood v. Lawyers Title Ins. Corp.*, 923 F.2d 161, 164 (11th Cir. 1991).

[74] See *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985); app. 215 N.J. Super. 306, 521 A.2d 1300 (1987).

[75] For example, when the insurer paid off the seller's mortgage without obtaining a deed to the insureds, and the insurer failed to either cure title or return the money later, the jury awarded punitive damages for breach of escrow duties. *Ford v. Guarantee Abstract and Title Co. Inc.*, 553 P. 2d 254 (Kan. 1976). In affirming the judgment, the court stated: "[t]he continued refusal of these substantial companies to issue a title policy or return the Fords' money, after admittedly disbursing the same in violation of their fiduciary instructions, and in violation of the cardinal rule of title practice, was, to say the least, such gross neglect of duty as to evince a reckless indifference of the rights of the Fords, which deprived them of any opportunity to buy and live out their remaining time in a modest retirement home." 553 P.2d at 268. In *Schwartz v. Aracor Search & Abstract, Inc.*, 2014 WL 4493662 (E.D.Pa. 2014) (unpublished), the damage to the borrowers' credit rating and other harm caused by the theft of loan payoff money justified entry of a punitive damage award against the title agent that stole the payoff money, despite the agent's plea that it had used the money for payroll rather than an evil purpose.

17 Agents & Approved Attorneys

This chapter addresses the various issues concerning title insurance agents and approved attorneys.[1]

17.1 Actual, Implied And Apparent Authority, And Estoppel

The scope of the agent's authority is the recurrent issue in cases involving agents. Authority is an issue when the act in question is beyond the agent's policy-issuing role, such as with escrows; as a defense to coverage given by the agent without authority; and when the insurer seeks to recoup a loss from an agent, on the basis that the agent went beyond the scope of its authority.

The general law of agency applies to title agencies. The three forms of authority which an agent may have are actual, implied and apparent. In addition, a principal may be estopped to deny the agent's acts under certain conditions.

A title agent's actual authority is determined by the agency contract. The relationship between agent and insurer is contractual. It is almost always defined by a written agreement. The contract establishes that the agent may act for the insurer in soliciting and issuing insurance policies.[2] The contract invariably states that any escrow, attorney-client or other duties assumed are not within the scope of the agency.[3] See §17.2 below regarding escrow authority, and §17.3 below as

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[1] In California, agents are identified and defined by statute as "underwritten title companies." This phrase is more accurate, given the range of activities that many underwritten title companies undertake which are not done as agent of the title insurer. For brevity's sake only, this treatise uses the term "agent." Further, for the sake of brevity and clarity, this chapter will also refer to approved attorneys as "agents," except as otherwise noted.

[2] A typical agency contract states: "Insurer appoints Agent as its representative or agent to originate and solicit applications for title insurance, to examine and issue Commitments to Insure, conduct settlements and to countersign and issue policies of title insurance in connection therewith... ." First American Title Insurance Company contract reprinted at pp. 325-32, in *Title Insurance: The Lawyer's Expanding Role,* A.B.A. Real Property, Probate and Trust Law Section (1985).

[3] "Agent shall not, without written approval of Insurer: E. Receive nor receipt for any funds, including escrow or closing funds, in the name of the Insurer, but shall receive and receipt for same for its own account." *Title Insurance: The Lawyer's Expanding Role,* A.B.A. Real Property, Probate and Trust Law Section (1985) at p. 327.

to special issues involving approved attorneys.

The agency contract establishes various limits to the agent's actual authority: its territory (most agents being limited to one or several counties or parishes), the maximum policy amount the agent may issue without special approval, and the extra-hazardous risks for which the agent must obtain approval before giving coverage.

The agency contract is relatively detailed. However, a number of the powers which agents hold are properly termed "implied." As stated in the Restatement of Agency 2d (1978):

> It is possible for a principal to specify minutely what the agent is to do. To the extent that he does this, the agent may be said to have express authority. But most authority is created by implication. ... These powers are all implied or inferred from the words used, from customs and from the relations of the parties. They are described as "implied authority."[4]

Apparent authority, by contrast, pertains to actions for which the agent has no actual authority. The rule of apparent authority is synopsized by the Restatement as follows:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third parties. Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not, as when authority is created, to the agent. It is entirely distinct from authority, either express or implied. ... [A]pparent authority exists only with regard to those who believe and have reason to believe that there is authority; there can be no apparent authority created by an undisclosed principal.
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> ... The manifestation of the principal may be made directly to a third person, or may be made to the community, by signs, by advertising, by authorizing the agent to state that he is authorized, or by continuously employing the agent.
>
> ... Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. Further, the third person must believe the agent to be authorized.[5]

A title insurer may not deny liability under a policy issued by an agent that had actual authority to issue policies but which lacked authority to issue the particular policy at issue, if the acts and statements of the insurer reasonably suggested that the agent had authority to issue such a policy.[6]

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[4] §7, Comment C, p. 29.

[5] §8, Comments A, B and C, pp. 30-2.

[6] See *Commercial Standard Ins. Co. v. Moore*, 237 Ark. 845, 376 S.W.2d 675 (1964), in which the agent's apparent authority to act state-wide came from the insurer's printing of policy forms with the agent's name on the cover, with the title "State Agent." Also, in *Hutsell v. U.S. Life Title Ins. Co.*, 157 Ga.App. 845, 278 S.E.2d 730 (1981), a letter

One title case said:

> "While actual authority is created by written or spoken words or conduct by the principal to the agent, apparent authority is created by written or spoken words or conduct by the principal to a third party." *Cameron County*, 819 S.W.2d at 603. One who seeks to bind a principal based on the apparent authority of its agent must show that the principal acted in such a way that a reasonably prudent person would believe that the agent had the authority to act as he did. *Biggs v. United States Fire Ins. Co.*, 611 S.W.2d 624, 629 (Tex. 1981). A principal is bound even though the agent lacks actual authority when the agent acts within the scope of apparent authority. *Id.*[7]

Thus, there was no apparent authority for an agent to accept notice of a claim, when the policy itself directed the insured to submit notice to the underwriter, and there were no "manifestations" from insurer to insured suggesting that the agent had authority to act in the insurer's place.[8] Likewise, the agent's stock of policy forms did not create apparent authority to insure a transaction tainted by fraud:

> The fact that appellee had placed in the hands of its sub-agent, Gibralter Title, Inc., binder and policy forms to be used in the insuring of titles does not support appellant's contention that the subagent had indiscriminate authority to issue same

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modifying a policy was binding on the insurer because the agent that issued it had actual authority to modify a policy, although the method he used—the issuance of a letter rather than an endorsement—was not authorized under the agency agreement. In *FV-1, Inc. v. Commonwealth Land Title Ins. Co*., 2015 WL 1611144 (M.D.Tenn. 2015) (unpublished), the insurer argued that a policy was void because the owner of the insured parcel was the agency principal and the agency contract prohibited the agent from insuring title to property it owned. The court said that, while the agent may have had no actual authority to issue the policy, the agent had the apparent authority to issue the policy because it had an insurance agency appointment and this limitation on its powers had not been communicated by the insurer to the agent's customers. Also see *Gondeck v. A Clear Title and Escrow Exchange, LLC*, 47 F.Supp.3d 729 (N.D.Ill. 2014), in which the court denied summary judgment to the insurer on a claim of *respondeat superior* liability for closing acts based on the insurer's confirmation to an Illinois customer that a Florida title company was its agent, and the *lack* of any "public pronouncements, press releases, or advertising materials alerting the public that A Clear Title was Chicago Title's agent only for the purpose of issuing title commitments, policies, endorsements, and assurances," the *lack* of such a disclaimer on the websites maintained by either the insurer or the agent, and certain general comments about settlement agents on the insurer's website. In *North American Title Ins. Co. v. Maryland Ins. Admin.*, 2018 WL 4148622 (Md.App.) (unpublished), the court found that a policy was effective despite the fact that the agent that issued it was not appointed by the insurer until two days after the insured mortgage was signed and the commitment issued before closing did not name the insurer as the policy issuer. The court said that the insurer "ratified" the policy by not returning the premium to the insured after the agent reported the remittance.

[7] *Spring Garden 79U, Inc. v. Stewart Title Guar. Co.*, 874 S.W.2d 945, 950 (Tex.App.-Houston [1st Dist.] 1994).

[8] *Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 512 P.2d 667 (1973). In *DLJ Mortgage Capital, Inc. v. Kontogianis*, 102 A.D.3d 489, 959 N.Y.S.2d 18 (N.Y.A.D. 1 Dept. 2013), lender customers were found to have failed to prove that a title insurer had cloaked a title company with apparent authority to issue fake title commitments on its behalf.

> and bind the appellee.
>
> Possession of such materials does not of itself create an appearance of authority sufficient to bind the insurer to any insurance contract executed in its name by the agent, nor does such possession, though vested by the principal, clothe an agent with apparent authority to make contracts of insurance which differ in terms from such forms.[9]

Numerous other courts have also held that a title agent or approved attorney's issuance of policy forms does not create apparent authority to act as the insurer's agent for closing acts or other conduct beyond the issuance of commitments and policies.[10] An agent's business card stating that it was an agent of the insurer, and the printing of the insurer's name on certain forms, were not evidence of the conferral of apparent authority on the agent to perform construction disbursing escrows as the agent of the insurer.[11] Statements by an insurer that correctly confirm that a person or company serves as its policy-issuing agent, without more, do not give the apparent authority to the agent to act beyond the scope of its agency.[12] A title agent's statements to a purchaser at closing and disbursement of

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[9] *Applefield v. Commercial Standard Ins. Co.*, 176 So.2d 366, 376-7 (Fla.App. 1965).

[10] "There is no evidence of apparent authority of Grynwald [the agent] to do more [than issue the policy]. His possession of blank title policy forms could bear only upon the authority to issue the title policy. If his endorsement of the check made payable to Southwest Title, and his conducting the closing in response to Northland's letter addressed to Southwest Title, can be said to have given appearance of wider authority, none of this was known or traceable to Southwest Title. Only the conduct of the principal, leading one to suppose that the agent has the authority he purports to exercise, may charge the principal through the apparent authority of an agent. *Chastain v. Cooper & Reed*, 152 Tex. 322, 257 S.W.2d 422 (1953). Nor can it be held that Southwest Title has ratified a wider exercise of authority on its behalf. The only benefit Southwest Title has received is the insurance premium, and Northland has at all times affirmed that portion of the transaction and insisted upon the performance by Southwest Title of the terms of the insurance contract." *Southwest Title Ins. Co. v. Northland Building Corp*., 552 S.W.2d 425, 428 (Tex. 1977). See also *Cameron County Savings Ass'n v. Stewart Title Guar. Co*., 819 S.W.2d 600 (Tex.App.-Corpus Christi 1991); *Security Union Title Ins. Co. v. Citibank (Florida), N.A.*, 715 So.2d 973, 23 Fla.L. Weekly D1421, (Fla.App. 1 Dist. 1998), reh.den. Aug. 25, 1998 (insurer not vicariously responsible for the loan fraud of its policy-issuing attorney agent); *National Mortgage Warehouse v. Bankers First Mortgage Co*., 190 F.Supp.2d 774 (D.Md. 2002) (issuance of policies did not create apparent agency for closing acts).

[11] In *Haselow v. Vilas Title Services, Inc*., 364 Wis.2d 758, 869 N.W.2d 170 (Table), 2015 WL 4210989 (Wis.App. 2015) (unpublished), the Vilas Title manager's business cards said "Providing title insurance and complete closing services" and "Agents for Chicago Title Insurance Co." The construction draw request form that Vilas Title sent in a packet to the owner had a Chicago Title logo at the top and said at the bottom "Issuing Agent of CHICAGO TITLE INSURANCE COMPANY." The property owner sued Chicago Title for the alleged negligence of Vilas Title in the handling of the construction loan disbursements. The trial court granted the insurer's motion for summary judgment, with the appeals court affirmed. Judge Nielsen found that the Haselows had not proven the essential element for apparent authority, which was acts or statements by the claimed principal suggesting an agency relationship for these tasks. He noted that the Haselows never spoke to anyone at Chicago Title, and the papers containing its name and emblem had been printed by Vilas Title, not the insurer. In addition, the Haselows had not proven that Chicago Title knew about the transaction. Chicago Title's underwriting counsel said in an affidavit that, to her knowledge, "Chicago Title had no notice or knowledge of any construction loan disbursing arrangement involving the Haselows until Chicago Title was sued ... in March 2013."

funds do not create apparent authority of the agent to conduct a closing as the agent of the insurer.[13]

An insurer may be estopped to deny that an agent's actions are binding on it.[14] Estoppel only applies when the agent has no actual authority, and the insurer has not given the agent apparent authority. Estoppel is a tort remedy rather than a principle of agency, and it requires proof of detrimental reliance on the part of the claimant. The principle of estoppel as applied to agents is codified in the Restatement of Agency as follows:

> (1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
> (a) he intentionally or carelessly caused such belief, or
> (b) knowing of such belief and that others might change their positions because of it,

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[12] In *Stinespring v. Fidelity Nat'l Financial, Inc.*, 2013 WL 1626203 (N.D.Ill.) (unpublished), the plaintiffs alleged that, at a meeting in Panama, they were told by "the International Officers" of Chicago Title that Manfred Pino Sbravatti, the CEO of LatinAmerica Title Company, "was the 'star' of the Chicago Title international agents and was a man of unquestioned integrity and skill." The court said that, if an officer of Chicago Title spoke of Pino in glowing terms, meant only that he was "an agent of Chicago Title who was authorized to act on its behalf." The statement did not invest further Pino with authority to issue policies outside of the scope of his contract, or generally invest him with an aura of trustworthiness that would make Chicago Title liable to investors whose money was allegedly stolen by Pino on later transactions that did not trigger policy liability. In *Gondeck v. A Clear Title and Escrow Exchange, LLC*, 47 F.Supp.3d 729 (N.D.Ill. 2014), the court denied summary judgment to the insurer on a claim of *respondeat superior* liability for closing acts based on the insurer's confirmation to an Illinois customer that a Florida title company was its agent, and the *lack* of any "public pronouncements, press releases, or advertising materials alerting the public that A Clear Title was Chicago Title's agent only for the purpose of issuing title commitments, policies, endorsements, and assurances," the *lack* of such a disclaimer on the websites maintained by either the insurer or the agent, and certain general comments about settlement agents on the insurer's website. In *Federal Deposit Ins. Corp. v. United General Title Ins. Co*., 2014 WL 3611835 (E.D.N.Y. 2014) (unpublished), a title agent with actual authority to write legitimate policies issued some fake commitments and one fake policy on fake transactions as part of a loan fraud scheme. The FDIC took over the lender insured and sued the insurer on the policies and, more generally, for assisting the fraudsters in making it look like the transactions were real. The FDIC admitted that the policies were not valid and the agent had no actual authority to issue fake commitments. It urged that the insurer gave apparent authority to issue fake policies by assigning and delivering "official, sequentially numbered and countersigned insurance policies, binders, commitments, certificates, and reports bearing UGT legends and the signatures of UGT corporate officers." The court held dismissed the claims on which no fake policies were issued, since a commitment is not an indication of an insurance contract. It did not decide the issue on the fake policy on the motion to dismiss. In In *DLJ Mortgage Capital, Inc. v. Kontogianis*, 102 A.D.3d 489, 959 N.Y.S.2d 18 (N.Y.A.D. 1 Dept. 2013), lender customers were found to have failed to prove that a title insurer had cloaked a title company with apparent authority to issue fake title commitments on its behalf.

[13] *Spring Garden 79U, Inc. v. Stewart Title Guar. Co.*, 874 S.W.2d 945, 950 (Tex.App.-Houston [1st Dist.] 1994); *3Z Corp. v. Stewart Title Guar. Co.*, 851 S.W.2d 933 (Tex.App.-Beaumont 1993).

[14] In *H & H of Johnston, LLC v. Old Republic Nat'l Title Ins. Co*., 405 S.C. 469, 748 S.E.2d 72 (S.C.App. 2013), the insured claimed that the attorney agent promised that title would be free of certain encumbrances. The court refused to dismiss the claim for the alleged oral contract and estoppel, notwithstanding the fact that the alleged agreement directly contradicted the terms of the policy and the attorney-agent's testimony.

> he did not take reasonable steps to notify them of the facts.
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> * * * *
>
> (3) Change of position, as the phrase is used in the restatement of this subject indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.[15]

Apparent authority would also be found in most cases in which estoppel applies, because both require an act of the principal that leads the third party to believe that the agent has actual authority. However, apparent authority does not require any proof of change of position. Also, estoppel is a defense rather than a cause of action, and thus may sometimes be pled when apparent authority is not. As the Restatement says, estoppel is a defense which acts "by preventing the one against whom it operates from pleading the truth."[16]

17.2 Escrow And Other Functions Outside Scope Of Agency

Modern title agency contracts explicitly state that escrow or closing duties assumed by the agent are outside of the scope of the agency. A title agent has no authority to enter into an escrow agreement "as agent of" its underwriter. The insurer is not bound by an agency relationship that does not exist and that is proclaimed only by the alleged agent.[17] The title agent's handling of the closing, without more, does not make the insurer liable for the agent's acts as closer. A title company can and often does have more than one role in a transaction, only one of which is as agent of the title insurer. This fact has been repeatedly acknowledged by the courts:

> [T]he fact that a closing agent such as a lawyer or title company might wear "two hats," in selling the title insurance and closing the sale, does not make the title insurance company liable for the mishandling of the real estate closing.[18]

The tie between the insurer and the title agent at many closings is a closing protection letter issued by the insurer to the customer on behalf of the title agent. However, a closing protection letter affirmatively states that the title company for which the letter is issued *is not* the agent of the insurer

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[15] Restatement of Agency 2d (1978), §8A.

[16] Id. at Comment A, p. 39.

[17] In *Bodell Construction Co. v. Stewart Title Guar. Co.*, 945 P.2d 119 (Utah App. 1997), the agency's use of the underwriter's name on settlement statements was found to be without actual authority, and the underwriter was not liable for the agent's escrow acts. In *La Candelaria East Harlem Community Center, Inc. v. First American Title Ins. Co.*, 146 A.D.3d 473, 46 N.Y.S.3d 14, 2017 N.Y. Slip Op. 00102 (N.Y.A.D. 1 Dept. 2017), the court held that, although a title agent signed an escrow agreement as the "authorized agent" of First American Title, it did not have actual authority to conduct a non-title escrow as agent of the insurer and the insurer was not responsible for the claimed acts of the title company in conducting the escrow.

[18] *Sommers v. Smith and Berman, P.A.*, 637 So.2d 60, 62 (Fla.App. 4 Dist. 1994) [citing *Cameron County Savings Ass'n v. Stewart Title Guar. Co*., 819 S.W.2d 600 (Tex.App.-Corpus Christi 1991)].

in conducting the closing.[19] The recipient of the closing protection letter thus receives a statement directly from the insurer advising him or her that the title company's agency does not include closing services. Conversely, when the insurer has not issued a closing protection letter, the parties to the closing or escrow do not even have an assurance that the title company is a policy-issuing agent of the insurer, much less that it is an agent of the insurer in conducting the closing.[20] See Chapter 14 for a complete discussion of closing protection letters.

Similarly, the underwriter is not responsible for the closing acts of an approved attorney. The approved attorney's own words cannot create actual authority from the underwriter. Rather, escrow work is one of a number of services provided by title agents which are not done as part of the issuance of a title insurance policy.[21] The agent's liability to the underwriter for escrow negligence, defalcation or theft of money from the agent's escrow account is discussed at §17.8.3.

Courts in many states have held that the insurer has no *respondeat superior* liability for the title company's breach of escrow or closing duties, under rulings issued in California,[22] Florida,[23]

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[19] Paragraph 9 of the Conditions and Exclusions in the 2015 ALTA Closing Protection Letter says this: "The Issuing Agent is the Company's agent only for the limited purpose of issuing policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for Your loss arising from closing or settlement services is strictly limited to the contractual protection expressly provided in this letter. Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction."

[20] *Cameron County Savings Ass'n v. Stewart Title Guar. Co.*, 819 S.W.2d 600 (Tex.App.-Corpus Christi 1991); *Sommers v. Smith and Berman, P.A.*, 637 So.2d 60, 62 (Fla.App. 4 Dist. 1994).

[21] See *Nappen v. Blanchard*, 210 N.J. Super. 655, 510 A.2d 324 (1986).

[22] See *Universal Bank v. Lawyers Title Ins. Corp*., 62 Cal.App.4th 1062, 73 Cal.Rptr.2d 196 (Cal.App. 2 Dist. 1997), holding underwriter not liable for alleged fraud of underwritten title company in conduct of escrow, saying "unambiguous terms of the agreement specifically excluded from the scope of the agency sub-escrow activities, including 'closings of real estate transactions.' The practice of underwriters in issuing closing protection letters did not implicitly broaden the scope of the agency," and in any event the lender did not request a CPL. The court also said the agency contract was not broadened by issuance of underwriting bulletins by underwriter setting escrow standards. The agent's execution of escrow instructions "as an agent of" the underwriter does not relieve the agent of liability for closing acts.

[23] In *Sussman v. First Financial Title Co. of Fla.*, 793 So.2d 1066, 26 Fla.L. Weekly D1883 (Fla.App. 4 Dist. 2001), reh.den., the agent was sued for an escrow act. The court found that the agent's execution of escrow instructions the "the agent" of the insurer was not a valid defense by the agent to its liability for the escrow error. The court noted authorities holding that an insurance agent can be the agent of the underwriter for one function and the agent of the insured for other purposes. In *Bank of America, N.A. v. Zaskey*, 2016 WL 2907732 (S.D.Fla. 2016) (unpublished), a title insurer took custody of loan payoff money from its agent after the lender rejected the payoff. The court dismissed the borrowers' claim against the insurer under respondeat superior for the agent's claimed negligence in the handling of the money, based on *Sommers v. Smith and Berman, P.A.*, 637 So.2d 60, 62 (Fla.App. 4 Dist. 1994). In a later decision involving the same parties, the court ruled that the insurer did not become liable in respondeat superior because the agency contract permitted it to audit the title agent's escrow accounts, and dismissed all claims against it. *BAC Home Loans Servicing LP v. Zaskey*, 2016 WL 4761857 (S.D.Fla.) (unpublished).

Illinois,[24] Indiana,[25] Maryland,[26] Michigan,[27] Mississippi,[28] Missouri,[29] New Hampshire,[30] New Jersey,[31] New York,[32] Ohio,[33] Pennsylvania,[34] Tennessee,[35] Texas,[36] Utah,[37] Virginia[38] and

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[24] *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F.Supp. 818 (N.D.Ill. 1995); *Rosenberg v. B.H. Kahan and Associates*, 2013 IL App (1st) 113690-U, 2013 WL 3015860 (Ill.App. 1 Dist.) (unpublished) (title insurer not liable for alleged bad conduct of title agent in closing of loans that loan assignee said were the product of loan fraud; no closing protection letters issued; claims based on state title insurance act).

[25] *Fidelity Nat'l Title Ins. Co. v. Mussman*, 930 N.E.2d 1160 (Ind.App. 2010) (underwriter not responsible for agent's bounced closing check; case of first impression in Indiana).

[26] *National Mortgage Warehouse v. Bankers First Mortgage Co*., 190 F.Supp.2d 774 (D.Md. 2002) (issuance of policies did not create apparent agency for closing acts); *Proctor v. Metropolitan Money Store*, 579 F.Supp.2d 724 (D.Md. 2008), later decision 645 F.Supp.2d 464 (2009) (underwriter not liable for agents' claimed negligence or fraud in failing to disclose terms of foreclosure rescue transactions); *Haley v. Corcoran*, 659 F.Supp.2d 714 (D.Md. 2009) (underwriter not vicariously liable for title agent's role in closing house sale later claimed to be a foreclosure rescue scam, relying on *Proctor* decision).

[27] In *Dietrich v. Chicago Title Ins. Co.*, 2005 WL 2932060 (E.D.Mich. 2005) (unpublished), an insurer was sued for the alleged closing error of a title agent. The underwriter argued the plain language of the agency contract, but the court denied summary judgment. It did not reach any conclusion as to liability for the agent's acts. Also see *PAL Properties LLC v. Ticor Title Ins. Co.*, 2008 WL 5158894 (Mich.App.) (unpublished), app.den. 483 Mich. 1032, 765 N.W.2d 616 (Mich. Jun 03, 2009) (agency contract provisions requiring agent to keep a segregated escrow account and allowing underwriter to audit that account did not create a principal-agent relationship for closings or underwriter liability for agent's closing acts); *Bergin Financial, Inc. v. First American Title Ins. Co.*, 397 Fed.Appx. 119, 2010 WL 3272756 (6th Cir. (Mich.)) (unpublished) (underwriter not liable to lender for title agent participation in loan fraud flips based on issuance of underwriting bulletins about closing acts and flipping fraud); *Fifth Third Mortgage-MI, L.L.C. v. Hance*, 2011 WL 4501573 (Mich.App.) (unpublished) (claims against underwriter for vicarious liability for the agent's closing acts dismissed; delivery of company escrow accounting manual to title company did not counteract agency contract carve-out of escrow activities).

[28] *G&B Investments, Inc. v. Henderson (In re Evans)*, 2011 Bkcy. LEXIS 3924, 2011 WL 4712176 (Bkcy. S.D. Miss., Oct. 7, 2011) (unpublished) and *In re Evans*, 2011 WL 576072 (Bkcy.S.D.Miss.) (unpublished) (insurer not liable for closing acts and fraud of approved attorney under an assortment of theories, including apparent authority, implied agency, negligent hiring and similar claims; *G&B* decision contains a lengthy discussion of the subjects).

[29] *Bluehaven Funding, LLC v. First American Title Ins. Co.,* 594 F.3d 1055 (8th Cir. (Mo.) 2010) (title insurer not liable for losses incurred by lender due to title agent employee's theft of closing money, rejecting audit power as evidence of agency).

[30] In *Northeast Credit Union v. Chicago Title Ins. Co.*, 2010 WL 4851075 (D.N.H.) (unpublished), the title insurer was found not liable to a lender for a title company closer's theft of the loan funds, either under the title agency contract or the title policy.

[31] *Thurber v. Thurber*, 2017 WL 164480 (N.J.A.D.) (unpublished) (New Jersey court refused to "expansively read" *Sears Mortgage* decision to make title insurer vicariously liable for acts of title agency employee that allegedly aided husband in defrauding his wife).

[32] *Lucas v. Kensington Abstract, LLC*, 20 Misc.3d 1135(A), 872 N.Y.S.2d 691 (Table), 2008 WL 3823776 (N.Y.Sup.), 2008 N.Y. Slip Op. 51734(U) (unpublished); *HSA Residential Mortgage Services of Texas, Inc. v. Stewart Title Guar. Co.*, 7 A.D.3d 426, 776 N.Y.S.2d 791 (N.Y.A.D. 1 Dept. 2004), app.den., 3 N.Y.3d 607, 818 N.E.2d 667,

Wisconsin.[39]

The title insurer also is not responsible for the construction disbursing activities of a title

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785 N.Y.S.2d 25 (N.Y. September 21, 2004) (title agent that stole loan funds while serving as settlement agent not acting in scope of agent role and underwriter had no duty to repay funding lender); *Nechadim Corp. v. C.J.P. Abstract, LLC*, 67 A.D.3d 656, 888 N.Y.S.2d 162, 2009 N.Y. Slip Op. 07993 (N.Y.A.D. 2 Dept. 2009) (title company was agent only for policy issuance; underwriter not responsible for title company's failure to promptly record mortgage); *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012) (loss caused by theft of loan money by settlement agent borne by lender that appointed the agent; although settlement agent was also a title agent, there was no apparent or actual agency from the insurer for closing acts, and insurer was not obligated to issue policies insuring mortgages not funded); *E.C.I. Financial Corp. v. First American Title Ins. Co. of New York*, 121 A.D.3d 833, 995 N.Y.S.2d 100, 2014 N.Y. Slip Op. 06937 (N.Y.A.D. 2 Dept. 2014) (insurer "bore no liability for its agent's failure to timely record the mortgage").

[33] *Horvath v. Lawyers Title Ins. Corp*., 2013 WL 1294677, 2013-Ohio-1295 (Ohio App. 11 Dist.) (unpublished) (insurer not liable for escrow theft; Ohio law permitting buyer to buy closing protection letter does not require that insurer prove offer of CPL at closing to avoid liability); *Anderson v. Preferred Title & Guar. Agency, Inc*., 2014 WL 585966 (Ohio App. 10 Dist. 2014) (unpublished) (title insurer not vicariously liable to borrower in prison for having committed loan fraud for actions of title company that prepared HUD-1s that apparently assisted in the loan fraud scheme).

[34] *Stout Street Funding, LLC v. Johnson*, 873 F.Supp.2d 632 (E.D.Pa. 2012) (most claims for agent theft dismissed based on lender's failure to obtain closing protection letter).

[35] *4-J L.P. v. Scarbrough & Weaver, PLC*, 2013 WL 411447 (Tenn.App.) (unpublished) (scope of agency did not encompass escrow or closing acts; title insurer not liable for title company owner's theft of closing money; closing protection letter refutes rather than supports argument for apparent authority); *Branch Banking and Trust Co. v. Fidelity Nat'l Title Ins. Co*., 2013 WL 6844653 (M.D.Tenn.) (unpublished) (title insurer not liable to lender for title agency's concealment of failure to pay off loan secured by insured parcel; insurer had already paid off loan to satisfy its policy duty to loan assignee; dismissed claims brought by loan assignor).

[36] In *Southwest Title Ins. Co. v. Northland Building Corp*., 542 S.W.2d 436 (Tex.App. 1976), aff'd in part, rev'd in part, 552 S.W.2d 425, 20 Tex. Sup. Ct. Jour. 352 (Tex. 1977), an examining attorney who closed a transaction was not the agent of the insurer in any function other than the "closing" of the insurance contract. See also *Lawyers Title Co. v. J.G. Cooper Development, Inc*., 424 S.W.3d 713 (Tex.App.-Dallas 2014) (reversing summary judgment against insurer making it liable for acts of fee closing attorney's employee based on controls over escrow account, and remanding to determine if trust account should be deemed to be owned by fee attorney or insurer).

[37] In *Bodell Construction Co. v. Stewart Title Guar. Co.*, 945 P.2d 119 (Utah App. 1997), the agency's use of the underwriter's name on settlement statements was found to be without actual authority, and the underwriter was not liable for the agent's escrow acts.

[38] In *In re Taneja*, 2010 WL 4882826 (Bkcy.E.D.Va.) (unpublished), the court found that the title companies were not the underwriters' agents for closing acts based on the plain language of the agency contracts, adopting the reasoning of *Wells Fargo Bank, N.A. v. Old Republic Nat'l Title Ins. Co.*, 2009 WL 4927145 (E.D.Va.2009), aff'd 2011 WL 703475 (4th Cir. (Va.)) (unpublished), which made the identical ruling.

[39] *Olson v. Zurich American Ins. Co*., 340 Wis.2d 740, 813 N.W.2d 247 (Table), 2012 WL 739046 (Wis.App.) (unpublished) (upholding jury verdict of negligent supervision of agent because issue waived on appeal).

company.[40] However, an insurer can confer apparent authority on a title agent as to closing acts by specific affirmative conduct.[41] Such *respondeat superior* claims sometimes survive preliminary motions, however, such as motions to dismiss.[42]

Three states have adopted statutes declaring that title insurers are strictly liable for theft of money by their appointed agents.[43] However, the statutes do not impose liability on a title insurer for

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[40] *Business Bank of St. Louis v. Old Republic Nat'l Title Ins. Co.*, 322 S.W.3d 548 (Mo.App. E.D. 2010), reh.den. June 8, 2010, app. transfer den. Aug. 31, 2010; *Haselow v. Vilas Title Services, Inc.*, 364 Wis.2d 758, 869 N.W.2d 170 (Table), 2015 WL 4210989 (Wis.App. 2015) (unpublished). In *Elsebaei v. Philip R. Seaver Title Co., Inc*., 2015 WL 7079068 (Mich.App.) (unpublished), the court held that the *title agent* was not directly liable to the owner of the property for the work it performed as the disbursing agent for the lender on a construction loan.

[41] See *Gondeck v. A Clear Title and Escrow Exchange, LLC*, 47 F.Supp.3d 729 (N.D.Ill. 2014), in which the court denied summary judgment to the insurer on a claim of *respondeat superior* liability for closing acts based on the insurer's confirmation to an Illinois customer that a Florida title company was its agent, and the *lack* of any "public pronouncements, press releases, or advertising materials alerting the public that A Clear Title was Chicago Title's agent only for the purpose of issuing title commitments, policies, endorsements, and assurances," the *lack* of such a disclaimer on the websites maintained by either the insurer or the agent, and certain general comments about settlement agents on the insurer's website. Also see *Faith Assembly v. Titledge of New York Abstract, LLC*, 106 A.D.3d 47, 961 N.Y.S.2d 542 (N.Y.A.D. 2 Dept. 2013), in which a title agency owner stole money that was being held under a construction escrow for renovation of a church. The court ruled on a motion to dismiss that the insurer had no fiduciary duty to detect or protect against the theft, but that its agency contract was not emphatic enough to permit dismissal of the claim that the title company conducted the non-closing escrow as agent of the insurer. In *Adrianne Roggenbuck Trust v. Stewart Title Co*., 2017 IL App (1st) 161769-U, 2017 WL 4399974 (Ill.App. 5 Dist.) (unpublished), the court denied a motion to dismiss a complaint seeking to make the insurer liable for its title agent's closing acts, including participation in alleged fraud, because of numerous facts suggesting that the relationship between underwriter and agent "was so intertwined that there were no boundaries delineating each company."

[42] See *American Home Mortgage Corp. v. First American Title Ins. Co.*, 2007 WL 3349320 (D.N.J.) (unpublished) (alleged participation of agent in loan fraud scheme); and *Lee v. Dublin Manor Corp*., 2007 WL 2259190 (S.D. Ohio) (unpublished) (alleged agency as to promise to deliver occupancy permit at closing). Both decisions were issued on motions to dismiss, and thus the court did not make substantive rulings on agency. The court in *Coldwell Banker Relocation Services, Inc. v. TRW Title Ins. Co.*, 74 F.3d 1243, 1996 WL 5156 (8th Cir. Jan. 8, 1996) (per curiam) (unpublished) also found an underwriter liable for a title agent's escrow acts, in part based on the issuance of a closing protection letter. The Eighth Circuit refused to follow the case in *Bluehaven Funding, LLC v. First American Title Ins. Co.*, 594 F.3d 1055 (8th Cir. 2010), noting that the opinion is unpublished, nonprecedential and per curiam. In *Luan v. Advanced Title Ins. Agency, L.C*., 2015 WL 4560383 (D. Utah) (unpublished), the court refused to dismiss claims against a title insurer for money stolen from a title agency's escrow account by a cyber hacker. The court held that provisions in the agency contract regulating the handling of closing money might override the contract term limiting the scope of the agency to issuance of insurance policies. Ironically, the court also held that the plaintiffs properly invoked Utah's law making an underwriter strictly liable for agent escrow account theft. It was this statutory strict liability, and not any actual agency relationship for escrow acts, that caused the insurer to impose controls in the agency contract on the handling of escrowed money.

[43] Strict liability is imposed by Neb. Rev. Stat. § 44-1993(8) and Utah Code Ann. § 31A-23-308. Fla.Stat.Ann. § 627.792 provides that a title insurer is liable for the defalcation, conversion or misappropriation of settlement funds held in escrow by a licensed title insurance agent. However, that law does not apply to attorney title agents, who are regulated by the state Supreme Court. *Hechtman v. Nations Title Ins. of New York*, 840 So.2d 993 (Fla. 2003). See §17.8.3 for a complete discussion of those statutes and the cases construing them.

a title company's theft of escrowed money when no title commitment was issued and the money was not held for use in a closing.[44]

Claimants have attempted to make insurers liable for acts beyond the scope of the title agent's actual authority by asserting that the insurer was negligent in the hiring and supervision of the agent. Some states do not recognize such a cause of action.[45] Other courts have rejected the claim on the basis that the insurer has no duty to a non-insured.[46] A related theory is that the principal recklessly appointed an unfit "managerial" agent, and thus may be assessed punitive damages for the agent's actions. A title agent is not a managerial agent. It does not have the supervisory authority to act for the insurer.[47] The agency is independent, and not the functional equivalent of a branch or division office of the insurer.[48] As a result, this liability theory is equally inapplicable to title agents except in

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[44] See *Hechtman v. Nations Title Insurance of New York*, 840 So.2d 993 (Fla. 2003); *Winkler v. Lawyers Title Ins. Corp.*, 41 So.3d 414 (Fla.App. 3 Dist. 2010); and *Cohen v. Chicago Title Ins. Co.*, 53 So.3d 331 (Fla.App. 3 Dist. 2010). *Hechtman* held that the liability law applied only to non-attorney agents licensed by the state insurance commissioner, not attorney agents who are regulated only by the Supreme Court. *Winkler* said that the liability law does not apply when the title company holds money escrowed under condo reservation agreements for units that were never scheduled for closing and on which no title commitments were issued. *Cohen* said the underwriter was not liable for the title company's theft of escrowed funds when the title company only acted as escrowee and a different company issued the title insurance commitment and policy.

[45] A negligent hiring and supervision claim was rejected in *Stinespring v. Fidelity Nat'l Financial, Inc.*, 2013 WL 1626203 (N.D.Ill.) (unpublished), In *Focus Investment Associates*, *Inc. v. American Title Insurance Co.*, 992 F.2d 1231 (1st Cir. 1993), the court found: "Rhode Island does recognize the direct liability of an employer to third parties for damages caused by employees or agents who were negligently hired, trained or supervised." The court said there was no evidence that the insurer knew or should have known that the agent was unfit, however. It went on: "Focus next argues that American's failure to give Landman [the agent] person instructions or training with respect to title insurance or title searching, failure to conduct seminars or courses, and failure to audit Landman's work constituted negligence and resulted in Focus's loss ... . As we have stated already, however, American was under no duty to provide Focus with a title report, and any title search undertaken by Landman or American was for American's benefit, not Focus's. Thus, any failure on American's part to train Landman is not actionable by Focus." 992 F.2d at 1238.

[46] *Krehling v. Baron*, 900 F.Supp. 1578 (M.D.Fla. 1995).

[47] In *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (1985), app. 215 N.J. Super. 306, 521 A.2d 1300 (1987), the court said: "The rule is stated in Restatement, supra, §909: 'Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal or a managerial agent authorized the doing and the manner of the act, or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act. The rule is based on the notion that it would be improper ordinarily to award punitive damages against one who is personally innocent and therefore liable only vicariously. … ' Since Inter-County Abstract was an independent agency, it was not a 'managerial agency.'"

[48] In *Lane v. Security Title & Trust Co.*, 382 S.W.2d 326, 332 (Tex.App. 1964), the court said: "We do not agree with the premise that Post was acting in a managerial capacity for Security. He and Frederick operated their own business as partners under an assumed name. They were employed only as issuing agents by Security, with authority only to issue title policies and binders on printed forms furnished to them by Security and bearing the signatures of its president and secretary and its corporate seal. If they had been managers of Security's offices in Dallas, instead of their own, they doubtless would have had authority to obligate Security for overhead expenses, such as the wages of clerical employees, rent, utilities, etc., but no such authority was shown. In fact, Post and his partner were not shown to have authority to do

the most unusual of circumstances.

A title insurer also does not have *respondeat superior* liability for a title company's search error.[49] The insurer is not responsible for the tortious or criminal conduct of a title insurance agent that participates in loan fraud, foreclosure rescue or other real estate fraud,[50] or for an agent's claimed duty to disclose information suggesting that the transaction was loan fraud, which information the agent obtained while performing escrow functions.[51] Thus, the insurer is not responsible as the agent's principal for escrow and closing acts absent some specific actual or apparent authority.[52]

Other intentional tortious conduct of the agent is also generally beyond the scope of the agency, and thus the insurer is not liable as principal. An underwriter received summary judgment

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anything for Security except to countersign and deliver the binders and policies."

[49] *100 Investment Limited Partnership v. Columbia Town Center Title Co.*, 430 Md. 197, 60 A.3d 1 (Md. 2013).

[50] *Proctor v. Metropolitan Money Store*, 579 F.Supp.2d 724 (D.Md. 2008), later decision 645 F.Supp.2d 464 (D.Md. 2009) (underwriter not liable for agents' claimed negligence or fraud in failing to disclose terms of foreclosure rescue transactions); *Haley v. Corcoran*, 659 F.Supp.2d 714 (D.Md. 2009) (underwriter not vicariously liable for title agent's role in closing house sale later claimed to be a foreclosure rescue scam, relying on *Proctor* decision); *Bergin Financial, Inc. v. First American Title Ins. Co.*, 397 Fed.Appx. 119, 2010 WL 3272756 (6th Cir. (Mich.)) (unpublished) (underwriter not liable to lender for title agent participation in loan fraud flips based on issuance of underwriting bulletins about closing acts and flipping fraud); *G&B Invs., Inc. v. Henderson (In re Evans)*, 460 B.R. 848 (Bkcy.S.D. Miss. 2011) and *In re Evans*, 2011 WL 576072 (Bkcy.S.D.Miss.) (unpublished) (insurer not liable for closing acts and fraud of approved attorney under an assortment of theories, including apparent authority, implied agency, negligent hiring and similar claims; *G&B* decision contains a lengthy discussion of the subjects); *Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank*, 878 F.Supp.2d 453 (S.D.N.Y. 2012) (loss caused by theft of loan money by settlement agent borne by lender that appointed the agent; although settlement agent was also a title agent, there was no apparent or actual agency from the insurer for closing acts, and insurer was not obligated to issue policies insuring mortgages not funded); *Chase Home Finance LLC v. Islam*, 37 Misc.3d 1206(A), 2012 WL 4801108 (N.Y.Sup.), 2012 N.Y. Slip Op. 51916(U) (unpublished); *Sher v. Luxury Mortg. Corp*., 2012 WL 5869303 (D.Md.) (unpublished) (facts similar to *Cole Taylor*, issue not decided on motion to dismiss); *Duffy v. Lawyers Title Ins. Corp*., 972 F.Supp.2d 683 (E.D.Pa. 2013) (insurer not liable for title agent's conduct in foreclosure rescue scams). The central issue in most such cases is the agency doctrine that, "[w]here a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to be committed." By appointing the closing agent, the lender is deemed to be the innocent party who enabled the fraud to be committed. This doctrine is examined in *Cole Taylor Bank* and *Proctor*.

[51] *Resolution Trust Corp. v. American Title Ins. Co.*, 901 F.Supp. 1122 (M.D.La. 1995). In this case, the RTC sued the underwriter, claiming that it was responsible for the agent's alleged failure to tell the lender that loan fraud was being committed. The court found, first, that the claimed knowledge of the agent was acquired in the course of closing duties, which are excluded from the agency relationship. Further, however, the court ruled that the agent "did not have a duty to disclose to River City, the lender and policy holder, irregularities, illegalities, or acts of fraud in the loan transaction." Id. at 1124.

[52] *Cameron County Savings Ass'n v. Stewart Title Guar. Co*., 819 S.W.2d 600 (Tex.App.-Corpus Christi 1991); *Southwest Title Ins. Co. v. Northland Building Corp*., 552 S.W.2d 425, 428 (Tex. 1977); *Spring Garden 79U, Inc. v. Stewart Title Guar. Co.*, 874 S.W.2d 945 (Tex.App.-Houston [1st Dist.] 1994); *Bodell Construction Co. v. Stewart Title Guar. Co.*, 945 P.2d 119 (Utah App. 1997).

dismissing a claim that it was responsible under a deceptive trade practice act for an agent's misrepresentation made at closing.[53] Also, when the agent fraudulently misrepresented title, the insurer was not the principal of the agent in such misrepresentation and could not be sued directly for the agent's fraud.[54] The court did not reach the question of the insurer's liability on the policy, however. Likewise, an underwriter was not responsible for an attorney-agent's role in keeping a lender's construction mortgage off record, enabling the owner to sell out the development without paying off the lender. The court found that the policies issued free of the unrecorded mortgage were not fraudulent or negligent. As to the negligence claim, the court found that the insurer had no duty to the lender, because he was not an insured, and further that the issuance of the "clean" policies was not the proximate cause of the lender's damage.[55] However, a lender survived dismissal when it alleged that the insurer "materially misrepresented the terms or conditions" of the closing protection letter by not disclosing when the letters were issued that the agency contract excluded escrow activities from its scope.[56]

An insurer may be vicariously liable for a title agent's violation of state regulations.[57] Two decisions have upheld punitive damage awards against underwriters for tortious conduct of agents. However, neither case enunciated a rationale for doing so. First, when an agent intentionally disregarded the underwriter's form of exception, misleading the insured, the agent and underwriter were both found liable for punitive damages for reckless misrepresentation. The insurer was held liable although the principal evidence of the agent's misrepresentation was the insurer's instructions not to do what the agent did. The court gave no discussion of the theory on which the insurer was found liable.[58] Likewise, when an agent performed a closing, including payoffs, and failed to obtain a deed vesting the insured in title, an award was upheld for punitive damages against both the agent and the insurer. Again, the court did not discuss the basis for connecting the insurer to the agent's

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[53] *Spring Garden 79U, Inc. v. Stewart Title Guar. Co.*, 874 S.W.2d 945 (Tex.App.-Houston [1st Dist.] 1994). The court held: "We find that Reliance [the agent] and its agent Dover had no actual authority, express or implied, to act on behalf of Stewart Title in its dealings with Spring Garden before and at the closing of the sale of the Property. Reliance was authorized only to issue title insurance policies on behalf of Stewart Title and to collect premiums due. ... Actions preceding the issuance of the policy, such as representations to a purchaser and details of a closing and disbursement of funds, do not implicate a company in Stewart Title's position whose only role is to indemnify title. [citations omitted]" 874 S.W.2d at 949-50. See §15.8 regarding liability in Texas for violations of the Deceptive Trade Practices Act.

[54] *Adler v. Heldman*, 169 A.D.2d 925, 564 N.Y.S.2d 828 (Sup.Ct.App. 1991).

[55] *Krehling v. Baron*, 900 F.Supp. 1578 (M.D.Fla. 1995).

[56] *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F.Supp. 818 (N.D.Ill. 1995).

[57] *Chicago Title Ins. Co. v. Washington State Office of Ins. Commissioner*, 178 Wash.2d 120, 309 P.3d 372 (Wash. 2013) (insurance commissioner had authority to make title insurer pay fine for policy-issuing agent's violation of illegal inducement marketing regulations).

[58] *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990). The theory against the insurer amounted to negligent hiring and supervision of the agent, although that cause of action has not been adopted elsewhere. See *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993).

escrow activity.[59]

17.3 Issues Unique To Bar Fund Attorney-Agents And Approved Attorneys

Some states have domestic title insurers formed to underwrite policies issued by attorneys ("bar funds" or bar-related insurers).[60] The bar-related insurer appoints attorneys as its agents. In certain areas, the so-called commercial underwriters have also appointed attorneys as their agents. The attorney-agent has two principals in each transaction--the client and the insurer. In some states, the attorney-agent is considered to be providing legal services to the insurer.[61] In those states, claims against the attorney agent are treated as malpractice claims, with the attendant statute of limitations.[62] An approved attorney or attorney agent does not cease to be counsel to the insured,

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[59] *Ford v. Guarantee Abstract and Title Co., Inc.*, 553 P.2d 254 (Kan. 1976).

[60] See Bohan, *'Bar Funds' and Their Attorney Members*, in *Attorneys' Role in Title Insurance*, A.B.A. Real Property, Probate and Trust Law Section (1990), at F.

[61] In a case of first impression, a Connecticut court held that a bar-related title insurer was not liable for alleged negligence in the supervision of its attorney agent members, in part because of its member rules and also based on public policy. *DeGirolomo v. Papa*, 2010 WL 654388 (Conn.Super.) (unpublished). Florida has held that attorney agents are exempt from licensure and regulation by the Department of Insurance, because they fall under the state supreme court's jurisdiction. See *State Dep't of Insurance v. Keys Title and Abstract Co., Inc.*, 741 So.2d 599 (Fla.App. 1 Dist. 1999), rev.den. However, Minnesota attorney agents *are not* exempt from licensure by the state Department of Commerce. *Wayne B. Holstad, PLC v. Commissioner of Department of Commerce*, 2014 WL 802318 (Minn.App.) (unpublished). In *Boone v. Quicken Loans, Inc*., 803 S.E.2d 707, 420 S.C. 452 (S.C. 2017) , the South Carolina Supreme Court ruled that the procedures used by Quicken Loans' title agency did not cause it to commit the unauthorized practice of law, because attorneys licensed in the state performed all title-related tasks that are the practice of law. The court thus found that a proposed class of plaintiffs had no grounds to sue the lender and title agency.

[62] In *Commonwealth Land Title Ins. Co. v. Jones*, 948 So.2d 1243 (La.App. 3 Cir. 2007), an action by a title underwriter against its attorney-agent, the Louisiana court held the lawsuit controlled (and barred) by the three-year statute of limitations for legal malpractice. The court said that, although the relationship was not attorney-client, the work performed by the agent was legal in nature. Similarly, in *Stewart Title Guar. Co. v. Hayden & Butler, P.S.C.*, 2010 WL 3292931 (Ky.App.) (unpublished), because a Kentucky title agent's contract said that the relationship between underwriter and agent was client and attorney, the state's one-year statute of limitations for professional liability applied, and the underwriter's lawsuit for breach of the agency contract was filed too late. In *Mississippi Valley Title Ins. Co. v. Thompson*, 754 F.3d 1330 (11th Cir. (Ala.) 2014), the federal Eleventh Circuit Court of Appeals sent to the Alabama Supreme Court the question of whether or not an attorney title insurance agent is performing a "legal service" when he or she conducts a title search. If so, the lawyer malpractice statute of limitations controls. In *Hines v. Holland*, 779 S.E.2d 63 (Ga.App. 2015), the certifying attorney was sued for malpractice by the insurer. The court denied the attorney's request to substitute the lay title searcher who made the searching error as the defendant, finding that the duty of care owed by the attorney to the insurer was not the equivalent of the searcher's duty of care to the attorney, and that there was no privity between the searcher and the insurer. In *Loan Partners, LLC v. PTC Family Investments, LLC*, 157 So.3d 771 (La.App. 4 Cir. 2014), the court held that, because a buyer's malpractice claim against a title company attorney employee had outlawed under the malpractice statute of limitations, so had the buyer's claim against the title company based on the conduct of the attorney employee. In *Mississippi Valley Title Ins. Co. v. Thompson*, 802 F.3d 1248 (11th Cir. (Ala.) 2015), the issue of whether or not a title insurer was timely in the filing of its lawsuit against an attorney for title searching mistakes depended on whether to classify him as a title agent or an attorney providing legal services, and the agency contract alone was not sufficient evidence to put his actions in either pigeonhole. In *Fidelity Nat'l Title Ins. Co. of New York v. Crowley*, 88 Mass.App.Ct. 1101, 35 N.E.3d 447 (Table), 2015 WL 4887598 (Mass.App.)

however, by assuming duties to the insurer.[63] The intersection of the practice of law and title searching, examination, closing and related acts is discussed further at §13.3.

In some parts of the country, notably New England and several southern states, insurers appoint approved attorneys to examine abstracts or other title evidence produced by others. In most such jurisdictions, the approved attorney is not a title agent.[64] The approved attorney's function varies somewhat from place to place.[65] The approved attorney's essential responsibility is to give opinions of title which the insurer uses to commit to insurance.[66] The attorney often also attends the closing. A description of the New York practice is illustrative:

> The approved attorney performs some of the work needed to write title insurance. The approved attorney is not compensated by the title insurance company and receives no portion of the premium for this work. The services performed by the approved attorney typically include examination of title, attendance at closing, collection and remittance of the title insurance premium, and certification of the title to the title insurance company.[67]

Thus, the approved attorney is "approved" by the insurer only in the sense that the insurer has agreed to accept his or her examination or opinion of title in issuing the policy.

(unpublished), the court held that the fact that a title agent was also an attorney does not convert the claim against him under the agency contract to a legal malpractice claim, or invoke the statute of limitations for that kind of claim.

[63] In *Breck v. Moore*, 910 P.2d 599 (Alaska 1996), the Moores' action was time-barred because they were charged with constructive discovery of the cause of action on the policy through the knowledge of their attorney, Breck, at the time of closing. The court rejected the Moores' argument that Breck had "switched his allegiance" before closing and become counsel for the insurer in his role as approved attorney. The court held that "Breck was the Moores' attorney at all relevant times," and that "[t]he fact that he exchanged documents with the title insurer and that his fee was channeled through the title insurer does not change his relationship to the Moores." 910 P.2d at 604.

[64] See discussion of the difference between a title agent and an approved examining attorney in *Southwest Title Ins. Co. v. Northland Building Corp.*, 542 S.W.2d 436 (Tex.App. 1976), aff'd in part, rev'd in part, 552 S.W.2d 425, 20 Tex. Sup. Ct. Jour. 352 (Tex. 1977).

[65] See, generally, Travaskis, *The Role of the Lawyer as an Agent or Approved Attorney*, in *Title Insurance: The Lawyer's Expanding Role*, A.B.A. Real Property, Probate and Trust Law Section (1985), at p. 299. The Connecticut legislature adopted a law in 1996 saying that " [n]o person may act as a title agent unless he is a commissioner of the Superior Court in good standing [an attorney], except any individual who held a valid title insurance license on or before June 12, 1984." The insurance commissioner ruled that pre-1984 corporate or partnership agents must conduct their title agent functions through attorneys or grandfathered individual agents. The circuit court found, in *Connecticut Attorneys Title Ins. Co. v. Connecticut Ins. Dep't*, 2000 WL 279052 (Conn.Super.) (unpublished), that it did not have subject matter jurisdiction to accept an appeal of the ruling.

[66] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980).

[67] McDonald, *Attorneys Writing Title Insurance: The Ethical Concerns, Perils and Pitfalls,* in *Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992, at p. 91.

On occasion, the approved attorney or attorney-agent represents more than one of the parties to the transaction. This makes for very complicated ethical questions and competing duties.[68] The attorney is obligated to obtain the best possible coverage for the insured-client, while also fully disclosing to the insurer-principal all risks in the transaction. For example, in a Massachusetts case, construction was halted on property because the owner-insured was not aware he needed a permit from the state transportation department. The permit was required because the property had been owned by a railroad, a fact not disclosed in the policy issued through the approved attorney. The court obviously looked askance at the role of the approved attorney, noting:

> The lawyers were entitled to compensation for their work for the Bank and would also share, by way of commissions, in the insurance premium paid by the Bank. … [I]t is plain (and becoming better understood) that the lawyers in the particular setup described are placed, or place themselves, in a conflicted situation.[FN3]
> [FN3] ...The conflict may arise initially in the lawyers' selecting a title company which they serve as agent, and again in the writing of the policy, where the interests of the insured may diverge from the company's interests and where negotiation would ordinarily be called for.[69]

The conflict of interest is magnified when a true title defect appears. *Collins v. Pioneer Title Ins. Co.* shows the extreme case:

> Ables was initially retained by Collins to examine title and to draft the closing documents. He was asked by Collins to secure a policy of title insurance as part of the closing, and he secured a policy of title insurance as part of his attorney-client relationship with Collins. For whatever reason, Ables obliged his client Collins by obtaining a policy for him without an exception for the Chalupsky lawsuit by failing to mention Chalupsky's claim in the attorney's documents on title which he sent to Pioneer. Ables also obliged another client, the sellers, by obtaining a policy of title

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[68] Much has been written about the ethical issues faced by the approved attorney and member of a bar-related insurer. See, for example, McDonald, *Attorneys Writing Title Insurance: The Ethical Concerns, Perils and Pitfalls*, in *Current Developments In Title Insurance 1992*, Practicing Law Institute N-384 1992, at p. 85; Bohan, *'Bar Funds' and Their Attorney Members*, in *Attorneys' Role in Title Insurance*, A.B.A. Real Property, Probate and Trust Law Section (1990), at F; Travaskis, *The Role of the Lawyer as an Agent or Approved Attorney*, in *Title Insurance: The Lawyer's Expanding Role*, A.B.A. Real Property, Probate and Trust Law Section (1985), at p. 299; Rooney, *The Role of the Lawyer as a "Member" of a Bar Guaranty Fund*, in *Title Insurance: The Lawyer's Expanding Role*, A.B.A. Real Property, Probate and Trust Law Section (1985), at p. 333; and Formal Opinion 37, *Lawyers Writing Title Insurance*, Ohio State Bar Association Report, Committee of Legal Ethics & Professional Conduct, Ohio State Bar Association (7-3-89); Annotation, *Attorney and Client: Conflict of Interest in Real Estate Closing Situations*, 68 A.L.R.3d 967; Wilson, *A Guide to Ethical Issues for Title Insurance Lawyers*, in <u>Title Insurance 1999: Mastering Critical Issues Facing Buyers, Sellers and Lenders</u>, Practicing Law Institute N-448 1999, p. 849 (containing an excellent collection of ABA and state ethics rulings on attorney title agent issues, and RESPA anti-kickback issues).

[69] *Somerset Savings Bank v. Chicago Title Ins. Co.*, 636 N.E.2d at 1358-9, 1360, later opinion 420 Mass. 422, 649 N.E.2d 1123 (1995).

> insurance acceptable to Collins so that he would release the money held in escrow to them. Meanwhile he was also an "approved attorney" for Pioneer.[70]

The approved attorney or attorney-agent must proceed cautiously in order to zealously represent the client(s) without violating duties to others.[71]

An attorney title agent does not represent the parties to the transaction who are not the attorney's clients. However, the attorney's combined roles can lead to the assertion that some duty of care is owed to the non-client.[72] A buyer's claim that an attorney-agent tortiously interfered with the purchase contract by advising the seller to reject it was defeated primarily because the attorney proved that the seller was his client before he reviewed the rejected offer.[73] In a transaction involving the attorney-agent's own real estate, Tennessee holds that the attorney's special status creates a greater duty of care toward the buyer. In *Continental Land Co., Inc. v. Investment Properties Co., LTE*,[74] the court found that attorney Brown defrauded the buyer by his suppression of a material fact. The court noted that Tennessee holds that concealment is actionable "when it constitutes a trick or contrivance or when there is a duty to disclose."[75]

The approved attorney or attorney-agent must disclose a title defect to the insurer. In part,

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[70] 629 F.2d at 435-436.

[71] See Annotation, *Attorney and Client: Conflict of Interest in Real Estate Closing Situations*, 68 A.L.R.3d 967. See also *Chevy Chase Bank v. Chaires*, 715 A.2d 199, 350 Md. 716 (1998), in which an attorney was sued by his client, the bank, over his handling of a lien. The court noted with unhappiness the attorney's many roles: borrower, settlement agent for his own lender, attorney for his wife, a co-borrower, and title insurance agent.

[72] In *Feingerts v. D'Anna*, 237 So.3d 21 (La.App. 4 Cir. 2018), the court held that a Louisiana title agency that was related to a law firm gave legal advice on which a seller relied in deciding to sell property, and therefore was liable to the seller when the sale was rescinded. The seller was not a client of the law firm. In *JBJ Investment of South Florida, Inc. v. Southern Title Group, Inc*., 251 So.3d 173 (Fla.App. 4 Dist. 2018), the court held that an attorney hired by a title company to draft a mortgage and note might be liable to the lender, with whom he never spoke, for failing to verify that the parcels encumbered by the mortgage were the right ones, even though the title company prepared the legal description exhibit. In *Gorsha v. Clark*, ___ F.Supp.3d ___, 2019 WL 1071576 (S.D. Ohio 2019) (permanent citation not yet available), the court held that an attorney who owned the title agency hired for a sale, and who drafted the deed given by the seller, could be found to have been the seller's attorney despite the fact that the lawyer never communicated with the seller.

[73] *Andrews v. Carmody*, 2001 WL 758735 (Ohio App. 11 Dist.) (unpublished).

[74] 1999 WL 1129025 (Tenn.App.) (unpublished).

[75] When Brown drafted the deed, he altered the legal description so that it carved out land included in the purchase agreement. The legal description was long and confusing, and the buyer was unable to understand it. The court found this to be a trick or contrivance, which amounted to fraud. Because of his special standing as a real estate lawyer and agent of a respected title insurance company, Brown was bound, "even in his private business transactions, to a higher ethical standard than a non-lawyer party and to ensure that his actions did not reflect unfavorably on the legal profession." The court emphasized that the buyer "stated that in choosing to let Mr. Brown prepare the documents necessary for closing, he primarily relied on Mr. Brown's status as an agent for Lawyer's [sic] Title." Thus, "under the limited circumstances of this case," the court found Brown to have a duty to disclose his unilateral changes to the deed.

this is the same duty owed by any other agent of the insured. Further, however, the attorney is providing the opinion and title evidence on which the insurer will issue the policy, giving the attorney a direct duty to the insurer.

The insured's duty to disclose a known title defect is not canceled by imputing the attorney's knowledge to the insurer, on the grounds that the approved attorney is the insurer's agent. For example, in the *Collins* case, the insured and his attorney were aware of the title defect but failed to disclose it to the insurer. The insurer issued its policy in reliance on the attorney's opinion. The court voided the policy, for failure of the insured to disclose a material risk to the insurer.

> The record shows that Collins first advised Pioneer of the Chalupsky lawsuit in May, 1973, several months after the policy was issued. It is obvious that Chalupsky's claim to the property significantly "increase(d) the risk of loss" and therefore the information not disclosed was material within the definition of the statute. The misrepresentation in the Attorney's Preliminary Report on Title filed by Ables on behalf of Collins therefore rendered the policy of title insurance void. …
>
> Despite the fact that Collins did not deal directly with Pioneer prior to the issuance of the policy, he knew that Pioneer was not informed of Chalupsky's claim. He admitted that he had received a copy of Ables' Preliminary Report on Title and an owner's binder from Pioneer, neither of which mentioned Chalupsky's claim. Furthermore, he knew the importance of the Chalupsky claim to the risk assumed by Pioneer. He had earlier insisted on a policy which showed no exception for the Chalupsky litigation. We simply do not believe that Collins, an attorney with experience in land dealings, expected that Pioneer would insure the title without exception for Chalupsky's claim, then being litigated, if it knew all of the facts.[76]

The same result was reached in *Weir v. City Title Ins. Co.*,[77] *Sullivan v. Tomgil Building Corp.*[78] and *National Credit Union Administration v. Ticor Title Ins. Co*.[79] In *NCUA*, the attorney withheld the damaging information from both principals. The court therefore held that his knowledge could not be imputed to the insurer, based on § 279 of the Restatement (Second) of Agency, which states:

> The principal is not affected by the knowledge of an agent as to matters involved in a transaction in which the agent deals with the principal ... as, or on account of, an adverse party.

Conversely, knowledge of the attorney normally may not be imputed to the insured in order

[76] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429, 434 (6th Cir. (Tenn.) 1980).

[77] 125 N.J.Super. 23, 308 A.2d 357 (App.Div. 1973).

[78] 46 Misc.2d 613, 260 N.Y.S.2d 465 (Sup.Ct. 1965).

[79] 873 F.Supp. 718 (D.Mass. 1995).

to make Exclusion 3(b) apply. When the attorney was aware of a title defect, but the insured was not, one court found that the attorney was acting adversely to his client's interest, preventing imputation of his knowledge.[80]

The insurer's mere appointment of the attorney as a policy-issuing agent does not give the attorney apparent authority to bind the insurer to his or her fraudulent acts. In *Security Union Title Ins. Co. v. Citibank (Florida), N.A.*,[81] the attorney-agent committed loan fraud in one loan in his own name, and represented several others who committed the same kind of fraud. The lender argued that the insurer was liable under the principle of vicarious liability of a principal for its agent's fraud, as enunciated in Restatement (Second) of Agency, §§261 and 262.[82] The court found that, while the attorney-agent was "certainly wearing at least 'two hats' with respect to these transactions," the insurer had given no apparent authority, and "did not put Turner in a position that enabled him to commit the frauds with regard to the loans. Thus, it seems clear to us that this attempt on the part of the bank to reach into Safeco's 'deep pockets' and recover its loan losses has no basis in law." In every such situation, the court must determine that the agent was acting within the scope of his or her agency authority when the person committed the fraud in order to find that the principal bears the liability for that conduct.[83]

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[80] *Peoples Downtown Nat'l Bank v. Lawyers Title Guar. Fund*, 334 So.2d 105 (Fla.App. 1976).

[81] 715 So.2d 973, 23 Fla.L. Weekly D1421 (Fla.App. 1 Dist. 1998), reh.den. Aug. 25, 1998.

[82] The Restatement (Second) of Agency §261 (1958) states that "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." However, the phrase "while apparently acting within his authority" is the critical factor. Restatement (Second) of Agency §262, comment c, says that, "if a third person should know or otherwise has notice that an agent is acting for his own purposes or is otherwise violating his authority, the principal is not liable."

[83] Most states follow the rule enunciated by a Kentucky court that, for a principal to be held responsible for the misconduct of an agent, the wrongful act "must have been done, not only in the course of the servant's employment, but also with a view to the furtherance of his employer's business, and not for a purpose personal to himself." *Brooks v. Gray-Von Allmen Sanitary Milk Co*., 211 Ky. 462, 277 S.W. 816 (1925). In *Richards v. Attorneys' Title Guaranty Fund, Inc.*, 866 F.2d 1570 (10th Cir. (Colo.) 1989), the court held that a principal's liability for an agent's acts was based on the rule that, "when one of two innocent persons must suffer from the acts of a third, he must suffer who put it in the power of the wrongdoer to inflict the injury." 866 F.2d at 1572-73. In *Commonwealth Land Title Ins. Co. v. Howard*, 2016 WL 1255719 (E.D.Ky.) (unpublished), the court refused to impose liability on a title insurer for the fraud conducted by a title agent because the insurer did not know about the fraud, it was not conducted in the course of the agent's work for the insurer, and the parties making that claim were the borrowers on the loan and were fully aware of and participated in the misrepresentations at closing. Georgia follows the doctrine that "the acts of an agent within the scope of his authority are binding on his principal," which is effectively the same as the Restatement rule. However, when an agent is working for two principals that are aware of the dual agency, neither principal can be held liable by the other for the agent's actions unless they participated in the agent's wrong. As the Supreme Court of Georgia has said, "the misconduct of a dual agent by consent cannot be imputed to either of the principals who is not actually at fault, since each of the principals is under an equal duty to exercise ordinary care in selecting and supervising the agent to protect his own interests." *Burnett v. Lewis*, 40 Ga.App. 525, 150 S.E. 462 (1929); *Hodges v. Mayes*, 240 Ga. 643, 242 S.E.2d 160 (1978). In *James B. Nutter & Co. v. Old Republic Nat'l Title Ins. Co.*, 2016 WL 5792686 (N.D.Ga. 2016) (unpublished), the court used these principles to hold that a title insurer could not be liable for the closing acts of a title agent who also served as the lender's closing agent, because the scope of the two agencies did not intersect. The closing acts were performed solely as the

The insurer generally is not responsible for fraud or defalcation committed by the attorney against the client. Defalcation by attorney-agents surfaces as a reported decision most frequently in the form of a disciplinary ruling.[84] For example, the insurer was not responsible when the attorney representing the purchaser failed to pay off the existing mortgage. The insurer had issued a closing protection letter to the buyers' lender for the approved attorney. Closing protection letters are the subject of Chapter 14. The court found that neither the approved attorney status nor the closing protection letter made the attorney the insurer's agent. Thus, the buyers had no cause of action against the insurer.[85] However, the insurer was held liable for the fraudulent acts of its approved attorney, when the insurer referred the insured's private attorney to the approved attorney to get title insurance.[86]

17.4 Issues Unique To Affiliated Business Agents

Some title agencies are owned, in full or in part, by people or companies who also own or participate in related businesses: real estate brokers, lenders, law firms and developers.[87] The Real Estate Settlement Procedures Act creates a safe harbor for the payment of title insurance premiums to a title agency that is affiliated with another party having an interest in the transaction.[88] The

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agent of the lender.

[84] See, for example, *In the Matter of Wofford*, 330 S.C. 522, 500 S.E.2d 486 (1998); *In re Schneider*, 707 So.2d 38 (La. 1998); *In the Matter of Austin*, 269 Ga. 27, 494 S.E.2d 671 (1998); *Office of Disciplinary Counsel v. Bertram*, 85 Ohio St.3d 113, 707 N.E.2d 464 (1999); and *In re Fallin*, 731 So.2d 221 (La. 1999).

[85] *Nappen v. Blanchard*, 210 N.J.Super. 655, 510 A.2d 324 (1986).

[86] *Meyerson v. Lawyers Title Ins. Corp.*, 39 A.D.2d 190, 333 N.Y.S.2d 33 (N.Y.A.D. 1 Dept.1972), aff'd., 33 N.Y.2d 704, 349 N.Y.S.2d 675, 304 N.E.2d 371 (1973).

[87] Affiliated business agencies have generated considerable activity in legislation, regulation and litigation, which is beyond the scope of this treatise. An example is found in *Guardian Title Co. v. Bell*, 805 P.2d 33 (Kan. 1991), in which a statute and regulation limiting captive business were challenged as being unconstitutional.

[88] Section 8 of RESPA (12 U.S.C.A. §2607), adopted in 1973, prohibits payment of referral fees or the splitting of a settlement service fee with a party making the referral of a settlement service. The law is implemented via regulations found at 24 CFR § 3500.14. In 1983, Congress created a safe harbor for "affiliated business arrangements" at §2607(c)(4). Section 8(c) requires three things: (1) disclosure of the affiliation by the form promulgated by the Consumer Financial Protection Bureau; (2) that the customer is not compelled to use the affiliated provider; and (3) the owner of the title agency does not receive a "thing of value" other than "a return on the ownership interest or franchise relationship." HUD, as the predecessor to the CFPB as the regulator for RESPA, issued a policy statement in 1996 that said that it construed the Act as meaning that "the entity receiving the referrals of settlement service business must be a ... *bona fide* provider of settlement services." *Statement of Policy 1996–2 Regarding Sham Controlled Business Arrangements,* 61 Fed.Reg. 29,258 (1996). That statement also said that HUD would consider a set of ten factors "and will weigh them in light of the specific facts" when judging whether a title agency is bona fide or a sham. The ten factors include whether the provider has "sufficient initial capital and net worth," whether it has "its own employees," and whether it is "located at the same business address as one of the parent providers." Numerous courts have refused to grant deference to the HUD policy statement. In *Carter v. Welles-Bowen Realty, Inc*., 736 F.3d 722 (6th Cir. (Ohio) 2013), the Sixth Circuit Court of Appeals held that HUD's ten-factor test is not the law, and title agencies do not have to prove that they are "bona fide" providers of settlement services in order to meet the statutory safe harbor. In *Dewrell*

affiliated business agency could be subject to the claim that it suppressed information from an insured at the behest or for the benefit of the affiliated business.[89]

17.5 Scope Of Agency For Title Insurance Coverage

The insurer is liable for policy risks assumed by its agent, subject to the limitations described below. The insurer is normally bound by the coverages given by its agent. However, the type of agent or employee involved may have no authority to bind the insurer as to policy coverages. Also, a policy-issuing agent may not have the authority to bind the particular coverage in question. If the agent did not have authority to bind the insurer as to the coverage, the issue becomes whether or not apparent authority or estoppel apply.

Only certain classes of agent employees may issue or amend policies. The ALTA policies state that they may only be issued or amended by an officer of the insurer or a proper signatory. Deletion of an exception by a "title closer" was not binding on the insurer because the closer had no actual authority to amend the policy and the policy informed the insured that only a "validating officer or agent" had authority to amend, negating any apparent authority or estoppel.[90]

Sacks, LLC v. Chicago Title Ins. Co., 749 S.E.2d 802, 13 FCDR 3251 (Ga.App. 2013), a title agent sued by her underwriter for the premium remittances she owed failed in her inventive argument that the agency contract could not be enforced as a violation of RESPA. She argued that, because the contract was tiered, giving the agent a greater split of the premium if she met a remittance threshold, the premium split adjustment at the upper tier was an illegal inducement under Section 8. The court held that Section 8's safe harbor for agency premium payments is a blanket exemption, and that RESPA does not prescribe certain permitted and non-permitted terms in such agency contracts. In *Chultem v. Ticor Title Ins. Co*., 2015 IL App (1st) 140808, 2015 WL 8536788 (Ill.App. 1 Dist. 2015) (unpublished), the court held that, because attorney-agents in Chicago provide some services in exchange for their share of the premiums, they are within Section 8(c)'s safe harbor. In *Edwards v. First American Corp*., 798 F.3d 1172 (9th Cir. (Cal.) 2015), however, the Ninth Circuit refused to adopt a firm safe harbor approach. The Consumer Financial Protection Bureau has aggressively pursued what it considers to be sham title agencies despite the repeated pronouncements from the courts that the sham versus bona fide analysis is off base. See *Consumer Financial Protection Bureau v. Borders & Borders, PLC*, 2015 WL 631196 (W.D.Ky.) (unpublished), and the later decision of *Consumer Financial Protection Bureau v. Borders & Borders, PLC*, 2018 WL 1440606 (W.D.Ky. 2018) (unpublished). In *Cantrell v. New Penn Financial, LLC*, ___ F.Supp.3d ___, 2019 WL 4689226 (D.S.C. 2019) (not yet released for publication), a borrower's claim against a title company based on RESPA's Section 8 was dismissed because the agent proved that the requirements for an affiliated business arrangement had been met.

[89] A Minnesota court refused to certify a class in a much-watched action against Burnet Realty that claimed that the real estate broker had a fiduciary duty to give its customers information on the lowest-cost competitors to its own affiliated business title agency, Burnet Title. *Grady v. Burnet Realty, Inc.*, December 14, 2007, Hennepin County, MN Case No. 27-CV-07-3336. In *NRC, Inc. v. Huddleston*, 886 S.W.2d 526 (Tex.App.-Austin 1994), a broker misrepresented that an earnest money deposit was being held by it as escrowee, when in fact the check was no good because it had been drawn on a closed account. The court upheld a jury verdict for actual and punitive damages, and entered judgment under the Deceptive Trade Practices Act as well. There is no indication from the *NRC* opinion that the broker in that case was affiliated with the title agent. However, the case illustrates the conflict of interest and possible liability that an affiliated business agency might face under similar circumstances.

[90] *Van Arsdale v. Metropolitan Title Guaranty Co.*, 103 Misc.2d 104, 425 N.Y.S.2d 482 (1980). The court ruled: "As the policy itself set forth the scope of the agent's authority, by stating the authorized manner by which amendments thereto were to be made, plaintiff, being on notice thereof, knew or should have known of the limits upon the agent's authority and, by disregarding the clear terms of his policy, acted at his peril. ... Since the plaintiff, dealing with the

Likewise, agency contracts put limitations on the types of coverages for which the agent may bind the insurer. The typical agency contract states that the agent may not commit the insurer to an "extra-hazardous risk" without the insurer's consent.[91] Some extra-hazardous risks may be defined or listed in the agency contract. Many are identified by the insurer's underwriting manuals and memoranda given to the agent. If the insurer proves a lack of actual authority, the insured must show apparent authority.[92] The agent was found to have apparent authority to bind the insurer to construction lien coverage when state insurance law distinguished between general and special agents of the insurer; the agency was a general agency; its contract covering the entire state and exclusive in all counties but one; the insurer printed policy covers with the agent's name on them, with the title "State Agent;" and the agent was permitted to use its own judgment as to which form of policy to issue.[93] Similarly, when the agent was an authorized signatory, the insurer was bound by the agent's letter stating "You will also note that the survey has been insured," although the agent had no actual authority to give such a coverage.[94] An insurer may also be estopped to assert a limitation on authority which would not be clear to the prudent third party. See §17.1 above for a discussion of estoppel in the context of agency.

A second limitation found in every agency contract is the territory in which the agent may issue policies. When an agency contract permitted the agent to issue policies in any county in the state, the insurer had no basis for denying actual authority to issue a policy covering land in two counties, including one which was not the agent's normal territory.[95] However, when the agency contract limited the agent to several counties, the agent had no authority to issue a policy outside of that territory.[96]

The agent has no apparent authority when the third party has good reason to suspect that such authority is lacking. However, the insured lender had no duty to ask if the agent was authorized to issue a policy insuring a mortgage given by the agent, even though the lender knew that the loan was to cover a shortage in the agent's escrow account just before the insurer audited.[97]

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agent, knew or should have known that the power to amend the policy was limited and delegated to certain employees of the defendant, the defendant-principal ought not to be bound by the unauthorized transaction between its agent and the plaintiff." 425 N.Y.S.2d at 484.

[91] "Agent shall not, without written approve of Insurer: A. Commit Insurer to: … (3) An extraordinary risk as set forth in Insurer's rules, regulations or instructions or manuals. ... ." First American Title Insurance Company contract reprinted at pp. 325-32, in *Title Insurance: The Lawyer's Expanding Role,* A.B.A. Real Property, Probate and Trust Law Section (1985).

[92] *American Title Ins. Co. v. East West Financial,* 959 F.2d 345 (1st Cir. 1992).

[93] *Commercial Standard Ins. Co. v. Moore*, 237 Ark. 845, 376 S.W.2d 675 (1964).

[94] *Hutsell v. U.S. Life Title Ins. Co.*, 157 Ga.App. 845, 278 S.E.2d 730 (1981).

[95] *American-First Title & Trust Co. v. First Federal Sav. & Loan Ass'n*, 415 P.2d 930 (Okla. 1965).

[96] *Ford v. Commonwealth Land Title Ins. Co.,* 691 F.Supp. 1484 (D.C. Cir. 1988).

[97] *John Rondinelli, Inc. v. Safeco Title Ins. Corp.*, 544 So.2d 326 (Fla.App. 1989). The agent omitted a prior mortgage

17.6 Agent Conduct In Relation To Claims

The policy states that notice of a claim is to be delivered to the insurer's home office, as further discussed at §2.3. Most if not all agency contracts are equally clear in stating that the agent has no authority to accept a claim notice, waive the insurer's right to receive notice, or adjust the insured's claim.[98] However, some states, including California, have adopted regulations that state that notice to the policy-issuing agent is adequate, and which describe the agent's obligations on receipt of such a notice, as discussed at §2.3.1.

An agent that receives a notice of claim or tender of defense should forward the notice to the insurer immediately, and instruct the insured that further communication is to be with the insurer. The agent may wish to obtain the name of the claim administrator and give it to the claimant, if the insurer's procedures permit that action. The agent may not make any comment to the insured or its representative or attorney about whether or not the claim is covered or if the allegations of the complaint invoke a duty to defend.[99] If it does, the agent may be liable to the insurer for the damages it incurs that flow from the breach of the agency contract. See §17.8.

States differ as to whether or not, in the absence of a specific statute, notice to the policy-issuing agent is adequate to meet the policy's requirement of notice. Some courts have ruled that notice to an agent alone is not sufficient.[100] For example, one court found:

> The policy provisions as to notice were not secret and undisclosed. We fail to understand what visible and apparent interpretation by the Title Company of Sedillo's authority could reasonably have been relied upon by plaintiffs for giving the notices

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on the policy. The insurance of an agent's own property creates the automatic possibility of a conflict of interest, and only the agent's own integrity avoids serious exposure to the insurer for misrepresentation of the status of title. See *United States v. Marlatt*, 24 F.3d 1005 (7th Cir. (Wis.) 1994).

[98] "Agent shall not, without written approval of Insurer: … D. Incur debt in the name of Insurer, adjust any claim for loss or accept service of summons or other process on Insurer, but Agent shall immediately notify Insurer at its state office at [address], by certified mail, of any attempted service of summons, other process or other paper upon Agent as the agent of Insurer, and the reasons therefore, if obtainable." First American Title Insurance Company contract reprinted at pp. 325-32, in *Title Insurance: The Lawyer's Expanding Role*, A.B.A. Real Property, Probate and Trust Law Section (1985).

[99] In *Green Trails, LLC v. Stewart Title of Louisiana, Inc.*, 111 So.3d 14 (La.App. 1 Cir. 2012), writ den. 104 So.3d 443 (La. December 14, 2012), the insured gave notice of a lawsuit to a title agent who allegedly opined that the insurer had no duty to defend, but the agent did not forward the tender to the insurer. The lawsuit by the insured against the agent for failing to forward the tender to the insurer was barred by the statute of limitations. The court also faulted the insured for not making the tender directly to the insurer until months after it learned that the insurer was providing a defense to another insured in the same action.

[100] *Worthey v. Sedillo Title Guar., Inc.*, 85 N.M. 339, 512 P.2d 667 (1973); *New Jersey Dep't of Environmental Protection v. DiFlorio*, 2007 WL 4553046 (N.J.Super.A.D.) (unpublished) (notice to agent only, and only orally rather than in writing, held not sufficient under state law or the terms of the policy); *Chicago Title Ins. Co. v. Bristol Heights Associates, LLC*, 2011 WL 4031565 (Conn.Super.) (unpublished) (meeting between agent who was also counsel for insured and underwriting counsel for insurer not deemed to be a notice of claim).

> to Sedillo and not to the company. There has been no evidence brought to our attention which shows any secret limitations or restrictions upon Sedillo's authority.
>
> We are not here concerned with representations made by the agent in securing plaintiffs' application for insurance, or with undisclosed restrictions upon an agent's authority, but with plaintiffs' total disregard of the plain conditions imposed upon them by the provisions of the written contract under which they seek recovery.[101]

However, other jurisdictions have found notice given only to the agent to be adequate to meet the policy's requirement of notice.[102]

A policy-issuing agent sometimes learns of a defect in title to a parcel that the agent recalls having insured, or of a lawsuit in which a party received a policy from that agent. Such knowledge of an agent is not imputed to the insurer in the ordinary course. Further, the insurer's knowledge of a possible covered matter affecting a person who received a policy, which policy may or may not still be in effect, does not excuse the insured from delivering a notice of claim or a tender of defense, except in the most extraordinary circumstances.[103]

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[101] *Worthey v. Sedillo Title Guar., Inc.*, 512 P.2d at 672.

[102] See *Security Title Guar. Corp. of Baltimore, The v. GMFS, LLC*, 910 So.2d 787 (Ala.Civ.App. 2005), in which a statute stating that knowledge of an agent is imputed to the principal gave effect to a notice of claim that was delivered to the agent only, to excuse the insured's failure to deliver a tender of defense to the insurer until after the insured mortgage had been extinguished by a foreclosure and sale. Similarly, in *Purcell v. Land Title Guarantee Co.*, 94 Mo.App. 5, 67 S.W. 726 (1902), when an agent told the insured to ignore a mortgage and that the claim would be handled, the insured was justified in assuming that he had given sufficient claim notice. See §17.1 regarding the application of estoppel generally in the principal-agent relationship.

[103] In *McLaughlin v. Attorneys' Title Guaranty Fund, Inc.*, 61 Ill.App.3d 911, 18 Ill.Dec. 891, 378 N.E.2d 355 (Ill.App. 3 Dist. 1978), the insurer's agent was also the attorney for the estate from which a lien arose. The insurer was estopped from enforcing the notice provision as a bar to recovery under the policy, based on the imputation of knowledge from agent to insurer rather than a finding that the agent had authority to accept a claim notice.

17.7 Agent Liability To Insured Under Policy

In almost every jurisdiction, an agent is not liable to the insured for losses payable under the title insurance policy.[104] This principle was well-developed in *Mickam v. Joseph Louis Palace Trust*, in which the insured sued the agent, Seaver Title Company, for its claimed policy loss. The court found:

> This claim is meritless, because Seaver Title is not the insurer under the policy; Seaver Title merely acted as an agent for Security Union. While an agent is liable for his own torts, an agent is not liable for the contracts it makes on behalf of a disclosed principle. [citations omitted][105]

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[104] *Old Republic Nat'l Title Ins. Co. v. Kaufman*, 1997 WL 309212 (S.D.N.Y.) (unpublished); *Eller Media Co. v. DGE, Ltd.*, 2004-Ohio-4748, 2004 WL 2002449 (Ohio App. 8 Dist.) (unpublished); *Boyce v. Cassese*, 941 So.2d 932 (Ala. 2006); *McColgan v. Brewer*, 906 N.Y.S.2d 353, 75 A.D.3d 876, 2010 N.Y. Slip Op. 06128 (N.Y.A.D. 3 Dept.) (agent not liable for statement made after claim submitted); *Barton v. Vallejos*, 2012 WL 2261011 (D. Utah) (unpublished) (Utah title agent not liable for omission of encumbrance from policy and may not be sued for misrepresentation as if policy were an abstract of title); *Russo v. PPN Title Agency, LLC*, 2017 WL 3081709 (N.J.A.D.) (unpublished) (agent not liable to insured for title search error because commitment is strictly binder of insurance and title agent is merely an agent of a disclosed principal, the insurer); *Greenberg v. Stewart Title Guar. Co*., 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992) (title agent not liable to insured for search error and has no direct liability for insurance product issued as agent). In *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 331 P.3d 491 (Idaho 2014), the court dismissed claims by the loan assignee against the title agent on the policy for lack of privity. In *Cummings v. Stephens*, 157 Idaho 348, 336 P.3d 281 (Idaho 2014), reh.den. Nov. 5, 2014, the Idaho high court held that Idaho's search statute does not transform a title commitment into an abstract of title, and thus a title agent may not be sued for faulty abstracting of title for having included in a title commitment parcels not owned by the sellers and one they did own but did not intend to sell. In *Federal Deposit Ins. Corp. v. Horn*, 2014 WL 1236053 (E.D.N.Y. 2014) (unpublished), a New York court found several title companies liable to the FDIC for issuing title commitments to defunct AmTrust Bank showing borrowers in title before their deeds were signed, and failing to disclose that the properties were being flipped. The FDIC alleged that the title agents had been hired "to provide accurate information, title commitments and chain of title, and to perform other services such as filing and recording deeds and mortgages." The court held that the title agents could be liable for abstractor negligence. The FDIC did not inform the court that New York rejected negligent misrepresentation claims on title insurance policies, in *Citibank, N.A. v. Chicago Title Ins. Co.*, 214 A.D.2d 212, 632 N.Y.S.2d 779 (A.D. 1 Dept. 1995), reversing 620 N.Y.S.2d 717 (S.Ct. 1994). In *Brackman v. Southern Tier Abst. Corp.*, 289 A.D.2d 630, 734 N.Y.S.2d 282, 2001 N.Y. Slip Op. 09768 (A.D. 3 Dept. 2001), an agent was sued for alleged negligence in failing to discover a right of access from the land to be insured to a nearby lake. Framing the issue as negligence, the court found that the agent could be sued by the seller, but that the seller had not proven the search was negligent. A Florida commentator wrote: "Many practitioners fail to recognize the distinction between title insurer and title insurance agent. For instance, many lawyers file policy claims with the issuing agent even though paragraphs 3(b), 4 and 13 of the Conditions and Stipulations ... require that written notice be sent to the title insurer, not the title insurance agent. ... The title insurance agent, who is the disclosed agent of the title insurer on the face of the policy, is not a party to the contract and is not liable on the policy." Boyette, *Title Insurance Liability Beyond the Policy*, Florida Bar Journal, July/August, 1995, pp. 24-34, at 30. That article provides a thorough review of the Florida statutes defining title insurer and title agent, and the types of suits that may be brought against an agent, such as for escrow or closing liability and abstractor negligence. In *Williams v. Stewart Title Guar. Co*., ___ F.Supp.3d ___, 2019 WL 1112395 (D.Colo. 2019) (permanent citation not yet available), appeal filed April 9, 2019, when a title insurer sued a seller for her false title affidavit that failed to disclose a million dollar judgment against herself and won, the seller's lawsuit against the title agent for search negligence was dismissed on the doctrine of res judicata.

[105] 849 F.Supp. 516, 520 (E.D. Mich. 1993).

Mickam follows general insurance agency law that the agent procures coverage for the insured but does not become the insurer. In keeping with this principle, the Utah Supreme court held that, when the insurer became insolvent, the agent did not become its coinsurer or reinsurer:

> An insurance agent who acts in an authorized, nontortious manner is not personally liable to the insured for his or her acts or for any contracts which he or she makes on behalf of the disclosed principal. …
>
> FN. Further, "the subsequent insolvency of the insurance company has been held not to impose liability on the agent or broker, where the company was solvent when the policy was procured." 3 Couch on Insurance 2d §25:48 (rev.1984)... .[106]

However, when an insured sued the title agent after the underwriter filed bankruptcy and rendered the policy worthless, the Indiana Supreme Court held that a title agent may be directly liable to the lender insured as an abstractor of title. It rested its decision on the Restatement (Second) of Torts Section 552, which says that a party in the business of supplying information can be sued in tort if it provides "false information" and the other party justifiably relies on it. The court held that title agents are in the business of supplying information, not insurance.[107] Also, Ohio takes the stance that a title agent "may be liable for failing to disclose an encumbrance where there is privity of contract between the title examiner" and the insured.[108] See §15.12 for a state-by-state summary of the cases that have held, in the various states, whether or not a title company is liable in tort if it is negligent in the searching or examination of title records.

A title agent is also not liable to the insured for other types of claims related to the issuance of the policy, such as an alleged duty to explain the terms of the instruments excepted in Schedule B.[109] However, a title company may be directly liable to the insured for duties it undertakes outside of the scope of the policy. Thus, an agent may be liable for escrow negligence, improper preparation of documents and handling of funds,[110] errors in the recording of documents,[111] searching the title to

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[106] *New West Federal Sav. & Loan Ass'n v. Guardian Title Co. of Utah*, 818 P.2d 585 (Utah 1991).

[107] U.S. Bank, N.A. v. Integrity Land Title Corp., 929 N.E.2d 742 (Ind. 2010).

[108] *McMullian v. Borean*, 167 Ohio App.3d 777, 857 N.E.2d 180, 2006-Ohio-3867 (Ohio App. 6 Dist. 2006).

[109] *Windel v. Mat-Su Title Ins. Agency, Inc*., 305 P.3d 264 (Alaska 2013) (title agent had no duty to advise insured about possible invalidity of easement excepted in policy that encumbered insured parcel).

[110] In *Fansler v. North American Title Ins. Co*., 2019 WL 1281432 (Del.Super.) (unpublished), later decision 2019 WL 2524261 (Del.Super.) (unpublished), the buyers sued a title agent, claiming that it was "professionally negligent" in failing to secure a valid access easement for the insured property.

[111] In *Steele v. Title365 Company*, 2019 WL 2912502 (Cal.App. 4 Dist.) (unpublished), the court refused to dismiss claims brought by sellers against the title agent concerning a secret loan to the buyer secured by a deed of trust that the title agent recorded ahead of the sellers' take-back deed of trust.

the "wrong" parcel,[112] offering coverage advice after a claim has been made,[113] negligent misrepresentation of title,[114] negligence in the preparation of an approved attorney's opinion of title,[115] intentional misrepresentation of title,[116] violation of a deceptive trade practice act,[117] or fraud.[118] A title agent is not liable to the seller for failing or refusing to issue a policy in the form desired by the seller.[119] See §13.7 concerning duties in escrow for drafting of documents and §15.7 for a full discussion of negligent misrepresentation of title.

An agent may also face liability for negligence or misrepresentation in its duties as procurer of insurance on behalf of the insured, or as an insurance broker.[120] For example, when the insured

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[112] In *Tyler Title Company, LLC v. Cowley*, 2019 WL 1760105 (Tex.App.-Tyler) (unpublished), a Texas title agent was found liable to the buyer of real estate because the street address in the purchase contract corresponded to a parcel that was not owned by the seller. The title agent accepted the seller's premise that the solution was to convey to the buyer the parcel that was owned by the seller, and the court held the title agent was duty-bound not to allow closing to occur by a deed of that property.

[113] *Meridian Title Corp. v. Gainer Group, LLC*, 946 N.E.2d 634 (Ind.App. 2011); *Green Trails, LLC v. Stewart Title of Louisiana, Inc.*, 111 So.3d 14 (La.App. 1 Cir. 2012), writ den. 104 So.3d 443 (La. December 14, 2012).

[114] See *Mickam v. Joseph Louis Palace Trust*, 849 F.Supp. 516 (E.D.Mich. 1993); *Lumbert v. Fidelity Nat'l Title Ins. Co.*, 728 So.2d 826 (Fla.App. 5 Dist. 1999) (insured permitted to maintain suit against title agent for negligent failure to disclose true state of title and breach of fiduciary duty, even after underwriter settled with insured, although the court posited that "we are not sure what action Lumbert has remaining against the agent after settling with the principal... ."). In *Papunen v. Bay Nat'l Title Co.*, 271 So.3d 1108, 44 Fla. L. Weekly D543 (Fla.App. 3 Dist. 2019), a title agent sued for missing a title issue was not protected by a release signed by the buyer insured giving up any right to sue the seller for title issues, says a Florida court.

[115] *Collins v. Pioneer Title Ins. Co.*, 629 F.2d 429 (6th Cir. 1980).

[116] *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990).

[117] See, for example, *Gibbs v. Main Bank of Houston*, 666 S.W.2d 554 (Tex.App. 1984).

[118] *Applefield v. Commercial Standard Ins. Co.*, 176 So.2d 366 (Fla.App. 1965).

[119] In *Abikasis v. Provident Title Co.*, 2016 WL 3611016 (Cal.App. 2 Dist.) (unpublished), the court held that, because a title commitment is just an offer of insurance under certain conditions, a seller cannot sue a title agent for alleged negligent failure or refusal to issue a policy, particularly when the seller did not satisfy the conditions for the policy's issuance. Most states would add that there is no privity of contract between the seller and the title agent for two reasons: the seller is not the proposed insured, and the title agency is merely the agent of the insurer.

[120] In *Bank of America, N.A. v. Bailey*, 2016 WL 3410174 (D.Nev. 2016) (unpublished), a bank sued a title insurance agent as an insurance broker, claiming that the agent "downgraded" the insured's coverage by issuing a new policy that contained lesser coverage than the original policy, to the harm of the insured bank. In this decision, issued on a motion to dismiss, the court ruled that Nevada Title was acting as an insurance broker. It looked to this definition of an insurance broker, from *Appleman on Insurance Law*: "Generally, the legal distinction between an 'agent' and a 'broker' is that an 'agent' transacts insurance as the agent of the insurer and a 'broker' transacts insurance as the agent of the insured with regard to a particular insurance transaction." An excellent source on the subject of insurance agent and broker liability is Harnett, *Responsibilities of Insurance Agents and Brokers*, Matthew Bender (1992), which states by introduction: "Areas of potential attack are quite varied, although there are certain defined trouble areas which have surfaced in court. These

argued that the title agent orally committed to issuing a First American Eagle™ policy which would have given protection against survey matters, but instead issued a 1992 policy that included the survey exception, the court found a question of fact as to whether or not the agent was liable to the insured for failing to adequately inform the insured or, alternately, to bind the intended coverage.[121]

When sued, the agent may raise some of the same defenses that the insurer would raise as to the same claims, if they had been made on the policy.[122]

The title insurer is not obligated to pay the cost of defending its policy-issuing agent if it is sued. An underwriter will sometimes provide a courtesy defense to the agent if both are sued and the claims against the agent are predicated on the policy and not other acts or duties. However, the agency should not assume that it will receive such a courtesy defense, and should promptly retain counsel to defend itself. When the insured sued both the underwriter and agent on identical grounds, and the agent failed to answer because it assumed that the underwriter was providing its defense, the court refused to set aside a default judgment taken against the agent, because the agent's failure to act was based on "nothing more than a presumption," and a mistaken one at that.[123]

... include failure of the agent or broker to provide coverage after agreeing to do so, failure to notify the insured of policy cancellation or the lack of coverage, the duty to place insurance at the best terms for the insured, the duty to place insurance with both an authorized and solvent insurer, the duty to renew or service policies of insurance, the responsibilities of professed expertise, and finally the ameliorative effect of knowledge in the insured." §3.02, pp. 3-4 -5. In *Union Street Tower, LLC v. First American Title Ins. Co.*, 161 A.D.3d 919, 77 N.Y.S.3d 408, 2018 N.Y. Slip Op. 03390 (N.Y.A.D. 2 Dept. 2018), the court dismissed a claim of negligent procurement of insurance brought against a title agent, not on the merits of the claim but based on the applicable statute of limitations. In *DAB Three, LLC v. LandAmerica Financial Group, Inc.*, 192 A.3d 510, 183 Conn.App. 307 (Conn.App. 2018), a customer who contracted with LandAmerica Environmental Insurance Service Agency, Inc. to procure environmental contamination coverage was found to have no privity of contract with the employees of that agency to support claims against them personally, but the court did not dismiss the insurance broker claim against the agency. In *Fansler v. North American Title Ins. Co*., 2019 WL 1281432 (Del.Super.) (unpublished), later decision 2019 WL 2524261 (Del.Super.) (unpublished), the buyers claimed that a title agent was "professionally negligent" in failing to secure a valid access easement for the insured property. The court said the buyers could not sue the title agent for malpractice, but they might have a valid claim for negligent procurement of insurance. See also *Insurance Agents and Brokers: Personal Liability*, by Gregory H. Schillace, <u>For The Defense</u> (December, 2000), p. 68 (published by Defense Research Institute).

[121] *Marshall v. King & Morgenstern*, 272 Ga.App. 515, 613 S.E.2d 7 (Ga.App. 2005).

[122] For example, in *Ziemniak v. Goede & Adamczyk, PLLC*, 2012 WL 5868385 (S.D.Fla.) (unpublished), the court held that the economic loss doctrine prevents an insured from suing a title agent for negligent failure to make policy exceptions for liens against the property, after the lender has foreclosed on the property and made a full credit bid of the loan amount at sale. Likewise, in *C & D Capital, L.L.C. v. Colonial Title Co*., 2013 WL 2278127 (Mich.App.) (unpublished), a claim by a lender against a title agent for having issued policies free of its mortgages on several parcels was barred by the lender's full credit bid at the foreclosure sale of one parcel. The court did not reach several other valid arguments about why the lawsuit should be dismissed. See further discussion of the full credit bid rule as applied to the title insurance policy at §3.2.4. In *Fansler v. North American Title Ins. Co*., 2019 WL 1281432 (Del.Super.) (unpublished), later decision 2019 WL 2524261 (Del.Super.) (unpublished), the buyers' claim against a title agent that it was "professionally negligent" in failing to secure a valid access easement for the insured property was not barred by the three-year statute of limitations, because the agent "represented" that the property had access, extending the time to sue until the buyer discovered the problem.

[123] *Safetitle, Inc. v. Fidelity Nat'l Title Ins. Co.*, 701 So.2d 565, 22 Fla.L. Weekly D2046 (Fla.App. 5 Dist. 1997),

17.8 Agent Liability To Insurer

The liability of a policy-issuing agent to the insurer for risks undertaken in the policy is described in the agency contract. Thus, the essential first step in analyzing what portion, if any, of a loss paid by the insurer under a policy is to be borne or reimbursed by the issuing agent is to review the terms of the agency agreement.

17.8.1 Agency Contracts

The agency contract establishes various limits to the agent's actual authority: its territory (most agents being limited to one or several counties or parishes), the maximum policy amount the agent may issue without written approval, any right given to the agent to use the insurer's name, and the extra-hazardous risks for which the agent must obtain approval before giving coverage.[124] This book's analysis of agency contracts is limited to subjects relating to claim payments.

When there is more than one agency contract in force between the insurer and the agent, the court must determine which contract is the one that applies to the dispute before the court.[125]

17.8.2 Title Losses Payable By Agent

The agency contract makes the title agent liable to the insurer for various acts or omissions. Such loss sharing provisions have been shaped by the availability of errors and omissions coverage. An agency contract typically requires the agent to maintain errors and omissions insurance under a policy having a certain minimum dollar amount.

When errors and omissions claims rose dramatically in the 1980s, premiums took a similar hike and many carriers left the market altogether. During that time, a number of title agencies were unable to pay the premiums or were rejected for coverage. Many agency contracts were rewritten during that time to permit agents to drop errors and omissions coverage. In exchange, the agent typically became liable for a certain portion of title losses. Since that time, it has become commonplace for a title agency contract to require the agent to share in a policy loss.

Errors and omissions insurance became more available and affordable again in the 1990s, and some would attribute much of that stability to the formation of Title Insurance Assurance Company (TIAC) in 1988.[126] Many agency contracts were modified again to require the agent to

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reh.den. 699 So.2d 343, 22 Fla.L. Weekly D2272 (Fla.App. 5 Dist. 1997).

[124] In *Stewart Title Guar. Co. v. Stewart Title Latin America, Inc*., 2017 WL 1078759 (S.D.Tex.) (unpublished), the court held that a title insurer had good cause to cancel its agent, and that act revoked the agent's right to use the underwriter's name.

[125] In *First American Title Ins. Co. v. Bowles Rice, LLP*, 2017 WL 6329953 (N.D.W.Va.) (unpublished), later decision 2018 WL 3763001 (N.D.W.V. 2018) (unpublished), two different offices of the same law firm signed contracts with the insurer in different years. The loss provisions in the two contracts were different. Both law firm offices had some part in the issuance of the policy at issue. The court held that there was a question of fact as to which contract was applicable, precluding entry of summary judgment.

[126] The history of TIAC's formation, under the auspices of the American Land Title Association, is discussed at http://www.alta.org/tiac/.

carry a specified amount of errors and omissions insurance. In many cases, the loss provisions of those contracts were again amended. Some of the agency contracts written during the E & O crisis may still be in force. Other agency contracts contain loss provisions that were introduced or modified during that time. See §17.10 below regarding errors and omissions insurance.

At present, agency contracts reflect a wide range of positions on the agent's allocable share of losses paid on policies issued by the company. The insurer typically is fully responsible for "true" title risks such as forgery, except when the agent permitted the forgery to occur.[127] Some contracts hold agents responsible only for their intentional bad acts or intentional disobedience of written underwriting standards. Also, almost all agency contracts state that the agent is responsible for losses caused by the agent's acceptance of an extra-hazardous risk without the prior written authority of the insurer, with some contracts listing the subjects that are deemed extra-hazardous and others stating that those risks are as identified in the insurer's written underwriting manual, standards or bulletins.[128] Certain other contracts make the agent liable for intentional acts, extra-hazardous risks and gross negligence.[129] A greater number of contracts make the agent liable for all losses caused by

[127] The insurer had the right to pursue an agent for a forgery loss when the agency's employee acted as notary and accepted the signature from the imposter. *Safeco Title Ins. Co. v. Gannon*, 774 P.2d 30 (Wash.App. 1989). In *Fidelity Nat'l Title Ins. Co. v. Assurance Abstract Corp*., ___ F.Supp.3d ___, 2019 WL 1597072 (E.D.Pa. 2019) (permanent citation not yet available), the agent failed to detect the impersonation and forgery. The court held that the agent had no standing to bring a claim against the people who signed the purchase contract as buyers and then assigned the contract to the insured, in its attempt to recoup the loss.

[128] In *Fidelity Nat'l Title Ins. Co. v. Pitkin County Title, Inc*., 761 Fed.Appx. 802, 2019 WL 315328 (10th Cir. (Colo.) 2019) (unpublished), the agency contract said that the agent "shall not, without the prior written approval of [Fidelity's] corporate underwriting department ..., [c]ommit [Fidelity] to insure any Extra Hazardous Risk as defined herein." The contract said that an Extra Hazardous Risk was "all risks which result in a liability not normally assumed by" the insurer. The agent removed the survey-related exceptions without a survey. Fidelity submitted an affidavit that said that the removal of the standard exceptions "exposed Fidelity to greater risk, including claims for off-record matters like easements and encroachments." The court said this was adequate proof that the agent had violated its written instructions. The contract made the agent liable for the first $5,000 of most losses, or the full loss if the cause of the claim was Pitkin's "negligent, willful, or reckless conduct" or its failure "to comply with the terms and conditions of ... the manuals, underwriting bulletins and/or instructions" issued by Fidelity. The court affirmed the judgment against the agent for the full loss, plus attorneys' fees. However, it did so based on the term negligent act rather than the disobedience of written instruction provision.

[129] The issue in *First American Title Ins. Co. v. Lipmann*, 67 Mass.App.Ct. 1102, 851 N.E.2d 1133 (Table), 2006 WL 2138912 (Mass.App.) (unpublished), was what constitutes gross negligence in the context of a title agency contract. In that case, an attorney agent assumed incorrectly that a federal tax lien located in the title search did not attach to the property. The court had a sympathetic view of the agent, calling his decision to ignore the lien "clearly imprudent" but not grossly negligent. Therefore, the underwriter was precluded from recouping its loss against the agent, under the gross negligence standard of the agency contract. In *Fidelity Nat'l Title Ins. Co. of New York v. Crowley*, 88 Mass.App.Ct. 1101, 35 N.E.3d 447 (Table), 2015 WL 4887598 (Mass.App.) (unpublished), the court held that an agency contract in which the word "gross" was hand-typed above the word "negligence" limited the agent's liability to gross negligence, even as to those duties that were described by the agreement as breach of instructions or simple negligence. Also, the fact that a title agent was also an attorney does not convert the claim against him under the agency contract to a legal malpractice claim, or invoke the statute of limitations for that kind of claim. In *First American Title Ins. Co. v. Bowles Rice, LLP*, 2017 WL 6329953 (N.D.W.Va.) (unpublished), later decision 2018 WL 3763001 (N.D.W.V. 2018) (unpublished), there were *two* contracts between the law firm agent and the insurer, one with a liability cap of $1,000

search and examination errors, whether flagrant or merely mistaken.[130] Some contracts go even further, making the agent liable for all policy losses, even those that are not caused by an error or violation of underwriting standards. Often, however, such contracts limit the agent's liability by setting dollar amount caps based on different categories of losses.[131]

Because an agent is a customer to the insurer, most companies strongly encourage management participation in any decision to seek agent contribution or indemnification for a loss. The insurer's claims person must investigate the claim sufficiently to determine the exact source or

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with a carve-out for extra-hazardous risks and the other with no such liability cap. The court suggested that the liability cap might be enforceable, if that contract applied, even though the agent failed to disclose the enormous mechanic lien risk and broken priority when it sought approval to issue the $775 million loan policy. The court refused to find as a matter of law that the broken priority was an extra-hazardous risk.

[130] A title agency contract can make the agent liable for a blend of both contract duties and negligence. The decision in *Stewart Title Guar. Co. v. Lewis*, 2016 WL 6495416 (D.D.C.) (unpublished) offers one of the better analyses of how negligent acts can be classified as breach of the agency contract. In *Stewart Title Guar. Co. v. Closure Title & Settlement Co., LLC*, 2019 WL 97045, Case No. 3:18-cv-58 (W.D. Va.) (unpublished), the court held that a title insurance company stated a claim against its policy agent for breach of the agency contract due to its insurance of two deeds of trust that named the wrong party as grantor, which cost the insured and insurer money.

[131] For many years, the sum of $5,000 was a common figure used as the agent's share of the claim loss. See *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224 (9th Cir. 1988), for an example of a dispute involving a "deductible" form of contract. In *Stewart Title Guar. Co. v. Southern Land Title, Inc.*, 2009 WL 5206636 (S.D.Ala.) (unpublished), one paragraph of the agency contract set a liability cap for simple negligence. Another paragraph made the agent fully liable for claims caused by intentional acts, but also contained a reference to "negligence." The court struck negligence from the second paragraph, limiting the agent's liability for a large missed mortgage to the $500 cap. In *Fidelity Nat'l Title Ins. Co. v. Home Equity Title Services, Inc*., 2016 IL App (1st) 141098-U, 2016 WL 3249097 (Ill.App. 1 Dist.) (unpublished), the contract contained a provision stating that the agent was responsible for "the first $10,000" of any loss, subject to the terms of a second provision. That other provision was an indemnity of the insurer for all losses and attorneys' fees caused by an error or omission by the agent. The court said the two provisions did not conflict but were complementary. It found the agent liable for the entire $60,000 loss caused by its failure to detect and pay off a prior mortgage loan in the closing of what was declared to be a refinance loan. In *First American Title Ins. Co. v. Bowles Rice, LLP*, 2017 WL 6329953 (N.D.W.Va.) (unpublished), later decision 2018 WL 3763001 (N.D.W.V. 2018) (unpublished), there were *two* contracts between the law firm agent and the insurer, one with a liability cap of $1,000 (with carve-outs) and the other with no such liability cap. The court suggested that the liability cap might be enforceable, if that contract applied, even though the agent failed to disclose the enormous mechanic lien risk and broken priority when it sought approval to issue the $775 million loan policy. In *Fidelity Nat'l Title Ins. Co. v. Pitkin County Title, Inc*., 761 Fed.Appx. 802, 2019 WL 315328 (10th Cir. (Colo.) 2019) (unpublished), the agency contract said that the agent "shall not, without the prior written approval of [Fidelity's] corporate underwriting department ..., [c]ommit [Fidelity] to insure any Extra Hazardous Risk as defined herein." The contract said that an Extra Hazardous Risk was "all risks which result in a liability not normally assumed by" the insurer. The agent removed the survey-related exceptions without a survey. Fidelity submitted an affidavit that said that the removal of the standard exceptions "exposed Fidelity to greater risk, including claims for off-record matters like easements and encroachments." The court said this was adequate proof that the agent had violated its written instructions. The contract made the agent liable for the first $5,000 of most losses, or the full loss if the cause of the claim was Pitkin's "negligent, willful, or reckless conduct" or its failure "to comply with the terms and conditions of ... the manuals, underwriting bulletins and/or instructions" issued by Fidelity. The court affirmed the judgment against the agent for the full loss, plus attorneys' fees, and rejected the agent's arguments suggesting that its loss was capped at the deductible portion. However, the court based its decision on a finding of negligence rather than that the agent disobeyed written instructions.

sources of the claimed loss, so as to give competent advice to the insurer regarding the agent's duty to contribute.

Many losses stem from errors in searching or examining of title. The agent's liability to the insurer for such an error will most often depend on the terms of the agency contract and the insurer's underwriting standards.[132] Some errors are so essential to the conduct of a proper title search or examination that the insurer is not required to prove that it gave a written standard or directive on the subject.[133] If the underwriter has not given specific underwriting standards on a subject, whether by a national manual or state bulletins or manuals, the agent's duties may be measured by the standards set by, or the custom and practice of, other insurers or examiners in that state.[134] An insurer or agent will sometimes present expert testimony to establish local industry standards for the searching or examination of title.[135] However, some errors are so obvious or blatant that no expert testimony is

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[132] *Chicago Title Ins. Co. v. Runkel Abst. & Title Co*., 610 F.Supp.2d 973 (W.D.Wis. 2009), clarified by 654 F.Supp.2d 926 (W.D.Wis. 2009), later decision 2009 WL 3415816 (W.D.Wis.) (unpublished) (agent liable for missed use restrictions); *Stewart Title Guar. Co. v. Residential Title Services, Inc*., 607 F.Supp.2d 959 (E.D. Wis. 2009) (agent liable for failure to search gap in which mortgage was recorded); *Stewart Title Ins. Co. v. Equitable Land Service, Inc.*, 616 N.Y.S.2d 650 (N.Y.A.D. 2 Dept. 1994) (agent liable to insurer for accepting release of judgment which did not contain a legal description); *Fidelity Nat'l Title Ins. Co. v. First New York Title & Abst. Ltd.*, 269 A.D.2d 560, 707 N.Y.S.2d 112 (N.Y.A.D. 2 Dept. 2000) (agent liable to underwriter for diminution paid to insured lender due to missed mortgage); *Fidelity Nat'l Title Ins. Co. v. Pitkin County Title, Inc*., 761 Fed.Appx. 802, 2019 WL 315328 (10th Cir. (Colo.) 2019) (unpublished) (agent liable for entire loss caused by its violation of written underwriting instructions, because it gave survey coverage without a survey).

[133] In *Stewart Title Guar. Co. v. Lewis*, 2016 WL 6495416 (D.D.C.) (unpublished), the court found that the title agent was not entitled to dismissal of the insurer's lawsuit for breach of contract, on the theory that the agency contract did not contain a list of negligent acts. The court held that the agent's loss of a deed of trust that it had been instructed to record was patently an error that the insurer did not need to spell out in writing. The decision offers a good analysis of how negligent acts can be classified as breach of the agency contract.

[134] In *Sheils Title Company, Inc. v. Commonwealth Land Title Ins. Co.*, 184 F.3d 10 (1st Cir. (Puerto Rico) 1999), a lender's failure to pay off mortgages was not detected by the agent because it only spot-checked for discharges. The loan fraud that went undetected cost the insurer $1.8 million. The agent testified that " [i]t was impossible to check them all," and that his staff might check one in five mortgages. At trial, the "expert" on local custom was a former employee of the agent who now worked for a competitor. He also made only sample searches for discharges. The jury found the agent not liable under the contract. The lawsuit began with the agent suing the underwriter for capricious termination. In *Fidelity Nat'l Title Ins. Co. v. Pitkin County Title, Inc*., 761 Fed.Appx. 802, 2019 WL 315328 (10th Cir. (Colo.) 2019) (unpublished), the agency contract said that the agent "shall not, without the prior written approval of [Fidelity's] corporate underwriting department ..., [c]ommit [Fidelity] to insure any Extra Hazardous Risk as defined herein." The contract said that an Extra Hazardous Risk was "all risks which result in a liability not normally assumed by" the insurer. The agent removed the survey-related exceptions without a survey. Fidelity submitted an affidavit that said that the removal of the standard exceptions "exposed Fidelity to greater risk, including claims for off-record matters like easements and encroachments." The court said this was adequate proof that the agent had violated its written instructions.

[135] However, see *Old Republic Nat'l Title Ins. Co. v. Realty Title Co.*, 1999 MT 69, 978 P.2d 956 (Mont. 1999), which held that the underwriter was not obligated to offer expert testimony as if it were proving a case of abstractor negligence, because the "due diligence" standard of care was set by the agency contract. The underwriter proved that the agent knew of an unrecorded deed, recorded survey and its own prior title file evidencing the conflicting claim of title. The court held that, "had Realty Title exercised due diligence, it would not have issued conflicting title insurance policies to the

required to establish liability.[136] The fact that an agent may breach an agency contract by a negligent act does not render the negligence standard unenforceable under the economic loss doctrine.[137]

Most agency agreements make the agent liable to the insurer for the attorneys' fees and expenses it incurs due to the agent's error in the searching or examination of title, in addition to the loss amount.[138] However, when the failure to discover the title encumbrance was not the result of an

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same disputed 7.78-acre tract of land and, therefore, Old Republic would not have suffered a loss."

[136] *Stewart Title Guar. Co. v. Kelley*, 89 Mass.App.Ct. 1121, 49 N.E.3d 697 (Table), 2016 WL 1741537 (Mass.App. 2016) (unpublished) (attorney title agent's errors in title examination and failure to close equity loan account were so obvious and blatant that title insurer proved agent's liability for losses without expert testimony).

[137] In *Fidelity Nat'l Title Ins. Co. v. Pitkin County Title, Inc*., 761 Fed.Appx. 802, 2019 WL 315328 (10th Cir. (Colo.) 2019) (unpublished), the agency contract made the agent fully liable for a loss both when the loss was caused by the "negligent, willful, or reckless conduct" and when the loss was due to the agent's failure "to comply with the terms and conditions of ... the manuals, underwriting bulletins and/or instructions" issued by the insurer. The court affirmed the judgment against the agent for the full loss, plus attorneys' fees, based on a finding that the agent was negligent. It rejected the agent's argument that the suit was in contract, and any claim based on negligent conduct was barred under the economic loss doctrine. The court rested its ruling on the statement in *A Good Time Rental, LLC v. First Am. Title Agency, Inc*., 259 P.3d 534, 537 (Colo. App. 2011), that "sophisticated parties can build the anticipated cost of a breach of their respective duties into their bargain," and that a contract may measure conduct by referring to negligence.

[138] *Chicago Title Ins. Co. v. Runkel Abst. & Title Co*., 610 F.Supp.2d 973 (W.D.Wis. 2009), clarified by 654 F.Supp.2d 926 (W.D.Wis. 2009), later decision 2009 WL 3415816 (W.D.Wis.) (unpublished) (agent liable for missed use restrictions); *Stewart Title Guar. Co. v. Residential Title Services, Inc*., 607 F.Supp.2d 959 (E.D. Wis. 2009) (agent liable for failure to search gap in which mortgage was recorded); *Stewart Title Ins. Co. v. Equitable Land Service, Inc.*, 616 N.Y.S.2d 650 (N.Y.A.D. 2 Dept. 1994) (agent liable to insurer for accepting release of judgment which did not contain a legal description); *Fidelity Nat'l Title Ins. Co. v. First New York Title & Abst. Ltd.*, 269 A.D.2d 560, 707 N.Y.S.2d 112 (N.Y.A.D. 2 Dept. 2000) (agent liable to underwriter for diminution paid to insured lender due to missed mortgage); *Trumbull Ins. Co. v. Braunstein & Todisco, LLC*, 2004 WL 1616441 (Conn.Super.) (unpublished) (agent liable to underwriter for loss caused by lack of exception for unrecorded contract for sale of property to party other than insured); *Fidelity Nat'l Title Ins. Co. v. Pitkin County Title, Inc*., 761 Fed.Appx. 802, 2019 WL 315328 (10th Cir. (Colo.) 2019) (unpublished) (agent liable for entire loss caused by removal of survey exceptions without a survey, including defense costs incurred in defending insured in boundary dispute action). In *Fidelity Nat'l Title Ins. Co. of N.Y. v. Southern Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 512 S.E.2d 553 (1999), an agent was found liable for a loss payment to the insured, but not the cost of defending the insured in a lawsuit, based on the language in the agent's contract. In one paragraph of the contract, loss was defined as including "the...cost of defending the claim resulting in the loss." However, the same definition did not appear in the paragraph which applied. The court held that, absent the specific definition which included defense costs, those costs were not included, because they were not "a direct and necessary consequence" of the agent's negligence. In *Lawyers Title Ins. Corp. v. Rex Title Corp.*, 282 F.3d 292 (4th Cir. (Md.) 2002), a title agent was found liable to the underwriter in negligence because it failed to obtain a lien release before omitting the lien from the policy, causing the underwriter to suffer a significant loss. The federal appeals court affirmed judgment against the agent, based on Maryland law regarding insurance agents that says "an insurance agent must exercise reasonable care and skill in performing his duties [and] ... may become liable to those, including his principal, who are caused a loss by his failure to use standard care." In *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co., Inc.*, 968 S.W.2d 727 (Mo.App. S.D. 1998), an agent was responsible to the insurer for having missed two easements, although the measure of damages against the agent was found not necessarily to be equal to the amount paid by the insurer to settle with the insured. In *Fidelity Nat'l Title Ins. Co. v. Archer Land Title, LLC*, 2007 WL 3231847 (M.D.Tenn.) (unpublished), a title agent was found liable to its underwriter for the cost of settling three cases in bankruptcy in which the insured deeds of trust were attacked by the trustees for defective acknowledgments and tardy

error in searching or examining, the agent's liability will depend on the terms of the agency contract.[139] The contract statute of limitations is typically the applicable law setting the time limit for a suit by the insurer against the agent for breach of the agency agreement, although agency contracts often mix terms by referring to errors, negligence and gross negligence.[140] However, as to an attorney agent or approved attorney, the legal malpractice statute of limitations is controlling in a number of states, as is discussed in §17.3.

The title agent is also liable to the insurer when its conduct other than in the searching and examination of title causes a policy or other loss to the insurer. The agent's failure to perform tasks such as the prompt and accurate recording of insured instruments will also cause the agent to be

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recording. In *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 936 A.2d 343 (Md. 2007), the agent did not pay off a loan from closing because the borrower gave the wrong loan number. The title insurer paid off the loan and recovered from the agent-closer. The agent was found to be required to prove that it was really liable under the agency contract before it could collect from the borrower. In *Stewart Title Guar. Co. v. Southern Land Title, Inc.*, 2009 WL 5206636 (S.D.Ala.) (unpublished), one paragraph of the agency contract set a liability cap for simple negligence. Another paragraph made the agent fully liable for claims caused by intentional acts, but also contained a reference to "negligence." The court struck negligence from the second paragraph, limiting the agent's liability for a large missed mortgage to the $500 cap. In *Doss & Associates v. First American Title Ins. Co.*, 325 Ga.App. 448, 754 S.E.2d 85 (Ga.App. 2013), the court held that the title agent was liable to First American for having failed to make exception for a mortgage of which the agent was aware as of closing. It rejected the attorney-agent's claim that suit against the agent was premature because the insurer had not yet paid the loss. In *Commonwealth Land Title Ins. Co. v. Miller*, 2014 WL 929461 (Conn.Super. 2014) (unpublished), when a title insurer cleared title through the insured lender's foreclosure action and the title clearance attorneys' fees were tacked onto the foreclosure judgment but not collected from the borrower, the insurer was not barred from collecting those fees from the attorney-title agents due to their search negligence.

[139] *Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333, 808 A.2d 44 (N.H. 2002) (approved attorney not liable to underwriter for searching error of abstractor he hired because contract did not require approved attorney to perform search himself and did not create vicarious liability for acts of searcher). In *Stewart Title Guar. Co. v. R.E. Title Services LLC*, 2009 WI App 95, 769 N.W.2d 878 (Table), 2009 WL 1186810 (Wis.App.) (unpublished), an agent was found not liable to its underwriter for a mortgage posted by the register to the wrong parcel in the tract index because it contained a completely wrong legal description, although a search of the grantor-grantee index would have disclosed the lien.

[140] See *Ticor Title Ins. Co. v. Smith*, 794 S.W.2d 734 (Tenn.App. 1990). See also, *First American Title Ins. Co. v. Resource Real Estate Services, LLC*, 2012 WL 3245971 (N.D.Ill.) (unpublished) (Illinois' two-year statute of limitations for suing agent for mistake begins on day agent refuses to reimburse insurer, not day mistake is made); *Old Republic Nat'l Title Ins. Co. v. Panella*, 734 S.E.2d 523, 12 FCDR 3841 (Ga.App. 2012) (insurer's lawsuit against agent for policy claims not barred by Georgia's extended statute of limitations for breach of indemnity contract); *Fidelity Nat'l Title Ins. Co. v. B & G Abstractors, Inc.*, 2015 WL 6472216 (W.D.Pa.) (unpublished) (lawsuit by insurer against agent for giving mechanic's lien coverage despite broken priority was an action for breach of contract, though contract and complaint referred to negligence; thus, the longer statute of limitations for breach of contract applied, not the tort limitations period). In *Fidelity Nat'l Title Ins. Co. of New York v. Crowley*, 88 Mass.App.Ct. 1101, 35 N.E.3d 447 (Table), 2015 WL 4887598 (Mass.App.) (unpublished), the court held that the fact that a title agent was also an attorney did not convert the claim against him under the agency contract to a legal malpractice claim, or invoke the statute of limitations for that kind of claim. In *Stewart Title Guar. Co. v. ISGN Fulfillment Services, Inc.*, 2017 WL 3587176 (D.Conn.) (unpublished), the Connecticut six-year statute of limitations for an insurer to sue its agent for insuring a bad mortgage was said to begin running on the policy date, not the date the insurer discovered that title was defective, and a tolling agreement had no effect because it was signed after the statute had already run.

liable to the underwriter for losses it incurs as a result.[141] The agent is also liable to the insurer if its escrow or closing acts, such as in the handling of money and loan payoffs, cause a loss under the policy.[142]

Most contracts permit a title agent to buy a search from someone else, and establish a standard of adequacy for such third-party searches. If a loss is paid because the search falls below that standard, the agent is liable to the underwriter. Under some contracts, the agent is liable for all such errors. The searcher may also be directly liable to the underwriter.[143] See §15.13.3 on that topic.

An agent breaches the contract when it acts beyond the scope of its authority as set in the contract.[144] The agency contract typically states that the agent fully indemnifies the insurer for loss

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[141] In *Stewart Title Guar. Co. v. Title Connection, Inc.*, 2005 WL 1279180 (S.D.Miss. 2005) (unpublished), the agent was found liable to the underwriter when a deed of trust was set aside because it was recorded after the borrowers filed for bankruptcy and the underwriter was obligated to pay off the lender on a closing protection letter issued on behalf of the agent. In *Stewart Title Guar. Co. v. Kelley*, 89 Mass.App.Ct. 1121, 49 N.E.3d 697 (Table), 2016 WL 1741537 (Mass.App. 2016) (unpublished), the court found the attorney title agent liable for errors in the title examination that caused losses to the insurer, and ruled that the agent did not escape liability based on the fact that the title search error was made by a competent subcontractor searcher. The court noted that *Real Estate Bar Assn. for Mass ., Inc. v. National Real Estate Information Services*, 459 Mass. 512 (2011) held that, while a non-lawyer can and often does perform a title search in that state, only an attorney may make a "determination of marketable title." Thus, it said, the attorney agent could not delegate his professional liability to the non-attorney examiner.

[142] In *Fidelity Nat'l Title Co. v. First American Title Ins. Co.*, 2013 COA 80, 310 P.3d 272 (Colo.App. 2013), a title agent was liable to the underwriter for its failure to pay off a loan through closing, which caused policy liability, when the agency contract stated that the agent was fully responsible for "loss or damage … arising from any error, fault, or negligence by Agent in handling funds in connection with any escrow… ." In *Conestoga Title Ins. Co. v. Patchell (In re Patchell)*, 569 B.R. 635 (Bkcy.Md. 2017), the court said that the owner of a title agent was entitled to have her debt to her underwriter discharged in bankruptcy, even though it emanated from a lien on her personal residence, because the title agent believed her lender had agreed to release its lien.

[143] *Chicago Title Ins. Co. v. Dewrell Sacks, LLP*, 2009 WL 4348684 (M.D.Tenn.) (unpublished) (agent liable to underwriter when abstractor hired by agent missed mortgage); *Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333, 808 A.2d 44 (N.H. 2002) (approved attorney *not* liable to underwriter for searching error of abstractor he hired because contract did not require approved attorney to perform search himself and did not create vicarious liability for acts of searcher). In *First American Title Ins. Co. of New York v. Capri Title Services, Ltd.*, 19 A.D.3d 1062, 796 N.Y.S.2d 295, 2005 N.Y. Slip Op. 04777 (N.Y.A.D. 4 Dept. 2005), a New York title agent that bought incomplete "title notes" from another company was found not to have conducted an adequate title examination, and was liable to the underwriter for the loss caused by a missed lis pendens. The agency contract obligated the agent to either conduct its own search of the records or buy "an examination of an abstract of title prepared and certified by Agent or by another recognized professional abstractor whose work is accepted by prudent local title examiners, and showing all relevant public records searched…" The agent argued it had "obtained a title search from a recognized professional abstractor covering the period during which the Lis Pendens was filed... upon which it relied in issuing title," referring to the "title notes." The court ruled that the title notes were not an adequate abstract of title: "'Title notes' are not the legal equivalent of an 'abstract of title.' Capri's allegations that 'title notes' are 'merely an untyped abstract' are not compelling."

[144] In *Breisch v. Safeco Title Ins. Co.*, 1990 LEXIS 17036 (U.S.Dist. 1990) (unpublished decision), the agent insured over liens without verifying their payoff, agreed to act as attorney-in-fact for the seller, failed to obtain approval to issue a policy over the agent's limit, and failed to determine that a partner had authority to sign documents. These actions all violated the terms of the contract or written company standards.

suffered by the insurer resulting from the unauthorized act of the agent. Thus, when the agent has gone beyond the limits of its authority, it may be fully liable for the insurer's loss even if the agent did not make an error in the search and exam. Unauthorized acts include the issuance of a policy outside the agent's territory.[145] Also included is use of "starter" title evidence of a lesser quality than the contract requires, such as a guarantee rather than a policy or commitment, contrary to the insurer's bulletin.[146] Similarly, when the contract required that the approved attorney tell the insurer of lawsuits against the property, an action lay against an approved attorney handling construction disbursing who failed to advise the insurer that construction liens had been filed on the project, and that a supplier had threatened to file a significant lien.[147] An agent's intentional act in violation of a fiduciary duty to the insurer, which causes a loss or expense to the insurer, will render its debt to the insurer nondischargeable in bankruptcy.[148]

Most agency agreements give the insurer the sole discretion to settle claims under the policy. The agent is required to indemnify the underwriter to the extent dictated by the agency contract.[149]

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[145] *Ford v. Commonwealth Land Title Ins. Co.*, 691 F.Supp. 1484 (D.D.C. 1988); *Stinespring v. Fidelity Nat'l Financial, Inc.*, 2013 WL 1626203 (N.D.Ill.) (unpublished).

[146] *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224 (9th Cir. 1988); *Safeco Title Ins. Co. v. Attorneys' Title Services, Inc.*, 460 So.2d 518 (Fla.App. 1984).

[147] *Pioneer Nat'l Title Ins. Co. v. Cranwell*, 369 S.E.2d 678 (Va. 1988).

[148] *In re Marderosian*, 1995 Bkcy. LEXIS 1402 (D.R.I.) (agent's intentional omission of mortgage on series of policies in exchange for steep "closing" fees caused debt to insurer to be nondischargeable in bankruptcy); *In re McCarthy*, 473 B.R. 485 (Bkcy.D.Mass. 2012) (false certification by attorney-agent that he had malpractice insurance in place not enough to convert search negligence to intentional conduct causing debt to be nondischargeable); *In re Presley*, 490 B.R. 633 (Bkcy.N.D.Ga. 2013) (theft of escrowed money). See §5.11 for a complete discussion of recovery against debtors in bankruptcy and avoidance of the discharge of such debts.

[149] In *Fidelity Nat'l Title Ins. Co. v. First New York Title & Abst. Ltd.*, 269 A.D.2d 560, 707 N.Y.S.2d 112 (N.Y.A.D. 2 Dept. 2000), an agent was liable to its underwriter for the diminution paid the insured lender because the agent missed a mortgage. The agent objected to the amount of the settlement made by the insurer. The court said the agent's role was to indemnify the underwriter after it makes a good faith claim payment: "Contrary to the defendant's contention, it was obligated under the terms of the Agency Agreement to indemnify the plaintiff for the amount the plaintiff paid to settle the claim asserted against it by the Vollerthuns. 'When an indemnitor has notice of the claim against it, the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make' … . In the instant case, there was ample evidence in the record that the defendant received such notice, that the plaintiff made a reasonable settlement in good faith, and that the plaintiff could have been held liable if it had proceeded to trial … Therefore, the defendant was obligated to indemnify the plaintiff for the settlement amount." In *Chemical Bank of N.J. v. Bailey*, 687 A.2d 316 (N.J.Super.A.D. 1997), a contract which made the agent responsible for "the entire amount" of a loss was objected to on the grounds that it was overreaching. This argument was rejected, and the contract found to be unambiguous and enforceable. Similarly, in *Fidelity Nat'l Title Ins. Co. of N.Y. v. National Title Resources Corp.*, 261 F.3d 758 (8th Cir. Minn. 2001), the agent argued that it had no duty to pay Fidelity back on claims "without a tender of defense and without allowing National to participate in the claims resolution process." The court found that the underwriter had the sole right to administer claims, and any lack of participation did not negate the agent's duty to reimburse Fidelity: "The agency agreement specifically provided that National would be liable for all losses attributable to National's negligence and that Fidelity would have the authority to defend, settle, or dispose of any claims. Although not required to do so by the agency agreement, Fidelity did in fact offer a tender of defense to National by letter dated

One court, construing a typical contract, said this:

> This clause [giving the insurer unilateral settlement authority] is unambiguous. It provides Safeco with absolute discretion to settle disputes with policy holders. Under its terms, Charter and Attardi, as issuing agents, are required to indemnify Safeco for the settlement of any claim for which they are responsible.[150]

However, some states impose an extra-contractual duty on the insurer to prove that the settlement of the claim was reasonable, based on the premise that the loss payment provision is an indemnity contract.[151] The agent may not raise as a defense to its own liability that the curative counsel retained by the insurer should have been able to resolve the problem for some lesser expense.[152] See §17.8 for a discussion of a title agent's liability to the insurer for agency malfeasance.

An insurer seeking to recover from its agent for failure to obtain the insurer's approval to assume an insurance risk must prove that the agent was required to obtain the company's consent. Summary judgment was denied an insurer when reasonable people would disagree about whether or

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January 10, 1996. The agency agreement gave Fidelity the sole authority to dispose of claims, and this authority is stated in clear and unequivocal terms and, thus, comports with public policy." The court also affirmed an award of attorney fees against the agent because the contract so provided. Essentially identical rulings on the same two issues were made in *Chicago Title Ins. Co. v. Runkel Abst. & Title Co.*, 610 F.Supp.2d 973 (W.D.Wis. 2009), clarified by 654 F.Supp.2d 926 (W.D.Wis. 2009), later decision 2009 WL 3415816 (W.D.Wis.) (unpublished). Similarly, in *Fidelity Nat'l Title Ins. Co. of N.Y. v. First New York Title & Abst. Ltd.*, 269 A.D.2d 560, 707 N.Y.S.2d 112, 2000 N.Y. Slip Op. 01829 (2001), the agent argued that it should not have to reimburse the underwriter because it gave too little advance notice of its impending payout. The court disagreed: "'When an indemnitor has notice of the claim against it, the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make.'" [citations omitted] In the instant case, there was ample evidence in the record that the defendant received such notice, that the plaintiff made a reasonable settlement in good faith, and that the plaintiff could have been held liable if it had proceeded to trial … Therefore, the defendant was obligated to indemnify the plaintiff for the settlement amount."

[150] *Breisch v. Safeco Title Ins. Co.*, 1990 LEXIS 17036, 1990 WL 209334 (E.D.Pa. 1990) (unpublished).

[151] See *Colonial Title Company, LLC v. Commonwealth Land Title Ins. Co*., 2017 WL 4675535 (Tex.App.-Tyler) (unpublished), which held that Texas law on indemnity contracts imposes a duty on the indemnitee to prove that it made a reasonable and prudent settlement of its policy claim in order to recover that amount from the title agent as indemnitor. The court acknowledged that this duty was contrary to the plain terms of the agency contract, which gave the insurer the sole right to settle on terms that it found to be fair. The court did say that no expert testimony was required to prove the reasonableness of the settlement. Similarly, in *First American Title Ins. Co. v. Bowles Rice, LLP*, 2017 WL 6329953 (N.D.W.Va.) (unpublished), later decision 2018 WL 3763001 (N.D.W.V. 2018) (unpublished), the court accepted the principle that, under West Virginia law, an indemnitee seeking recovery of a claim settlement payment from the indemnitor must prove that the amount of the settlement was reasonable. The court held, however, that the insurer's duty to prove that fact did not support the indemnitor's demand for privileged documents that might *disprove* the settlement's reasonableness.

[152] In *Fidelity Nat'l Title Ins. Co. v. Title One, Inc*., 2016 WL 3971210 (E.D.Mich. 2016) (unpublished), a title agent's failure to get a release or subordination of the existing first mortgage caused the title insurer to pay the insured lender whose lien was wiped out. The agent was not absolved of liability to the insurer on the theory that title curative counsel should have been able to resolve the priority issue but did not.

not an overlap would be apparent to the agent in its review of the public records.[153] In Alabama, which follows the rule that it is the unauthorized practice of law for a non-lawyer to issue an opinion of title, a title agent is not required to look behind the attorney's opinion in issuing the policy. To do so would cause the title agent to engage in the unauthorized practice of law, and the parties may "not create such a duty by contract... ."[154]

As a matter of courtesy, if the insurer might seek contribution or indemnification from the agent, it should promptly put the agent on notice. The insurer may wish to urge the agent to submit the matter to its errors and omissions carrier. See §17.10 for a full discussion of errors and omissions insurance. The insurer should begin to forward all relevant information regarding the claim to the agent and, if the agent has so elected, to its errors and omissions carrier.

The insurer should invite the agent and E & O carrier to contribute any facts which they feel may be pertinent. The agent frequently has information about the transaction, parties, land or dispute which are not reflected in the title file, and which he or she may not think to mention unless prompted. Further, the agent should tell the title insurer early on about any coverage defenses that the agent or its E & O carrier believe to be applicable.[155] The insurer should respond if it does not think such defenses exist.

The insurer must bring suit against the agent within the statute of limitations.[156]

Many insurers require personal guarantees from the principals of a corporate agency, thus making those principals personally liable for the agency's breach of its contract. The underwriter may seek recovery for losses from the guarantors as well as the agency.[157] When a corporate agency

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[153] *First American Title Ins. Co. v. Politano*, 932 F.Supp. 631 (D.Vt. 1996).

[154] *Mississippi Valley Title Ins. Co. v. Hooper*, 707 So.2d 209 (Ala. 1997), citing *Upton v. Mississippi Valley Title Ins. Co.*, 469 So.2d 548 (Ala. 1985) and *Lawyers Title Ins. Corp. v. Vella*, 570 So.2d 578 (Ala. 1990).

[155] In *Stewart Title Guar. Co. v. Closure Title & Settlement Co., LLC*, 2019 WL 97045, Case No. 3:18-cv-58 (W.D. Va.) (unpublished), the court held that a title insurance company stated a claim against its policy agent for breach of the agency contract due to its insurance of two deeds of trust that named the wrong party as grantor, which cost the insured and insurer money. The title agent's primary defense was that the insurer should have denied the claim based on Exclusion 3(a). The court also predicted that the Supreme Court of Virginia would hold that Exclusion 3(a) applies only to intentional or knowing conduct of the insured, not mere negligence, and thus the insurer did not pay the claim as a mere volunteer.

[156] The state's contract statute of limitations normally applies to claims against agents, even if the agent is an attorney. See *Ticor Title Ins. Co. v. Smith*, 794 S.W.2d 734 (Tenn.App. 1990). See also, *First American Title Ins. Co. v. Resource Real Estate Services, LLC*, 2012 WL 3245971 (N.D.Ill.) (unpublished) (Illinois' two-year statute of limitations for suing agent for mistake begins on day agent refuses to reimburse insurer, not day mistake is made); *Old Republic Nat'l Title Ins. Co. v. Panella*, 734 S.E.2d 523, 12 FCDR 3841 (Ga.App. 2012) (insurer's lawsuit against agent for policy claims not barred by Georgia's extended statute of limitations for breach of indemnity contract). In *Kessock v. Conestoga Title Ins. Co.*, 194 A.3d 1046, 2018 PA Super 226 (Pa.Super. 2018), the court held that the statute of limitations for suit against the guarantor of the agency agreement began running on the date on which the court declared that the agent was negligent in its title search.

[157] *Fidelity Nat'l Title Ins. Co. v. Home Equity Title Services, Inc.*, 2016 IL App (1st) 141098-U, 2016 WL 3249097 (Ill.App. 1 Dist.) (unpublished) (guarantor liable to insurer for policy loss; liability was not extinguished by insurer's settlement with insured without guarantor's consent). However, because the signature block on a personal guaranty was

has lost its charter, the contract may be enforced against an officer of the corporation. It is no defense to argue that the terms of the contract were binding only on the agency and not on its officers and shareholders.[158] A title agency may not escape liability to the insurer by merely forming a new company and transferring the assets of the old company to the new one.[159] A title agency also does not avoid liability to the insurer for a loss that it paid the insured if the insured has also obtained a judgment against the agency for the same issue.[160]

The agent may also have a fidelity bond for escrow and funds-handling work. If the claim involves the wrongful taking of money by the agent, the insurer should also immediately notify the surety. Such bonds should be considered to inure to the benefit of the insured and the public as a whole. In a case in which the agent has disappeared or will not cooperate in collecting on the bond, the insurer may pursue the bond directly. This approach was approved when the agent was required by state law to have a fidelity bond.[161]

An arbitration provision in an agency contract is enforceable.[162]

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set up for the president of the title agency to sign in his corporate capacity, he was found not personally liable on the guaranty, in *Fidelity Nat'l Title Ins. Co. v. Law Title Ins. Co., Inc.*, 2005 WL 1126899 (N.D.Ill. 2005) (unpublished). In *Kessock v. Conestoga Title Ins. Co.*, 194 A.3d 1046, 2018 PA Super 226 (Pa.Super. 2018), the court held that the statute of limitations for suit against the guarantor of the agency agreement began running on the date on which the court declared that the agent was negligent in its title search.

[158] *Ford v. Commonwealth Land Title Ins. Co.*, 691 F.Supp. 1484 (D.D.C. 1988).

[159] *Commonwealth Land Title Ins. Co. v. Metro Title Corp.*, 315 Mich.App. 312, 890 N.W.2d 395 (Mich.App. 2016) (when owners of title agency facing liability to its underwriter shut down that company and moved title orders to new company, but did not transfer assets of old company to new, new agency assumed liabilities of old company).

[160] *Fidelity Nat'l Title Ins. Co. v. Home Equity Title Services, Inc*., 2016 IL App (1st) 141098-U, 2016 WL 3249097 (Ill.App. 1 Dist.) (unpublished) (liability to insurer was based on policy loss; judgment in favor of insured was based on closing malfeasance).

[161] *Anchor Equities, Ltd. v. Pacific Coast American*, 737 P.2d 532, 105 N.M. 751 (1987); *First American Title Ins. Co. v. Western Surety Co*., 283 Va. 389, 722 S.E.2d 637 (Va. 2012) (title insurer that paid claim caused by agent's employee's theft of closing funds entitled to collect on agent's statutory surety bond as subrogee).

[162] In *Hawkins v. Fidelity Nat'l Title Ins. Co*., 2016 WL 2866352 (D.S.C. 2016) (unpublished), the court ruled that the Federal Arbitration Act applied to an agency contract between a South Carolina lawyer agent and a title insurer domiciled in Virginia, because that contract involved interstate commerce. The Lawyers Title contract at issue contained this arbitration provision: "Unless prohibited by applicable law or regulation, either [LTIC] or [Hawkins] may demand arbitration pursuant to the Arbitration Rules of the American Arbitration Association." The court found that the agency contract crossed state lines in several ways. The agreement told Hawkins to mail his remittances to Lawyers Title's Louisville, Kentucky office. The claim on which Fidelity sought recoupment had been handled by its Jacksonville, Florida claims center. The insurer wrote its claim payment check on a California bank account, and that account was at a national bank regulated by the federal government. The claim correspondence was carried by the U.S. Postal Service. The court also held that a South Carolina law about professional negligence did not void the arbitration provision. In a separate action involving the same parties, by merger, the South Carolina federal court also ruled that Fidelity National Title was entitled to arbitrate with the agent under its own contract with him, in *Fidelity Nat'l Title Ins. Co. v. Wendell L. Hawkins, PA*, 2016 WL 6962775 (D.S.C. 2016) (unpublished).

17.8.3 Losses Caused By Theft Of Money From Escrow Account or Defalcation

Defalcation is the word most often used in the title industry for the stealing of money, particularly from an escrow account. When an owner or employee of a title agent steals money from the agent's escrow account, the escrow shortage almost invariably but indirectly causes losses on title insurance policies issued by the agent. The shortage can cause sellers' proceeds checks to be left unfunded, mortgage payoffs not made, and even lead to transactions being unwound.[163] In such cases, the agent is liable to the underwriter for those losses.[164] If the defalcator is a principal in the agency, the company sometimes ceases to do business immediately. Sometimes, the perpetrator attempts to cover up the failure to make payoffs to mortgagees by making monthly payments for a time. These schemes normally become unglued when the defalcator is discovered or is left with insufficient cash to make the necessary monthly payments. See §17.2 for a discussion of the fact that escrow and closing acts are outside of the scope of an agency appointment to issue title insurance policies. See §13.5 regarding defalcation by escrowees other than title agents. See §5.7 for a complete discussion of the insurer's rights against bonds maintained by title agents for employee theft and statutory bonds for escrow acts.

As further discussed at §17.2, title insurance agency contracts do not grant authority to the agent to bind the insurer as to escrow matters. However, on occasion, the insurer steps in and solves

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[163] See, for example, *Commonwealth Land Title Ins. Co. v. Gulf Underwriters Ins. Co.*, 1998 WL 283510 (Wash.App. Div. 1) (unpublished), in which an escrow company (not a title agency) failed to pay off mortgages, then folded, leaving unsatisfied mortgage liens to be paid off by the title insurer. In *Howell v. United States*, 164 F.3d 523 (10th Cir. (Utah) 1998), the principal of an agency was being sued by the IRS for back taxes. His defense was that he was prevented from following his "usual practice" of paying his corporate tax debts from the escrow account when his underwriter shut down the agency and took control of all of the accounts. The court agreed with Rogers that he should have been allowed to show at trial that he had "made reasonable efforts to protect the trust fund" [i.e., the money owed for taxes], which efforts "were frustrated by events beyond his control." The court did not explain how the use of other people's money held in escrow to pay one's own tax debts could qualify as "protecting" the money. In *Fidelity Nat'l Title Ins. Co. v. Madison Title and Escrow, Inc.*, 53 Va. Cir. 116, 2000 WL 1210851 (Va.Cir.Ct. 2000), the owners of one agency funneled money to a related agency and also used the escrow account to pay for personal expenses. The underwriter got judgments against the individuals and the agency to which the cash was directed.

[164] See, for example, *Chicago Title Ins. Co. v. Old Dominion Title Services, Inc.*, 2007 WL 4303300 (Minn.App.) (unpublished). In *Old Dominion*, the unusual fact was that an existing title agent had been purchased by another entity, which continued to operate under the underwriter contract for the old agency. The new company was barred from denying liability to the underwriter for its alleged failure to pay off mortgages based on the lack of a contract assignment. In *First American Title Ins. Co. v. Eddings*, 2014 WL 106691 (M.D.Ga. 2014) (unpublished); subsequent decision, 2014 WL 869553 (M.D.Ga. 2014) (unpublished), a title agent that stole closing money from his lawyer trust account was liable to the insurer for the losses caused by the theft, as was his wife. The court said that the bank that handled the escrow account might also be liable, because it discovered that the agent was covering his negative balances with false documents. In *First American Title Ins. Co. v. Sadek*, 2017 WL 6663899 (D.N.J. 2017) (unpublished), when a person owned both a mortgage banker and a title agency and closed a refinance loan to himself but failed to pay off the old loans or record the new mortgage, the court affirmed a judgment in favor of the title insurer based on conversion. In *Southern Title Ins. Corp. v. Syed Rizwan Mohiuddin (In re Mohiuddin)*, ___ B.R. ___, 2017 WL 2123870 (Bkcy.S.D.Tex.-Houston 2017) (permanent citation not yet available), the insurer received a judgment against the treasurer of a title agency who knew of and participated in transactions in which liens were not paid off at closing, and the court declared the $8 million debt non-dischargeable in bankruptcy.

some or all of the problems caused by the defalcation. In most cases, this is a reflection of the fact that the insurer has liability on its policies for the unpaid mortgages and other liens not excepted in the policies.

A Florida law makes the insurer liable for the "defalcation, conversion, or misappropriation" by "a licensed title insurance agent" of funds held by it in trust.[165] Based on a prior ruling that attorney-agents are not required to be licensed by the insurance department,[166] the Florida Supreme Court determined that an underwriter is not responsible for an attorney-agent's defalcation.[167] Defalcation by attorney-agents is further discussed at §17.3. However, the statute does not impose liability on a title insurer for a title company's theft of escrowed money when no title commitment was issued and the money was not held for use in a closing.[168]

Nebraska also has adopted a statute making a title insurer strictly liable for a shortage in an escrow account maintained by its policy-issuing agent.[169] That law has been held not to allow a title

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[165] Fla.Stat. §627.792. If the agent has more than one underwriter, the loss is borne by the insurer on whose paper the commitment or policy was issued as to the affected transaction. The law applies to trust funds, as defined in § 626.8473(1), which is money received by a title insurance agent "from others to be subsequently disbursed by the title insurance agent in connection with real estate closing transactions involving the issuance of title insurance binders, commitments, policies of title insurance, or guarantees of title."

[166] "The fact that attorney agents have been expressly exempted from the licensure requirement (and hence regulation by the Department of Insurance) evinces a clear legislative intent that title insurers are not to be held liable for attorney agents' thefts under this statute." *State Dep't of Insurance v. Keys Title and Abstract Co., Inc.*, 741 So.2d 599 (Fla.App. 1 Dist. 1999), rev.den.

[167] *Hechtman v. Nations Title Ins. of New York, Inc.*, 840 So.2d 993 (Fla. 2003).

[168] See *Winkler v. Lawyers Title Ins. Corp.*, 41 So.3d 414 (Fla.App. 3 Dist. 2010); and *Cohen v. Chicago Title Ins. Co.*, 53 So.3d 331 (Fla.App. 3 Dist. 2010). *Winkler* said that the liability law does not apply when the title company holds money escrowed under condo reservation agreements for units that were never scheduled for closing and on which no title commitments were issued. *Cohen* said the underwriter was not liable for the title company's theft of escrowed funds when the title company only acted as escrowee and a different company issued the title insurance commitment and policy.

[169] Neb. Rev. Stat. § 44-1993(8), adopted in 1997, states as follows:"(a) A title insurer is liable for the defalcation, conversion, or misappropriation by a title insurance agent appointed by or under written contract with such title insurer of escrow, settlement, closing, or security deposit funds handled by such title insurance agent in contemplation of or in conjunction with the issuance of a title insurance commitment or title insurance policy by such title insurer. However, if no such title insurance commitment or title insurance policy was issued, each title insurer which appointed or maintained a written contract with such title insurance agent at the time of the discovery of the defalcation, conversion, or misappropriation shares in the liability for the defalcation, conversion, or misappropriation in the same proportion that the premium remitted to the title insurer by such title insurance agent during the twelve-month period immediately preceding the date of the discovery of the defalcation, conversion, or misappropriation bears to the total premium remitted to all title insurers by such title insurance agent during the twelve-month period immediately preceding the date of the discovery of the defalcation, conversion, or misappropriation. (b) For purposes of this subsection, title insurance agent includes (i) a person with whom a title insurer maintains a title insurance agency agreement and (ii) an employer or employee of a title insurance agent or of a person with whom a title insurer maintains a title insurance agency agreement."

insurer that has replenished an agent's escrow account from recovering the stolen money from the people who received it from the agent.[170]

Utah also has adopted a statute making a title insurer strictly liable for a shortage in an escrow account maintained by its policy-issuing agent.[171] That statute has been broadly interpreted to cause the title insurer to pay other people's losses that go far beyond theft of money from the escrow account.[172]

In New Jersey, a 1993 court decision adopted the principle that a title insurer is liable for a closing attorney's theft of closing money after the attorney has been engaged to write title insurance in a transaction.[173] However, since that decision, title insurers have developed disclaimers to be signed by clients before title is ordered, which advise them that the attorney is not the agent of the insurer and that the only form of liability the insurer will assume is by the issuance of a closing protection or closing service letter. When an attorney stole money from his clients before title was

[170] In *United General Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (Neb. 2015), the Nebraska Supreme Court held that the people and companies who got the $588,000 stolen from a title agent's escrow account were not required to return that money to the title insurer after it complied with its statutory duty to cover the shortage in the escrow account. The upshot of the court's reasoning was that, when the legislature made the insurer "statutorily liable" for the theft, it also barred the insurer from the right to recover from others, even though the people who got the money "received a benefit from United General's payment of the shortage in the escrow account and ... may have been unjustly enriched." The enriched recipients included the children of the embezzling title agent.

[171] Utah Code section 31A-23a-407 (2003) says: "[a] title company, represented by one or more title insurance producers, is directly and primarily liable to others dealing with the title insurance producers for the receipt and disbursement of funds deposited in escrows with the title insurance producers in all those transactions where a commitment or binder for or policy or contract of title insurance of that title insurance company has been ordered, or a preliminary report of the title insurance company has been issued or distributed. This liability does not modify, mitigate, impair, or affect the contractual obligations between the title insurance producers and the title insurance company."

[172] In *Orlando Millenia, LC v. United Title Services of Utah, Inc.*, 355 P.3d 965, 2015 UT 55 (Utah 2015), the statute was construed by the state supreme court to make the insurer liable for the agent's simple error in the delivery of closing money, without any theft or misconduct by the agent. The court also held that the title insurer was required by the law to make a payment to a party who was not a principal to the escrow. The court said that Orlando, the party who wanted to be paid, was an "other[] dealing with" the title agent, who had a "dealing" with the title agent "for the receipt and disbursement of funds deposited in escrows," and that a title commitment had been "ordered," satisfying the prerequisites for the insurer's liability under the law. In *Luan v. Advanced Title Ins. Agency, L.C.*, 2015 WL 4560383 (D. Utah) (unpublished), the court refused to dismiss claims against a title insurer for money stolen from a title agency's escrow account by a cyber hacker. The court held that Utah's law making an underwriter strictly liable for agent escrow account theft was invoked by the theft, even though the person who stole the money was not employed by the title agent. In *First American Title Ins. Co. v. National Title Agency, LLC*, 2016 WL 1092485 (D. Utah 2016) (unpublished), the court said that an agency contract was ambiguous, and did not clearly make the agency owner liable to the insurer for claims it paid to agency customers due to a shortage in the escrow account under Utah's strict liability law. Also, the agency owner is not liable to the insurer for a fraudulent transfer of the agency's assets to a new company formed by his son, which the owner freely admitted was intended to put the assets beyond the insurer's reach. However, in a later decision, *First American Title Ins. Co. v. National Title Agency, LLC*, 2017 WL 2222920 (D. Utah) (unpublished), the same court held that the title agency and its owner, who had personally guaranteed the agency contract, were both liable to the insurer for the losses it paid due to the shortage in the agent's escrow account.

[173] *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 634 A.2d 74 (1993).

ordered or the disclaimer form was given to the clients, the insurer was not the attorney's principal and thus not liable for the theft.[174]

The insurer has the right to seek to recoup its losses from the person who stole the money, or any insurance policy or bond that covered that person's acts.[175] The insurer may pursue an employee that steals money. It must be careful to establish the causal nexus between the employee's theft and the losses suffered by the insurer.[176] If the person accused of theft is an attorney, the attorney-client privilege does not bar the insurer from obtaining the attorney's records about the closing or the escrow account.[177]

The insurer may seek recoupment through an errors and omissions policy or fidelity bond in favor of the title agent. The insurer should immediately give notice to any such carrier.[178]

When the person who steals money is an independent contractor hired by the title agent, the underwriter is entitled to pursue the title agent for recovery, if the agency contract makes the agent responsible for theft or fraud committed by its subagents and independent contractors. In *Lawyers*

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[174] *New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co.*, 203 N.J. 208, 1 A.3d 632 (N.J. 2010), modifying the agency ruling in *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 634 A.2d 74 (1993).

[175] In *K2 Settlement, LLC v. Certain Underwriters at Lloyd's, London*, 2012 WL 5990038 (W.D.Pa.) (unpublished), the court held that no reasonable juror could find that the sole owner of a title agency received an "improper personal financial gain" from her theft of escrow money, and thus there was no claim payable under a Special Mortgage Bankers fidelity bond issued by Lloyd's because, the surety claimed, the money stolen by the agency owner was used to pay salaries, and the bond excluded from coverage "salary, fees, commissions, bonuses, salary increases, ... profit sharing and other ... similar benefits" paid to employees. In *First American Title Ins. Co. v. National Title Agency, LLC*, 2017 WL 2222920 (D. Utah) (unpublished), the court held that the title agency and its owner, who had personally guaranteed the agency contract, were both liable to the insurer for the losses it paid due to the shortage in the agent's escrow account.

[176] In *Ticor Title Ins. Co. v. National Abstract Agency, Inc.*, 2008 WL 2157046 (E.D.Mich.) (unpublished), the appeals court was satisfied with trial testimony making the causal link between the escrow shortage and the policy losses. However, in *Stewart Title Guar. Co. v. Lockman*, 2008 WL 820359 (W.D.Mich.) (unpublished), related decision 2008 WL 1325900 (W.D.Mich.) (unpublished), the court referred to the *National Abstract* decision as it denied the two insurers' motions for summary judgment, which failed to make the same connection and were based largely on facts proven in the employee's criminal embezzlement case: "While it undoubtedly had an underwriting agreement with Northern Preferred, and Northern Preferred's employee, Karla Lockman, undoubtedly embezzled funds from Northern Preferred's escrow account, Stewart Title has failed to link this defalcation to its own losses, legally speaking. It has produced neither evidence nor legal authority to demonstrate how its sundry legal claims entitle it to a remedy from the Lockmans for the damages it purportedly suffered as a result of the two failed real estate transactions. …" The court went so far as to say that the underwriter's "relationship with Karla Lockman was attenuated at best."

[177] In *Fidelity Nat'l Title Ins. Co. v. Harlow, Adams & Friedman, P.C.*, 2013 WL 3770709 (Conn. Super.) (unpublished), when a law firm held money in escrow to pay off a mortgage loan, but disbursed the money to the borrower instead, causing the title insurer to have to pay off the loan, the court held that the law firm escrowee could not protect communications about the escrow under the attorney-client privilege.

[178] In *Anchor Equities, Ltd. v. Pacific Coast American*, 737 P.2d 532, 105 N.M. 751 (1987), the lender in the transaction was permitted to bring a claim directly against the agent's fidelity bond surety, based on the fact that the bond was required by state law for the protection of the public.

Title Ins. Corp. v. Phillips Title Agency,[179] attorney Jay Phillips performed the closings on title orders he placed with Central Title. He created a phony loan transaction that cost the underwriter $500,000. Lawyers Title sued Central Title under the agency contract, and the court found Central Title liable for the acts of its "subagent," Phillips. The agency contract made the agent responsible for "any improper closing or attempted closing by the agent." The court denoted Phillips a subagent of Central Title, in reliance on the Restatement (Second) of Agency §5 and a web of facts that showed that Phillips was accountable to Central Title in the closings he performed.

The insurer will typically move swiftly to garner what assets it may from the agent when it learns of a theft of escrow money.[180] When an attorney-agent takes money from his or her client trust account, any funds remaining in that account may belong to the insurer as subrogee of the parties whose funds were stolen. To recover from a client trust account, the insurer must trace funds back to the account and contend with competing claims to the same money.[181]

A prime source of recovery in some cases is a theft bond. One court rejected the theft bond surety's argument that it did not have to pay until the bankrupt agency had reimbursed parties having claims to the escrowed funds.[182] The court found that the bankruptcy trustee was entitled to demand payment to the extent of valid claims against the estate. The agent that embezzled the funds is not entitled to a discharge of that liability in bankruptcy.[183]

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[179] 361 F.Supp.2d 443 (D.N.J. 2005).

[180] The insurer may also pursue employees for conversion and unjust enrichment, if they personally obtained funds from the escrow account. *Stewart Title Guar. Co. v. Kiefer*, 1997 WL 626074, 984 F.Supp. 984 (E.D.La. 1997) (unpublished). In *Simmons v. Lennon*, 139 Md.App. 15, 773 A.2d 1064 (Md.App. 2001), an employee forged the drawer's signature on an attorney's escrow account check that she used to buy a car. The attorney sued the check payee for conversion and negligent failure to detect the forgery. The court denied recovery under either theory. As to conversion, the court found the right limited to recovery of the check itself, not the proceeds, precluding any meaningful recovery. On the issue of the payee's failure to detect the forgery, the court distinguished between a forged indorsement and a forged drawer's signature. It noted that the UCC authorizes suit only for forged indorsements, in which case the loss is passed back from the drawee bank to the bank that first accepted and failed to detect the forgery. Conversely, when a drawer's signature is forged, the drawer bank is stuck with the loss. In *Simmons*, the attorney was unable to identify any legal duty of a payee to detect a drawer's forgery. Thus, the drawer bank escaped liability because the time period for suit against it had passed and there was no right to recover against the car-selling payee for failure to detect the forged drawer's signature.

[181] An interesting example is found in *Goldberg v. New Jersey Lawyers' Fund*, 932 F.2d 273 (3rd Cir. 1991). In that case, the insurer was competing with the state Client Protection fund. The fund asserted that the insurer had no claim to the money because it was not a "client." The court found that it was not necessary under New Jersey law for the insurer to be a client in order to receive funds. Rather, " [w]ithout Chicago Title's coverage, its insureds could have become the Client Protection Fund's clients because they would no longer have had a collateral source for their claims. Indeed, the bankruptcy judge recognized that 'the payment by Chicago and other title companies had the effect of reducing claims against the Fund.'" Therefore, the insurer and the fund were given a 63/35 split of the trust account funds.

[182] *Nelson v. ITT Hartford Fire Ins. Co.*, 216 F.3d 1088, 2000 WL 763772, 2000 CJ C.A.R. 3519 (10th Cir. (Okla.) (Table) (unpublished).

[183] *In re Pleeter*, 293 B.R. 812, 41 Bkcy.Ct.Dec. 115 (Bkcy.S.D.Fla. 2003); *In re Blaszak*, 397 F.3d 386, 2005 Fed.App. 0051P (6th Cir. 2005). However, when escrow and exchange companies filed bankruptcy after their owner looted the accounts and received discharges, depositors who received only a portion of their money were free to pursue

The title insurer may also pursue third parties who helped the agent perpetrate the defalcation, or benefited from the ill-gotten money. For example, in *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*,[184] after paying parties on closing protection letters, the insurer sought recovery from the bank at which the escrow account was located, under the Illinois Fiduciary Obligations Act.[185] In the above decision, the court denied the bank summary judgment and remanded to the trial court. See also *Borne v. Grande*,[186] in which recovery was permitted against an agent's girlfriend's limited partnership assets pledged at the time the agency contract was signed, after the escrow defalcation of the agent.

When an underwriter receives notice of a defalcation, a central question that must be answered quickly is whether or not the agency is viable and should remain open for business. The underwriter or underwriters will, in most cases, have the contractual right to cancel their agency contracts, which effectively shuts down the agency. The typical agency contract says the underwriter may cancel the agent when a principal of the agency has stolen from the escrow account, or allowed the account to be plundered, causing policy risk to the underwriter. See §17.9 concerning termination of agency contracts generally. Most contracts do not require cause for termination. The underwriter may have an obligation to notify the state insurance commissioner of the situation, in which case the commissioner may order the agency closed.[187]

The underwriter may permit the agency to remain in business, with the condition that the insurer assume control of the agent's escrow activities to protect the public and to develop information on the source of the shortage. In one situation leading to a reported decision, the

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the owner of the companies for the balance despite the discharge, according to a California court. *People v. Abelman*, 2003 WL 21662014 (Cal.App. 2 Dist.) (unpublished). In *In re Owens*, 2010 WL 4116472 (Bkcy.S.D.Ind.) (unpublished), a title agency owner who stole money from the escrow account was found not entitled to a discharge for the debt, and the insurer was granted a treble-damage judgment against the debtor. In *First American Title Ins. Co. v. Sadek*, 2017 WL 6663899 (D.N.J. 2017) (unpublished), when a person owned both a mortgage banker and a title agency and closed a refinance loan to himself but failed to pay off the old loans or record the new mortgage, the court affirmed a judgment in favor of the title insurer based on conversion, and the court said it would follow with a trial to determine if the debt was dischargeable in bankruptcy. In *Southern Title Ins. Corp. v. Syed Rizwan Mohiuddin (In re Mohiuddin)*, ___ B.R. ___, 2017 WL 2123870 (Bkcy.S.D.Tex.-Houston 2017) (permanent citation not yet available), the insurer received a judgment against the treasurer of a title agency who knew of and participated in transactions in which liens were not paid off at closing, and the court declared the $8 million debt non-dischargeable in bankruptcy.

[184] 993 F.Supp. 1159 (N.D.Ill. 1998), later decision 22 F.Supp.2d 820 (N.D.Ill. 1998).

[185] 760 I.L.C.S. 65/1, *et seq.*

[186] 1998 WL 27242 (Minn.App.) (unpublished), rev.den.

[187] Each state's law is different in this regard. See the following cases, discussed further this section, which examine the duty or lack of same to report a defalcation to the insurance commissioner. *Security Title Guar. Co. of Baltimore v. United General Title Ins. Co.*, 935 F.Supp. 816 (E.D. La. 1996); *Fidelity Nat'l Title Ins. Co. of Pa. v. Chicago Title Ins. Co.*, 1995 U.S.App. LEXIS 21972 (unpublished); *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 2001 WL 1414517 (N.D.Ill.); related decisions 161 F.Supp.2d 876 (N.D.Ill. 2001), 2001 WL 58949, 2001 WL 477162, 2001 WL 558137, 2001 WL 649641, 2001 WL 789218.

underwriter was appointed receiver for the account.[188] In another, however, the insurer assumed control without being appointed receiver. It was later precluded from certain recoveries because the court said it became primarily liable on the escrow account by assuming its control.[189] In another case, underwriters obtained an order appointing a receiver to take control of the agent's business and escrow account, and to get records from its president's home so that the underwriters could administer claims. The agent sued the underwriters and their law firm for abuse of process and related torts. It alleged that they misused the receiver "to coerce the payment of money." The court found that the actions taken by counsel were privileged and not actionable.[190]

Such concerns suggest that it is prudent for the underwriter, on discovery of a defalcation or escrow account shortage of unknown origin, to enter into a written agreement in which the agent consents to the insurer's control of the escrow account and provides free access to all records. However, such an agreement should be constructed to make clear the limits of what the underwriter commits to do thereunder.[191] In two reported decisions, agents have argued that escrow control agreements are commitments by the underwriter not to cancel the agent or close down the business on account of the shortage. In *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*,[192] agency-turned-underwriter Intercounty sued its reinsurer, Fidelity, for cancelling the treaty after accepting a collateral agreement and being appointed receiver for the underwriter's escrow account. Intercounty alleged defamation, restraint of trade and that Fidelity had agreed not to cancel the treaty. Most of Intercounty's causes of action were dismissed. In the second case, *Fidelity Nat'l Title Ins. Co. of N.Y. v. National Title Resources Corp.*,[193] Fidelity National discovered a shortage in National Title's escrow account. The companies signed an agreement in which National admitted the shortage and that it was in default under the agency contract, Fidelity agreed to advance money to National to replenish the account, National agreed to repay Fidelity, and National gave Fidelity

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[188] *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 2001 WL 1414517 (N.D.Ill.); related decisions 161 F.Supp.2d 876 (N.D.Ill. 2001), 2001 WL 58949, 2001 WL 477162, 2001 WL 558137, 2001 WL 649641, 2001 WL 789218.

[189] *TRW Title Ins. Co. v. Security Union Title Ins. Co.*, 153 F.3d 822 (7th Cir. 1998), *rev'g* 1994 U.S.Dist. LEXIS 6373 (N.D.Ill.) (unpublished).

[190] *American Nat'l Title & Escrow of Fla., Inc. v. The Guar. Title & Trust Co.*, 748 So.2d 1054 (Fla.App. 4 Dist. 1999), rev.den. 767 So.2d. 453 (Table); later decision, 810 So.2d 996, 27 Fla. L. Weekly D447 (Fla.App. 4 Dist. 2002).

[191] In *Bank of America, N.A. v. Zaskey*, 2016 WL 2907732 (S.D.Fla. 2016) (unpublished), a title insurer that took custody of loan payoff money from its agent after the lender rejected the payoff was found not to be entitled to the dismissal of a claim by the borrowers about its own actions while it held the money. The borrowers alleged that the insurer caused damage to them by holding the money for some time before it was delivered to the lender. However, the Florida court did dismiss the borrowers' claim against the insurer for the agent's claimed negligence in the handling of the money, which was founded on respondeat superior.

[192] 2001 WL 315334 (N.D.Ill.), related decisions 2001 WL 1414517 (N.D.Ill.), 161 F.Supp.2d 876 (N.D.Ill. 2001), 2001 WL 58949, 2001 WL 477162, 2001 WL 558137, 2001 WL 649641, 2001 WL 789218.

[193] 261 F.3d 758 (8th Cir. (Minn.) 2001).

control over the escrow account and all of its records. Three months later, Fidelity terminated National's contract because it had not turned over escrow account control and records, and had not made up the shortage. Fidelity sued National for breach of contract, conversion and related causes of action. National countersued for breach of contract and "various torts." The jury found that Fidelity had breached the agency contract by cancelling. Fidelity got a money judgment against National of over $400,000, but National's judgment against Fidelity was for $566,000, with the result that the underwriter owed the agent. The jury award against Fidelity was thrown out, and summary judgment entered in its favor. The judgment was affirmed on appeal. The appeals court ruled that Fidelity did not waive the right to cancel the contract by signing the agreement.

> Nothing in the March agreement indicates any obligation on the part of Fidelity to refrain from terminating the agency agreement, nor does it waive Fidelity's rights to terminate the agency agreement for the defaults already admitted to by National in the March agreement. The March agreement appears to be simply an attempt to offer security to Fidelity after an acknowledgment by National that National had defaulted under the agency agreement. ... These shortages gave Fidelity cause to terminate the agency agreement immediately. ... National's admitted default of the agency agreement constituted a breach of the agreement which gave Fidelity the right to terminate. The fact that Fidelity gave National the opportunity to correct its default by entering into the March agreement did not waive Fidelity's right to terminate, nor did it waive National's default. Fidelity's termination of the agency agreement in response to National's default did not constitute a breach of contract.

If the agent files bankruptcy, the trustee may resist the underwriter's assertion of control over the escrow account. The underwriter may assert that the escrowed funds are not property of the debtor's estate. The court may impose the equitable remedy of a constructive trust to protect the victims of the theft. In the decision of *In re Dameron*,[194] the court ruled that the funds were held in escrow, and thus were not part of the agent's bankruptcy estate. The court said "[i]t would be grossly unfair to the plaintiffs [title insurer and lender] under the present circumstances to require them to share what are clearly their funds with other creditors in this case," since "it would be difficult to find a more flagrant case of the fraudulent mishandling of the money of another."[195]

Under either a constructive trust or escrow claim, claimants may be obligated to make a reasonable attempt to trace funds. This is made more difficult when escrow funds are commingled with operating income, or the agent's bookkeeping was bad. When tracing is impossible or extremely difficult, courts often adopt the "lowest intermediate balance" rule.

> [The rule] is grounded in the fiction that, when faced with the need to withdraw funds from a commingled account, the trustee withdraws non-trust funds first, thus

[194] 155 F.3d 718 (4th Cir. 1998), *aff'g* 206 Bkcy.Rptr. 394 (Bkcy.E.D.Va. 1997).

[195] 206 Bkcy.Rptr. at 402.

> maintaining as much of the trust's funds as possible. Hence, pursuant to the lowest intermediate balance rule, if the amount on deposit in the commingled fund has at all times equaled or exceeded the amount of the trust, the trust's funds will be returned in their full amount. [citation omitted] Conversely, if the commingled fund has been depleted entirely, the trust is considered lost. ... Finally, if the commingled fund has been reduced "below the level of the trust fund but not depleted, the claimant is entitled to the lowest intermediate balance in the account." [citation omitted] In no case is the trust permitted to be replenished by deposits made subsequent to the lowest intermediate balance.[196]

An insurer that funded the shortfall in an underwritten title company's escrow account is entitled to recover from a mortgage lender for loan funds never disbursed to the agent for a closing. The underwriter is also entitled to recover money paid to the lender by the underwritten title company which constituted an illegal kickback under RESPA, if no statute of limitations applies.[197]

An insurer which has reimbursed third parties for an escrow account shortage may assert that another entity was aware of the situation and had a duty to inform the insurer or shut down the agency. In *Quackenbush v. Superior Court*,[198] the court found that the California insurance code did not require the insurance commissioner to stop an agency's operations immediately after it received a report showing that the agency had submitted a false financial statement. The plaintiff was an escrow party who deposited funds in the eight months between the report and the date the commissioner seized the agency.

A sensitive issue is the proper handling by an underwriter of the termination of an agent when the insurer has evidence suggesting that the agent has a shortage in its escrow account or the account from which it remits premiums. An agent might elect to take funds from its escrow account to settle up with the terminating underwriter on premium remittances. This creates or increases a shortage in the escrow account, which may in turn translate into liens not being paid off. In this way, the agent creates policy liability on policies on which liens are not paid. The agent may also cause its underwriter to incur liability under a closing protection letter.[199] If the agent has more than one underwriter, the nimble insurer may limit its liability and receive more remittances than the company which delays in terminating the agent.

These situations raise the question of whether or not an underwriter has a duty to warn a common or successor underwriter, or a governmental authority, of the risks which the first insurer

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[196] *In re Dameron*, 155 F.3d 718 (4th Cir. 1998), *aff'g* 206 Bkcy.Rptr. 394 (Bkcy.E.D.Va. 1997).

[197] *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 939 F.Supp. 611 (N.D.Ill. 1996); aff'd 118 F.3d 1157 (1997); later opinion approving recovery under RESPA and stating that phony fees were a fraudulent conveyance, 22 F.Supp.2d 820 (N.D.Ill. 1998).

[198] 57 Cal.App.4th 660, 67 Cal.Rptr.2d 300 (Cal.App. 2 Dist. 1997).

[199] See the discussion of *American Title Ins. Co. v. Variable Annuity Life Ins. Co.*, 1996 WL 54431 (Tex.App.-Houston 14 Dist.) (unpublished), at §14.1 for an example of closing protection letter liability caused by an agency which went out of business leaving a shortfall in its escrow account.

has uncovered. Several decisions hold that there is no such duty. In *Security Title Guar. Co. of Baltimore v. United General Title Ins. Co.,*[200] Charter Title, Ltd. had three underwriters. It stopped remitting premiums. Security Title and Stewart Title sent in auditors and terminated their contracts. Security Title sent notice of the cancellation to the Commissioner of Insurance. Stewart Title sent a letter to the third underwriter, United General, "advising of potential irregularities in Charter's escrow accounts."[201] Apparently, both underwriters received some payment of premiums owed. United General, the third underwriter, did not audit until it got Stewart's letter. It then cancelled the agent, and shortly thereafter Charter filed bankruptcy. Its escrow account deficiency was reported as $1.7 million. United General sued the other underwriters for $1.3 million in escrow losses and $50 million in punitive damages. It alleged that it suffered greater losses from the escrow shortage because the other insurers failed to warn United General, and that they were unjustly enriched.

The District Court ruled that Stewart and Security had no duty to warn United General. The court also said that notice of termination, or lack of same, to the Insurance Commissioner did not inure to the benefit of United General. Rather, it found that United General's losses stemmed from its own failure to cancel the agent earlier. Finally, the court found no unjust enrichment. An essential element of unjust enrichment is "an absence of justification or cause for the enrichment... ." Because the premiums paid to Stewart and Security were pursuant to contract, there was "cause," precluding a finding of unjust enrichment.[202]

Also, in *Fidelity Nat'l Title Ins. Co. of Pa. v. Chicago Title Ins. Co.*,[203] an agent was terminated by Chicago Title and then signed by Fidelity. Within a year after signing the agent, Fidelity paid more than $600,000 to fund a shortage in the agent's escrow account caused by embezzlement. Fidelity sued Chicago on various theories, including conversion, unjust enrichment, breach of fiduciary duty and civil conspiracy. All counts were dismissed.

TRW Title Ins. Co. v. Security Union Title Ins. Co.[204] concerned Liberty National Title Insurance Company, formed by Ed Wells, a Chicago lawyer. Liberty was an exclusive agent for Security Union. It bought plant searches from Security Union, but violated that agreement. As part of the settlement of the lawsuit over back title plant fees, Wells agreed to obtain a new underwriter and Security Union conducted a partial escrow audit. Wells then contacted TRW and became its agent. TRW did not conduct a pre-signing escrow audit. Wells paid the title plant fees out of Liberty's escrow account. Wells prohibited Security Union from conducting a complete audit, but the title plant fee checks were discovered. Some years after TRW became Liberty's underwriter, it audited the escrow account and discovered a $4.1 million shortage. TRW entered into a workout

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[200] 935 F.Supp. 816 (E.D. La. 1996). Further fallout from the Charter Title escrow troubles is described in the attorney disciplinary decision of *In re Schneider*, 707 So.2d 38 (La. 1998).

[201] Id. at 817.

[202] Id. at 822.

[203] 1995 U.S.App. LEXIS 21972 (unpublished).

[204] 153 F.3d 822 (7th Cir. 1998), *rev'g* 1994 U.S.Dist. LEXIS 6373 (N.D.Ill.) (unpublished).

agreement with Wells and Liberty, which failed. TRW funded the shortage and sold the agency, then sued Security Union on a variety of claims, including fraud, unjust enrichment, co-trustee liability and equitable subrogation. The court found that Security Union was not sufficiently aware of the escrow shortage in order to establish that it had intended to induce Liberty to defraud TRW by becoming Liberty's new underwriter. The claim of unjust enrichment was based on the fact that TRW's funding of the escrow account negated the liability Security Union would otherwise have had on closing protection letters it had issued for Liberty. The court denied the claim of unjust enrichment, because TRW had "intentionally failed to investigate Liberty in order to conceal its courtship from Security." Thus, the court held, TRW's recklessness "caused its loss."[205] The claim that TRW was equitably subrogated to the claims of closing parties was denied because the court found that TRW was itself primarily liable to those parties, and "primary liability disqualifies TRW as a subrogee."[206] Finally, the court held that TRW was not a trustee as to Liberty's escrow account, because the insurer was not a fiduciary of parties whose money was deposited.

Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.[207] concerned an escrow shortage of another Chicago-area company. Intercounty Title Company was an agent of Stewart Title Guaranty Company. A new underwriter was formed by employees of Intercounty, and Fidelity National Title agreed to serve as reinsurer. At about the same time, the agency relationship between Stewart Title and Intercounty was terminated, with Stewart Title claiming that it remained owed unpaid premiums and loss expenses caused by Intercounty. Several years later, a large shortage was discovered in the escrow account of Intercounty National Title Insurance (INTIC). The Illinois Department of Financial Institutions shut down INTIC. Fidelity National was appointed trustee, making it "responsible for assuring the proper distribution of [INTIC's] remaining escrow funds." Fidelity claimed to have paid out $35 million of its own money to INTIC customers because of the shortage.

Numerous suits were filed, including one by Fidelity against Stewart Title. Among other claims, Fidelity alleged that Stewart Title had fraudulently concealed from the state and other parties, including Fidelity, what it knew of Intercounty's escrow account shortage. Fidelity also alleged that Stewart Title was unjustly enriched, and that Fidelity had a right to be reimbursed by Stewart Title in its own right and as assignee of the parties paid by Fidelity.

The fraudulent concealment count was dismissed by the trial court, based primarily on the *TRW* decision.[208] The court also held that Stewart Title had no duty to inform Fidelity, based in part

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[205] Id. at 829.

[206] Id.

[207] 2001 WL 1414517 (N.D.Ill.); related decisions 161 F.Supp.2d 876 (N.D.Ill. 2001), 2001 WL 58949, 2001 WL 477162, 2001 WL 558137, 2001 WL 649641, 2001 WL 789218.

[208] "*TRW Title* is instructive. It is undisputed Fidelity failed to conduct a pre-signing audit of Old Intercounty's escrow account before it executed the Fidelity-New Intercounty reinsurance agreement in September 1995. Nor did Fidelity obtain Old Intercounty's financial statements. Fidelity failed to inquire into Old Intercounty's escrow practices. Fidelity did not conduct credit or background checks on Old Intercounty's principals. Those principals were slated to operate and manage New Intercounty." 2001 WL 1414517 at *5 (N.D.Ill.). The court did not address any distinction between the duties of an underwriter and a reinsurer.

on the allegation that it was not aware of the reinsurance treaty until after it was signed. The court also ruled that, whether or not Stewart Title informed the state commissioner of a shortage, the commissioner was prohibited from disclosing that information to others such as Fidelity.[209] The trial court also dismissed the unjust enrichment claim Fidelity brought in its own name, again relying principally on *TRW*. The court found the claim barred by Fidelity's lack of pre-treaty due diligence.[210]

However, the trial court did not dismiss Fidelity's unjust enrichment claims as subrogee and assignee of the people it paid.[211] Stewart Title contended that Fidelity's subrogation rights were negated because it became "primarily liable" for INTIC's debts by serving as receiver for INTIC's escrow account. Stewart again based this argument on *TRW*, in which TRW Title was found to have operated the agent's escrow account "on the float" for several months before shutting it down and taking its lumps. The appellate court in *Intercounty* ordered a trial on the unjust enrichment claim.

The insurer does not become part of a conspiracy to defraud customers of the agent by paying policy claims and taking actions to protect the escrow account after discovery of a defalcation. Thus, one title insurer was found not liable to the sellers under RICO claims after resolving covered title claims caused by a title agent's theft of closing funds. Also, the underwriter's reinsurer was not the alter ego of the insurer, despite the fact that the reinsurer owned a majority of the underwriter's stock and the two had a close working relationship, and the sellers had no contractual rights against it.[212]

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[209] The court said: "Fidelity cannot rely on [its manager's] conversation with ... the Illinois Department of Financial Institutions to show reasonable inquiry. [The state regulator] was prohibited from disclosing confidential financial information to third parties. *See* 215 Ill. Admin. Code §8100.3000... ." 2001 WL 1414517 at *FN2 (N.D.Ill.).

[210] "In *TRW Title*, the court determined TRW's recklessness in failing to conduct reasonable due diligence precluded an unjust enrichment claim. ... The court held Security's retention of the benefit was not unjust. *Id. TRW Title* instructs that a title insurer's recklessness or negligence in failing to conduct a reasonable inspection of the escrow agent precludes relief under an unjust enrichment theory. *Id.* Fidelity failed to engage in reasonable due diligence by neglecting to conduct a pre-signing audit; obtain Old Intercounty's financial records; investigate Old Intercounty's escrow practices; and perform credit and background checks on management. Fidelity undertook a significant liability in an industry rife with risk of escrow mismanagement. Thus, Fidelity knowingly assumed the risk of a shortfall in New Intercounty's account. *Id.* at 828. Stewart's retention of the benefit must 'violate the fundamental principles of justice, equity and good conscience.' ... Fidelity's conduct precludes it from establishing Stewart's retention of the benefit is unjust." 2001 WL 1414517 at *6 (N.D.Ill.).

[211] "Fidelity's failure to conduct reasonable due diligence does not defeat its unjust enrichment claim as subrogee and assignee of the escrow depositors. The escrow beneficiaries were under no duty to independently conduct due diligence. … Subrogation prevents injustice and unjust enrichment. … Fidelity must demonstrate the subrogors suffered a detriment, and their loss is traceable to Stewart's liability as underwriter before September 1995." 2001 WL 1414517 at *7 (N.D.Ill.).

[212] *Albright v. Attorney's Title Ins. Fund*, 504 F.Supp.2d 1187 (D. Utah 2007), later decision 2008 WL 2952260 (D. Utah) (unpublished).

17.9 Termination Of Agency Contract

Either insurer or agent may cancel the contract on notice, typically without cause.[213] The agent must do several tasks on cancellation: account for premiums earned;[214] return all forms, supplies and records; and deliver all indemnities and title escrows taken as collateral for insurance coverage, with any money and documents securing same.

The agent ordinarily has obligations to the insurer after the contract is terminated. An agent typically is not permitted to issue policies on behalf of the insurer after its cancellation.[215] Often, the

[213] The subject of contract disputes between insurer and agent, as to matters other than liability for claim obligations, is beyond the scope of this treatise. There are several illustrative cases. In *Investors Title Co. v. Chicago Title Ins. Co.*, 983 S.W.2d 533 (Mo.App.E.D. 1998), reh.den., the title agency argued successfully that the insurer violated an exclusive-territory clause by acquiring another underwriter with a branch office in the territory. The insurer, in turn, obtained a judgment against the agent for premium remittances it had withheld in protest. Another contract dispute case is *Gammell v. Strategic Mortgage Services Inc.*, 1997 WL 797706 (Ohio App. 2 Dist.) (unpublished), rev.den. 81 Ohio St.3d 1516, 692 N.E.2d 620 (1998), in which a searcher and agent fought over their shares of the premiums. In *Stewart Title Guar. Co. v. Murphy*, 1998 WL 756083 (9th Cir. (Wash.)) (unpublished), the insurer sought an injunction prohibiting Pacific Northwest Title of Oregon from issuing policies on another underwriter's paper, because Pacific's parent company had signed an exclusive agency contract with Stewart. The parent company's articles of incorporation prohibited subsidiaries from writing for competitors of Stewart. The injunction was denied, however, because "PNT Oregon, though a subsidiary of PNT Holding, is a separate legal entity from its parent ... and is thus bound only by its own articles of incorporation, not those of PNT Holding." Id. at 1. In *American Nat'l Title & Escrow of Fla., Inc. v. The Guar. Title & Trust Co.*, 784 So.2d 1054 (Fla.App. 4 Dist. 1999), two underwriters had a receiver appointed for an agent after termination, and took other actions to preserve the agent's records. The agent sued for abuse of process and other torts. The court found the law firm had absolute immunity from suit for actions it took in the course of the litigation. However, in a later decision in the same lawsuit, the court found the title agency owner entitled to sue her former underwriters for allegedly giving false information to police leading to her arrest and jailing, and for interfering with customer relationships. The insurers were found not to be protected by the earlier ruling protecting their law firm under the litigation immunity. 810 So.2d 996, 27 Fla. L. Weekly D447 (Fla.App. 4 Dist. 2002). In *Coastal Abstract Service, Inc. v. First American Title Ins. Co.*, 173 F.3d 725 (9th Cir. (Cal.) 1999), the agent sued the underwriter for defamation and tortious interference with contract because one of its employees told a customer that the agent was "not paying its bills." The underwriter's employee made the statement to the agent's customer, whom the underwriter was courting, in response to the customer's complaint that the agent was slow in issuing policies. The court found that the evidence supported a finding that the insurer tortiously interfered with the contract between customer and agent. The case was sent back for a damage trial. An agent was awarded actual and punitive damages when its underwriter wooed away its employees to start a competing operation, after talks on the sale of the agency to the underwriter hit an impasse. *Fidelity Nat'l Title Ins. Co. v. Heart of Texas Title Co.*, 2000 WL 13037 (Tex.App.-Austin) (unpublished). In *WFG Nat'l Title Ins. Co. v. Meehan*, 107 N.E.3d 60, 2018-Ohio-491 (Ohio App. 8 Dist. 2018), a lawsuit by an insurer against its former agent for continuing to issue policies after termination led to counterclaims against the insurer and its lawyer for defamation, tortious interference with business relations and other claims. The court did not address the latent issue of whether or not the insurer would be obligated to honor a claim made on a policy issued by the agent after his authority was terminated.

[214] See *Foremost Ins. Co. v. Allied Financial Services*, 286 N.W.2d 740 (Neb. 1979). In *Old Republic Nat'l Title Ins. Co. v. United States*, 2010 WL 1727382 (S.D.Fla.), 105 A.F.T.R.2d 2010-2094 (unpublished), when the IRS levied on a title agent's bank accounts, an underwriter that made a timely challenge to the levies was entitled to be paid remittances in those accounts, because a state law said remittances are held in trust. In *In re Gaskill*, 480 B.R. 291 (Bkcy.W.D.Mich. 2012), the agent was permitted a bankruptcy discharge for the remittances owed.

[215] See *In the Matter of Carey*, 165 A.D.3d 1464, 85 N.Y.S.3d 270, 2018 N.Y. Slip Op. 07032 (N.Y.A.D. 3 Dept. 2018), in which an attorney who issued title insurance policies after he was terminated by his underwriter was publicly censured.

agent and underwriter work together for some time after the termination to wind down their joint affairs.[216] This may include closing the transactions and issuing the policies on commitments issued before termination. An agent changing underwriters normally would breach the contract with the first underwriter if it attempted to shift outstanding liabilities already committed to the new underwriter's paper. If such an arrangement is desired by all three parties, of course, it could be part of a winding-up agreement.

The agency contract normally states that the insurer owns the policies after the agency contract is terminated. This includes the information contained in the schedules of the policies, which may serve as a useful "starter" title plant for the insurer or its successor agent. The agent has been held not to have property rights in the content of the policies that would prohibit the insurer from using the policies itself or handing them over to a subsequent agent.[217]

17.10 Errors And Omissions Coverage

As stated above, errors and omissions coverage became quite costly in the 1980's. The cost rose because of agent defalcations, several carriers' election to leave the market, and increased claims presented by title insurers. This prompted the American Land Title Association to form an insurer, the Title Industry Assurance Company (TIAC), so that there would always be a carrier available to provide this form of coverage. Other carriers enter and leave the market periodically.

Errors and omissions insurance gives the agent financial backing for the agent's separate liabilities in three activities: abstracting, as title agent, and closing and escrow services. Not every agent does all three functions, and an agent is not required by the errors and omissions carrier to obtain coverage for every function it performs. A second form of protection sometimes obtained by agents is a fidelity bond. The cases concerning recovery on such bonds are found in §5.7.

A title agent errors and omissions policy also protects the agent against title losses payable by the agent to its underwriter. See §17.8.1 above regarding liability provisions of agency contracts. Most agency contracts require that the agent maintain errors and omissions insurance in a stated amount. Insurers commonly view errors and omissions coverage as a means of recoupment for losses caused by agents' mistakes. Title insurers sue errors and omissions carriers directly when permitted to do so under direct-action laws when possible under the terms of those laws.[218] A title insurer may

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[216] *Chicago Title Ins. Co. v. Title Consultants, Inc.*, 472 So.2d 1380 (Fla.App. 2 Dist. 1985).

[217] *Pacific Title, Inc. v. Pioneer National Title Ins. Co.*, 33 Wash.App. 874, 658 P.2d 684 (1983).

[218] In *Commonwealth Land Title Ins. Co. v. American Signature Services, Inc*., 2014 WL 672926 (E.D.N.Y. 2014) (unpublished), a title insurer was found to have no common law third party beneficiary claim against an agent errors and omissions policy, and New York's limited direct action law permits recovery only after the insurer obtains a judgment against the agent. In *First American Title Ins. Co. v. Continental Cas. Co*., 709 F.3d 1170 (5th Cir. (La.) 2013), the court held that, although Louisiana has a direct action statute permitting a title insurer to sue an agent's errors and omissions carrier, the insurer must still comply with the policy's claim reporting deadline. The error had occurred within the policy term, and First American had made a demand on the agent to report the claim to the E & O carrier, but the agent had failed to report the claim during the policy term. First American argued that it had "made" the claim and that should suffice, since it was a third party with a direct-action right. CNA retorted that its policy was of the claims-made-and-reported variety, and thus there was no right because of the lack of a report of the claim by the agent. The court accepted the carrier's position, saying that a relaxation of the policy would "rewrite a claims-made-and-reported policy into an

be deemed a necessary party in an action between a title agent and its errors and omissions carrier, when the insurer has made it plain that it intends to hold the agent liable for any loss that it suffers due to the agent's actions in issuing the policy on which a claim has been made.[219]

17.10.1 Covered Risks

Most errors and omissions policies have as their primary covered risk the liabilities assumed by the company as a policy-issuing title agent. The policy may also protect the agent against liability for closing errors, preparing abstracts and title searches, recording of documents, construction disbursing, serving as an intermediary in tax-deferred exchanges, and other related activities. Each carrier uses its own form of policy.

There is surprising variety between the carriers as to the nature of the risks and services the policy covers. Some policies are omnibus forms used for use with all manner of insurance agents or brokers. Other policies are used with many different service providers in the real estate field, such as real estate brokers, appraisers and mortgage brokers. Perhaps only the TIAC policy is written exclusively for use with title insurance agents.

All or most title agent errors and omissions policies are of the claims-made-and-reported variety. This means that three events must all occur within the policy period: the covered act must occur, the claim must be made against the agent, and the agent must report the claim to the carrier.[220] The agent must buy coverage for acts that occurred prior to the policy commencement date. This coverage is often included for the prior term if the same carrier issues the policy for the next term, though not always. If the title agent switches carriers, however, it will have assumed the risk of claims that might be presented during the present policy period for acts that occurred before the policy term commenced unless the policy contains prior-acts coverage.[221] A title agent may also

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occurrence policy."

[219] The court so held, in *Houston Specialty Ins. Co. v. Titleworks of Southwest Florida, Inc.*, 2015 WL 5599175 (M.D.Fla. 2015) (unpublished).

[220] In *First American Title Ins. Co. v. Continental Cas. Co*., 709 F.3d 1170 (5th Cir. (La.) 2013), the court held that, although Louisiana has a direct action statute permitting a title insurer to sue an agent's errors and omissions carrier, the insurer must still comply with the policy's claim reporting deadline. The error had occurred within the policy term, and First American had made a demand on the agent to report the claim to the E & O carrier, but the agent had failed to report the claim during the policy term. First American argued that it had "made" the claim and that should suffice, since it was a third party with a direct-action right. CNA retorted that its policy was of the claims-made-and-reported variety, and thus there was no right because of the lack of a report of the claim by the agent. The court accepted the carrier's position, saying that a relaxation of the policy would "rewrite a claims-made-and-reported policy into an occurrence policy." In *James River Ins. Co. v. Brick House Title, LLC*, 2017 WL 5126154 (D.Md.) (unpublished), the court held that a title agent wound up with no coverage under its errors and omissions policies because it learned of the claim in the first policy period but did not report it until the second policy term.

[221] In *American Guarantee & Liability Ins. Co. v. The Abram Law Group, LLC*, 555 Fed.Appx. 919, 2014 WL 563618 (11th Cir. (Ga.) 2014) (unpublished), a lawyer and his title agency were sued for title examination error on a loan that closed before the professional liability policy period and also their claimed fraudulent cover-up of those errors for a second loan that closed during the policy period. The court said the law firm had no coverage for either event due to the policy's prior acts exclusion on the claims-made-and-reported professional liability policy. The exclusion for "any act or omission or any Related Act or Omission that occurred" before the policy period nixed the error claim and the "Related

purchase "tail" coverage for claims received after a policy period for errors made during the policy term. This coverage is most desirable when the agent is closing down or is ceasing business operations on the sale of its assets.

17.10.2 Exclusions And Coverage Defenses

Various coverage defenses may be raised by E & O carriers. Each carrier's policy form is different, so the exclusions and other policy defenses vary by carrier.

All errors and omissions policies incorporate the sworn insurance application into the policy. The carrier may rescind the policy if the agent made a material omission or misrepresentation in the insurance application.[222]

Most policies include an exclusion for fraud or other intentional or criminal acts of the agent, which has been applied in cases involving alleged participation in loan fraud, embezzlement of escrowed funds, and other types of fraud or criminal activity.[223] Similarly, a court upheld an

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Act or Omission" provision cancelled liability for the second closing during the policy period.

[222] *Seneca Ins. Co., Inc. v. Lexington & Concord Search and Abstract, LLC*, 2008 WL 2120170 (E.D.Pa.) (unpublished) (misrepresentations about pending and prior claims and omission of the agent's "financial crisis" voided policy coverage); *Medmarc Cas. Ins. Co. v. The Reagan Law Group, P.C.*, 525 F.Supp.2d 1334 (N.D.Ga. 2007) (failure by attorney to disclose trust account shortage on application for professional liability insurance voids policy); *Whitford Land Transfer Co., Inc. v. Seneca Ins. Co., Inc*., 2008 WL 4792386 (E.D.Pa.) (unpublished) (policy voided because agent did not disclose several pending lawsuits against it, even if agent did not expect policy to provide coverage against those suits); *Fidelity Nat'l Title Ins. Co. v. Houston Cas. Co*., 2012 WL 4523666 (M.D.Fla.) (unpublished). In *Tudor Ins. Co. v. Associated Land Title, LLC*, 2010 WL 716309 (E.D.Mich.) (unpublished), a title agent survived summary judgment by the errors and omissions carrier to void its policy due to the agent's failure to disclose a pending claim in its application, based on evidence that the insurer had issued policies to 16 other title agents with pending claims, suggesting that the carrier might still have issued the policy if the claim had been disclosed. In *Zurich American Ins. Co. v. Expedient Title, Inc*., 2015 WL 9165875 (D.Conn.) (unpublished), a title agent's answer of "no" to the application question of whether any officer of the company was the subject of a governmental investigation was determined to be intentionally false, and thus voided coverage. In *Alterra Excess & Surplus Ins. Co. v. Excel Title Agency, LLC*, 742 Fed.Appx. 968 (6th Cir. (Mich.)) (unpublished), affirming 2016 WL 6432650 (E.D.Mich. 2016) (unpublished), the title agent's failure to disclose in its application that it had already received an email in which a person threatened to sue for breach of escrow instructions voided coverage for the judgment later entered against the title company in that dispute. In *Aztec Abstract & Title Ins., Inc. v. Maxum Specialty Group*, 302 F.Supp.3d 1274 (D.N.M. 2018), A title agent voided coverage by not disclosing an error of which it had knowledge on the application date.

[223] *Commonwealth Land Title Ins. Co. v. Gulf Underwriters Ins. Co.*, 1998 WL 283510 (Wash.App. 1 Div.) (unpublished) (exclusions found applicable to agent that took escrow funds by fraud and dishonesty); *Gulf Underwriters Ins. Co. v. KSI Services, Inc.*, 233 Fed.Appx. 239, (4th Cir. (Va.) 2007) (unpublished) (fraud exclusion negated coverage for employee theft of escrow funds); *Trumbull Ins. Co. v. Braunstein & Todisco, LLC*, 2004 WL 1616441 (Conn.Super.) (unpublished) (exclusion for "any dishonest, fraudulent, criminal, intentional or malicious act, error, omission, or Personal Injury or deliberate misrepresentation" found not to negate duty to defend, when agent failed to inform underwriter of unrecorded contract to purchase insured property, but no fraud alleged); *New England Ins. Co. v. Stewart Title Guar. Co.*, 57 Mass.App.Ct. 1107, 782 N.E.2d 557 (Mass.App. 2003) (fraud exclusion applied to intentional failure to except mortgage on title commitment, allowing attorney-agent's client to get two "first" mortgages on the same property); *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448 (6th Cir. (Mich.) 2003) (embezzlement falls under exclusion for "any dishonest, fraudulent, criminal or malicious act, any damages arising out of any gain, profit or advantage to which the insured is not legally entitled, and any damages arising out of the commingling, conversion, misappropriation, or defalcation of funds"). In *Chicago Title Ins. Co. v. Northland Ins. Co.*, 31 So.3d 214 (Fla.App. 4

exclusion for damages caused by escrowed money or funds "that have been stolen, converted, commingled, embezzled, or misappropriated by any person, at any time, under any circumstances."[224] However, a computer hacker's theft of title agent escrow funds does not clearly invoke a "conversion of funds" exclusion, which is more rationally be interpreted as being limited to conversion by the insured agent, not a third party fraudster.[225]

Dist. 2010), an exclusion for "damages arising out of the comingling, conversion, misappropriation or defalcation of funds or other property" was found to negate coverage when a title agent delivered money to an attorney for a mortgage payoff and the lawyer stole the money, causing a policy loss. The court drew no distinction between the stealing of money by the insured title agent and the lawyer, who was not affiliated with the agent. In *Title Industry Assurance Co., R.R.G. v. Chicago Abstract Title Agency*, 2015 WL 5675544 (E.D.Ill. 2015) (unpublished), a title agency was sued by two lenders and a title insurer for losses they suffered because an employee of the agency stole money from the company's escrow account. Its TIAC policy included two exclusions, one for "any dishonest, fraudulent, criminal malicious or intentional wrongful acts committed by or at the direction of the Insured" and the other for "defalcation, commingling or, or failure to pay any funds, notes, drafts, or other negotiable instruments... ." The carrier refused to defend the agency in the action and brought an action to have the court declare its duties. The court held that the carrier was required to defend the title agency, because the complaint alleged more types of conduct by the agent than the simple assertion of theft. In *Title Industry Assurance Co., R.R.G. v. First American Title Ins. Co*., 853 F.3d 876 (7th Cir. (Ill.) 2017), the court held that exclusions for "any dishonest, fraudulent, criminal, malicious or intentional wrongful acts committed by or at the direction of the Insured" and claims based on "any defalcation, commingling of, or failure to pay any funds, notes, drafts, or other negotiable instruments" did not clearly negate the duty to defend the insured in an action in which "[m]ost of the allegations in the tendered complaints had no obvious relationship to a fraud claim," and where "just one path toward a covered claim would have been enough to trigger the duty to defend." The court found the E & O carrier wrongly rejected the defense and was thus subject to the doctrine of estoppel to deny coverage. As a result, the insurer was "barred from asserting any policy defenses to coverage that might have applied otherwise," and "this means TIAC is on the hook for the judgment or any reasonable settlement amount that [Coastal Funding and First American] ultimately recover against TIAC's Insured." By contrast, in *Fidelity Nat'l Title Ins. Co. v. Maxum Indemnity Co*., 2017 WL 4048162 (E.D.Pa.) (unpublished), the court held that an errors and omissions carrier was not required to defend the agency against a suit filed by the underwriter claiming that the agency failed to properly supervise employees in the handling of the company escrow account, leading to shortages that caused policy claims. The exclusion at issue was for claims "alleging, arising out of, based upon, relating to, or attributable to, directly or indirectly, any ... commingling of funds or accounts, inability to pay or failure to safeguard funds."

[224] The quoted conversion and commingling exclusion was found to apply to a loss suffered by the agent because it transferred escrowed funds to an account of a related title agent, although there was no allegation of embezzlement or other tortious conduct by the insured agent, in *Steadfast Ins. Co. v. National Abstract Agency, Inc.*, 2007 WL 2874002 (E.D.Mich.) (unpublished). In *Hawks v. American Escrow, LLC*, 2012 WL 966059 (N.D.Ill.) (unpublished), exclusions for "the commingling or improper use of funds or accounts" and "improper use of, or failure to properly segregate or safeguard funds" negated coverage for a class action lawsuit claiming the agent failed to pay taxes and insurance from closings. In *Bethel v. Darwin Select Ins. Co.*, 735 F.3d 1035 (8th Cir. (Minn.) 2013), an exclusion for claims due to "loss, disappearance, pilferage or shortage of, or commingling or improper use of, or failure to segregate or safeguard, any client or customer funds, monies, or securities" was found to negate the carrier's duty to defend an action brought by a title insurer against its agent for delaying or failing to record instruments and failing to make loan payoffs, even though the allegations were couched in terms of negligence rather than intentional acts. In *Cornerstone Title & Escrow, Inc. v. Evanston Ins. Co*., 555 Fed.Appx. 230, 2014 WL 631098 (4th Cir. (Md.) 2014) (unpublished), the court held that a lawsuit brought by the Maryland Attorney General against a title company, accusing it of aiding a foreclosure rescue operation by failing to disclose information and delivering checks to the wrong parties, did not fall under an exclusion for claims based on "theft, conversion or misappropriation of escrowed money or negotiable instruments."

[225] In *ABL Title Ins. Agency, LLC v. Maxum Indemnity Co*., 2016 WL 3610163 (D.N.J.) (unpublished), a fraudster

Some policies have an exclusion for claims related to property flipping.[226] Most also exclude matters known to the insured agent[227] and violations of the insurer's underwriting standards.[228] An exclusion limiting escrow coverages to services provided "for a fee" was found to violate the public policy requiring escrowees to maintain errors and omissions coverage "as evidence of financial responsibility."[229] The court also refused to apply an "affiliate entity" exclusion, even though the

impersonated the seller's attorney, sending an email that convinced the title agent to wire sale proceeds to the criminal. In ruling on a motion to dismiss brought by the E & O carrier, the court held that this activity did not clearly fall under the "conversion of funds" exclusion in the errors and omissions policy. The court noted that "conversion" is defined as the wrongful exercise of control over someone else's property without authorization and to the exclusion of the property's owner. The title agent clearly did not take control of the money entrusted to it to the exclusion of the escrow principals. Nonetheless, in *Resource Real Estate Services, LLC v. Evanston Ins. Co*., 2017 WL 660800 (D.Md.) (unpublished), the court held that an exclusion "insufficiency in the amount of escrow funds" negated the carrier's duty to defend or indemnify the agent for the theft of the seller's money by an email directing the title agent to send the seller's money to a fake account.

[226] In *Those Certain Underwriters at Lloyd's London v. GMC Land Services of Florida, Inc*., 315 Fed.Appx. 785, 2009 WL 426096 (11th Cir. (Fla.) 2009) (unpublished), a broad exclusion for any claim involving a property flip was found to exclude a claim caused specifically by the forgery of a deed that was connected to a land flip. However, in *United Fire & Casualty Co. v. Realty Title Co.*, 2007 WL 428068 (W.D.Mo.) (unpublished), the errors and omissions carrier was found obligated to defend the insured agent in lawsuit by a lender claiming that the agent failed to detect a loan fraud ring, including property flipping, despite a specific exclusion for "actual or alleged improper participation by any insured in any 'flip transaction.'"

[227] In *United Fire & Casualty Co. v. Fidelity Title Ins. Co.*, 258 F.3d 714 (8th Cir. (Minn.) 2001), the carrier successfully invoked an exclusion for "claims arising from defects in title of which the [agent] had knowledge at the date of issuance of such title insurance" to avoid liability for a mortgage that the title agent discovered and reported, then removed based on an insufficient escrow. The court's analysis was brutally simple: the mortgage was a defect in title, and the agent knew about it; therefore, there was no coverage. The agent and its underwriter also argued that the mortgage was not a defect, because its validity was unclear, and to read the term "defect" in the errors and omissions policy this broadly would render coverage illusory. The court disagreed, saying: " [T]he plain and ordinary meaning of 'defect' includes a claim against title that, regardless of validity, might force a person into litigation. … [The seller] knew that the Notice of Adverse Claim could only be removed by litigation, since he set aside $5000 in escrow to pay for attorney's fees necessary to conduct the litigation. ... The doctrine of illusory coverage applies only when 'part of the premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent.' … That is not the case here. The E & O policy clearly provided coverage under many circumstances. ... But the policy was not meant to provide coverage for known defects in title, and Fidelity never paid a premium for such coverage."

[228] In *Trumbull Ins. Co. v. Braunstein & Todisco, LLC*, 2004 WL 1616441 (Conn.Super.) (unpublished), the errors and omissions carrier filed a declaratory judgment action, claiming that it was not required to defend the agent in a suit brought by the insurer, or to indemnify the agent, based on its Exclusion K, which removes coverage for any claim "arising out of any intentional breach of underwriting authority by any Insured in the Insured's capacity as a title insurance agent, or arising from defects of title not disclosed of public record and which the Insured had knowledge of at the date of issuance of such title ... " However, the complaint filed against the agent insured did not allege that the agent violated instructions. The court found a duty to defend: "The complaint in the Fidelity action neither discloses what B & T's underwriting authority was nor whether the Teamwork-First Fairfield contract was of public record. … Accordingly, exclusion K does not excuse the plaintiff from its duty to defend the defendants. The allegations in the Fidelity action state a claim that falls possibly within the coverage provided by the plaintiff to the defendants."

lender in the escrow was a company owned by the same people who owned the escrow company.[230]

Many errors and omissions policies contain what is sometimes known as a personal-profits exclusion, for illegal fees charged or overcharges of legitimate fees for services, without any attendant claim of an error or omission in the performance of the professional service.[231] Class action lawsuits claiming that title agents overcharged for closing services or failed to refund recording fee overcharges may or may not fall under such an exclusion.[232]

Most errors and omissions policies have at least one exclusion limiting the coverage for construction disbursing errors. In one case, TIAC refused to defend the agent when it was accused of taking forged or fraudulent waivers of lien in a construction escrow.[233] The TIAC policy contained

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[229] *Fireman's Fund Ins. Co. v. Puget Sound Escrow Closers, Inc.*, 96 Wash.App. 227, 979 P.2d 872 (Wash.App. 1 Div. 1999).

[230] The court found that such an exclusion was designed "in order to guard against collusion." The injured party was the borrower, and there was no evidence of collusion; hence, the exclusion as construed was not applicable.

[231] For example, in *Cornerstone Title & Escrow, Inc. v. Evanston Ins. Co.*, 555 Fed.Appx. 230, 2014 WL 631098 (4th Cir. (Md.) 2014) (unpublished), the policy contained exclusions for claims "based upon or arising out of [the insured's] gaining any profit or advantage to which [the insured] is not legally entitled," and for claims based on a violation of RESPA "or any similar state or local legislation." The agent was accused of aiding an equity stripping foreclosure rescue business operator. The court said that the complaint did not allege that Cornerstone received any personal or illegal profit or advantage by closing the transactions, and the exclusions did not apply. In *National Title Agency, LLC v. United Nat'l Ins. Co*., 2016 WL 1092485 (D. Utah 2016) (unpublished), an exclusion for claims against the agent for "gaining in fact [a] profit or advantage to which [it was] not legally entitled" was broadly construed, to negate coverage for a claim that the agent allowed the garnishment of its escrow account for agency company debts. The court refused to construe the exclusion to apply only to illegal gain.

[232] Two courts reached opposite conclusions in construing the same exclusion and very similar allegations against the insureds. In *Pacific Ins. Co. v. Burnet Title, Inc.*, 380 F.3d 1061 (8th Cir. 2004), an errors and omissions carrier was found to have a duty to defend a title agent accused of marking up settlement charges such as overnight delivery services in violation of RESPA Section 8(b). The Eighth Circuit found that the complaint alleged "professional services" covered by the E & O policy, not mere bookkeeping functions; that the complaint did not allege only intentional (excluded) acts; and that the request for attorney fees by the plaintiffs constituted "damages" within the meaning of the policy. However, in *St. Paul Fire & Marine Ins. Co. v. Prairie Title Services, Inc.*, 2005 WL 2850121 (N.D.Ill. 2005) (unpublished), an errors and omissions carrier was found not to be required to defend a title agency in a class action suit claiming that it has a duty to refund recording and courier fee overcharges. Despite the differing results, the exclusions and policy definitions at issue were nearly identical in both cases. St. Paul argued that, even if the agent was required to pay the recording fees to the plaintiffs, it would not suffer a loss as defined in the errors and omissions policy, because the policy defines damages as "compensatory damages imposed by law." The court agreed with the carrier, saying: "According to the Illinois courts, … the repayment of a sum the party never had a right to have is not considered a 'loss' because it cannot 'create a deprivation any more so than any borrower can be said to suffer a deprivation from being required to repay an indebtedness.' … Therefore, under Illinois law, an insurance company does not have a duty to defend for loss in cases where the plaintiff is seeking restitution of the defendant's improper gains. … The Seventh Circuit has also stated that an insured party 'incurs no loss within the meaning of [an] insurance contract by being compelled to return property that it had stolen, even if a more polite word than 'stolen' is used to characterize the claim for the property's return.'"

[233] *Simpson v. Title Industry Assurance Co.*, 590 N.W.2d 282 (Table), 224 Wis.2d 644, 1999 WL 19307 (Wis.App.) (unpublished).

Exclusion K, which removes coverage for "situations where work or materials have been supplied by subcontractors or other suppliers and the insured makes a payment without prior receipt of appropriate waivers or releases of lien from the subcontractors or other suppliers involved." The court found a duty to defend the agent, Cherryland Title, because the complaint alleged more than a failure to obtain valid waivers of lien. It found that, while the exclusion would apply if Cherryland had failed to obtain appropriate lien waivers before payment, "it does not apply to the claim that Cherryland was negligent in failing to contact the subcontractors and suppliers directly to determine if payment had been made." The agent asked for summary judgment on policy coverage also. It argued that the exclusion did not apply because the construction contract did not require waivers until the last draw, which was never disbursed, the agency collected lien waivers for all listed work and only later learned that some waivers were fraudulent. The court found the exclusion ambiguous because the word "appropriate" was not defined:

> [The policy] neither indicates from whose perspective or at what time we determine whether the lien waivers were appropriate. It is unclear whether appropriateness is determined by reference to purpose or simply form. From Cherryland's perspective at the time it obtained the waivers, the lien waivers were suitable, fit, or proper because they were indeed lien waivers from the contractor before payment. ... [T]he exclusion [must be] measured from the escrow agent's view at the time it obtains the lien waivers. Cherryland therefore obtained appropriate lien waivers from O'Brien even though the lien waivers were later found to be fraudulent.

A common coverage defense, when the agent's error has caused the title insurer to pay a loss under a title insurance policy, is that the insurer did not assert an applicable policy defense, and thus became a volunteer in settling the claim. This argument survived summary judgment in *Fidelity National Title Ins. Co. of Tennessee v. Kidd,*[234] in which the court held:

> The plaintiff, Fidelity National Title Insurance Company of Tennessee (formerly "Southern Title Insurance Company"), brought an action in negligence and contract against the defendants Warren Kidd; W.K. Associates, Inc.; and H. Christopher Sears. Plaintiff appeals from summary judgment entered for defendants.
>
> Warren Kidd through his company W.K. Associates, Inc., (Kidd) performed title abstract services for attorneys. Kidd also was Fidelity National Title Insurance Company's (National) agent for purposes of selling title insurance policies. Christopher Sears (Sears) was an attorney specializing in property matters. Sears regularly hired Kidd as his title abstractor. … The issue presented is whether National's cause of action against the defendants should fail because of a lack of proximate causation between defendants' alleged negligence or breach of contract and National's damages if National had no obligation to provide a defense or pay any loss to IA or Gortman under the terms of the policy.

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[234] 394 S.E.2d 225 (N.C.App. 1990).

> Defendants argue that even if they were negligent or breached a contractual duty to National, they have no liability to National because National had no liability to pay or defend its insureds because the matters raised by the insureds were excluded from coverage. If we determine, taking the evidence in the light most favorable to National, that the matters raised by the insureds were excluded from coverage, then National provided a defense and settlement funds to the insureds voluntarily, and the trial court correctly granted defendants' motion for summary judgment. If National was not obligated to defend the insureds, then any negligence of the defendants could not have proximately caused National any harm.[235]

A similar case is *Title Ins. Co. of Minnesota v. Christian,*[236] in which the insurer sought to recover from attorneys who had prepared the defective title evidence relied on by the insurer in issuing its policy. The attorneys put forth an inventive litany of policy defenses which the insurer overlooked or ignored, including that the commitment had expired, that the insured lender had actual knowledge of the missed prior lien, and that there was no evidence that the lender had funded the loan. The insurer was denied summary judgment. Similarly, in *Fidelity Nat'l Title Ins. Co. v. Tri-Lakes Title Co., Inc.,*[237] an agent was responsible to the insurer for having missed two easements.[238] However, the court found that the amount paid by the insurer to settle with the insured was not the measure of damages against the agent. Rather the appropriate measure, the court stated, was the diminution in value to the property. Thus, the insurer was required to prove that value rather than merely assert the amount of its claim payment.[239]

The unasserted-policy-defense argument also prevented recovery against an agent in *Stewart Title Guar. Co. v. Virginia Commonwealth Title Co.*[240] In that case, the insured lender elected not to foreclose its deed of trust when it learned that the borrower's signature had been forged on a correction deed putting the mortgagor in title. There was no evidence, however, that the mortgage or a power of attorney used to sign the mortgage had been forged. The insurer paid the lender on demand. It then sought recovery against the agent, which had also notarized the forged deed. The mortgagor testified that she did not sign the power of attorney, but the court discounted that testimony because of her apparent lack of knowledge. Because the insurer could not prove that the mortgage was forged and thus unenforceable, the agent was not liable to the insurer.

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[235] 394 S.E.2d at 226, 227-8.

[236] 267 S.C. 71, 226 S.E.2d 240 (1976).

[237] 968 S.W.2d 727 (Mo.App. S.D. 1998).

[238] The court found the agent's liability properly premised both on its contractual obligations and on negligent misrepresentation of title, in the form of the title insurance commitment, under §552 of the Restatement (2nd) of Torts.

[239] The *Tri-Lakes* case did not overtly involve an errors and omissions policy.

[240] 1995 U.S.App. LEXIS 23947 (4th Cir. 1995) (unpublished). The *Virginia Commonwealth* case and many other decisions are deftly analyzed in Bradford and Flynn, *Recent Developments in Title Insurance Law*, 32 Tort & Insurance Law Journal 617 (1997).

A Montana decision rejected the unasserted-defense argument, however, in a case in which the loss was clearly caused by the agent's error. In *Old Republic Nat'l Title Ins. Co. v. Realty Title Co.*,[241] the agent, Realty Title, insured the sale of land to one purchaser, then later insured a second deed from the same seller which included some of the land previously deeded and insured. The insurer settled the case by paying the second insured, Weibert. The agent raised numerous defenses, including that there was no loss because the second insured's title was good, and that the insurer had a duty to the agent to clear title rather than pay the insured. The court dealt with causation:

> With respect to Realty Title's arguments concerning Old Republic's alleged "parallel duty" under the agency agreement to assert policy exclusions against Weibert, we are in agreement with the District Court: "Such arguments beg the question that is before the Court. Had Realty Title used due diligence in its examination of its own records, conflicting policies would not have been issued." That is, Realty Title's failure to exercise due diligence in searching title records was the genesis or cause of the Weibert-Quality Seed dispute in the first instance. For this reason, we need not address Realty Title's contentions under the second issue on appeal that the real cause of the loss was Old Republic's decision to settle without first adequately investigating whether Weibert was, in fact, a bona fide purchaser with respect to the 7.78-acre parcel first insured by the Turks.

Thus, the Montana court correctly determined that the agent is not a beneficiary of the title insurance policy, and is not entitled to assert its provisions as a foil to its own liability to an underwriter which pays the insured in good faith when a claim is made.

Given the frequency with which the unasserted-defense argument is made, sometimes successfully, the insurer is well-advised to ask the agent and carrier early on if they believe any policy defenses exist, as further discussed at §17.8. If the carrier or agent thinks policy defenses exist and the insurer disagrees, it should respond immediately and seek to come to agreement. If the insurer agrees that a policy defense may exist, but believes the claim should be settled, the carrier's consent or contribution to a settlement avoids the "volunteer" defense. A complicating factor is that some E & O policies preclude the carrier from settling without the agent's written consent.[242] When such a policy is in force, the insurer may wish to verify that the agent has also given its written consent before the settlement is consummated.

Also, some errors and omissions policies are written so that the E & O insurance does not cover what the agent owes the underwriter on title claims. These policy forms are apparently written

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[241] 1999 MT 69, 978 P.2d 956 (Mont. 1999).

[242] One version of the Title Industry Assurance Company (TIAC) policy stated, under Limits of Liability: "4. LIMIT OF LIABILITY--REDUCTION FOR REFUSAL TO SETTLE: The Company shall not settle any claim without the written consent of the Insured. If, however, the Insured shall refuse to consent to any settlement recommended by the Company and shall elect to contest the claim or continue any legal proceedings in connection with such claim, then the Company's liability for the claim shall not exceed the amount for which the claim could have been so settled plus claims expense incurred up to the date of such refusal. Such amounts are subject to the provisions of Paragraphs 1 and 2 above."

to prevent the agent or its underwriter from collecting the agent's portion of a loss covered by and paid under the title policy.[243]

A related defense that may be raised by the E & O carrier is that its policy is not "other insurance" covering the risk of a title defect, and therefore is not a collateral source of recovery for matters covered by the title insurance policy. Generally, when two policies cover the same loss but one does not reserve rights to collect from the other, the non-reserving insurer is held to suffer the full loss. The 1970 ALTA title insurance policy did not clearly state that the insurer had a right of subrogation against another insurer whose policy might cover the same loss. In *Trico Manufacturing Co., Inc. v. Penn Title Ins. Co.*,[244] construing a 1970 ALTA policy, the court stated:

> The subject title insurance policy does not contain an "other insurance" clause or any language limiting coverage in the event that there was other insurance also covering the insured's loss. "It is fundamental that in the absence of some contractual provision, each insurer, where several policies are involved, is liable to the insured for the full loss up to the amount of insurance named in the particular policy. That insured is, of course, entitled to but one indemnity, but he may nevertheless look for that indemnity to any one or more of his policies in the absence of any stipulation for pro rating. 26 C.J. 361, §462... ." [T]he strict rule of construction against the insurer is applicable to 'other insurance' clauses."[245]

The title insurer was thus precluded from having the amounts paid on a credit life insurance policy offset against the insured lender's claim under the title insurance policy. The 1992 and 2006 ALTA policies contain an explicit subrogation "other insurance" provision.[246] Further, suit by the insurer against the agent has been held to be directly for a breach by the agent and not based on subrogation.[247] Thus, there is no weakness in the current form of title insurance policy precluding the title insurer to seek contribution from the errors and omissions carrier or a bond in favor of the

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[243] One version of the TIAC policy, for example, contained exclusions for the following: "(f) any liability assumed by the Insured under any contract or agreement whereby the Insured has agreed to participate in the payment of a loss, including attorneys' fees, court costs and expenses payable under a title insurance policy, unless such liability would have attached to the Insured even in the absence of such agreement; (g) defects in title, of which the Insured had knowledge at the date of issuance of such title insurance, but intentionally failed to disclose to the title insurance company; … (n) any liability of others assumed by the Insured under any contract or agreement, unless and only to the extent that the Insured would have had liability in the absence of the contract or agreement... ."

[244] 657 A.2d 890 (N.J.Super. 1995).

[245] 657 A.2d at 896.

[246] Conditions 13(b) of the 2006 ALTA Owner's policy states: "The Company’s right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights."

[247] *Florida Ins. Guar. Ass'n, Inc. v. Alatriste*, 584 So.2d 644 (Fla.App. 3 Dist. 1991).

agent.[248] However, in most jurisdictions, the insurer does not have a sufficient interest in the agent's errors and omissions policy to permit it to intervene in an action brought by the carrier against the agent to contest its policy coverage.[249]

17.10.3 Other Coverage Provisions

There are several other important provisions common to errors and omissions policies. One important aspect is that all such policies are of the claims-made variety. If the notice of claim is not delivered in time, the tardy notice will bar the claim.[250] In *Safeco Title Ins. Co. v. Gannon*,[251] the agent was aware that the insurer was handling a claim, but was not aware that he would be asked to pay for his negligent notarization of a forgery until after the agent's claims-made policy terminated. The insurer's notice was even too late under the "tail" provision built into that policy. The court found that the structure and limits of the claims-made form of policy would be defeated by allowing late notice under the "no prejudice" rationale. Similarly, a claim notice sent to the broker who placed the title agent's errors and omissions policy was not sufficient to put the carrier on notice, and the lack of notice was a valid defense to coverage under the claims-made policy. The court emphasized that the rationale behind claims-made policies is to cut off policy liability after strict time limits.[252]

A related defense is alleged prejudice to the errors and omissions carrier because it received late notice of the claim. Even if the errors and omissions carrier does not agree with the insurer's coverage position or decision to settle, the insurer may avoid this issue by giving prompt and continuing notice and information to the carrier. However, early notice avoids the question. See §2.3.3 regarding the effect of tardy notice of claim under the title insurance policy. Similar arguments seeking to extend the claim-notice deadlines on an errors and omissions policy were

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[248] *First American Title Ins. Co. v. Western Surety Co.*, 283 Va. 389, 722 S.E.2d 637 (Va. 2012) (title insurer that paid claim because its agent stole closing funds entitled to collect on agent's statutory surety bond as subrogee).

[249] *Seneca Ins. Co., Inc. v. Lexington & Concord Search and Abstract, LLC*, 484 F.Supp.2d 374 (E.D.Pa. 2007); *Whitford Land Transfer Co., Inc. v. Seneca Ins. Co., Inc.*, 2008 WL 834385 (E.D.Pa.) (unpublished). In both cases, which were apparently related, the court found that the insurer did not have a "sufficient interest" in the E & O policy, because it had not yet taken a judgment against the agent. In the *Lexington* decision, the court also found that the agency contract did not contain an assignment of rights under the errors and omissions policy, but the errors and omissions policy contained a provision requiring the carrier's consent to an assignment.

[250] *Title One, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 2009 WL 3059144 (E.D.Mich.) (unpublished) (agent's 41-month delay in reporting lawsuit against it negated coverage of claims-made policy); *First American Title Ins. Co. v. Titan Title, LLC*, 2011 WL 5854683 (M.D.La.) (unpublished) (title insurer's right to sue errors and omissions carrier directly does not alter duty to report claims within policy period); *Lexington Ins. Co. v. Integrity Land Title Co., Inc*., 852 F.Supp.2d 1119 (E.D.Mo. 2012) (late notice barred policy recovery); *JPMorgan Chase Bank, N.A. v. Scottsdale Ins. Co*., 2019 WL 959698 (D.N.J.) (unpublished) (when title agent deliberately cancelled coverage after being sued but before submitting a claim notice about lawsuit, endorsement cancelling policy negated coverage for subject of lawsuit).

[251] 54 Wash.App. 330, 774 P.2d 30 (Wash.App. 1 Div. 1989), recons.den. July 26, 1989.

[252] *Elkins v. Am. Int'l Special Lines Ins. Co.*, 611 F.Supp.2d 752 (S.D. Ohio 2009) ("[t]he very essence of a claims-made policy requires the claim to be first made during the policy period.").

denied in *Stewart Title Guar. Co. v. Kiefer*.[253]

If the errors and omissions carrier reserves the right to reevaluate its denial if suit is filed, the agent has been held to have a duty to give a second notice after litigation was started. In *First American Title Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*,[254] the carrier denied liability when the claim was presented before a lawsuit, but the carrier told the agency to notify it if suit were brought. The agent did not give notice of the suit until it was settled, which was found to violate the cooperation clause of the errors and omissions policy, voiding coverage.

The errors and omissions carrier may exercise a pay-and-walk provision in lieu of defending the agent, if state law and the policy's terms so permit.[255]

All or most errors and omissions policies have loss limits per claim or occurrence. There can be disputes over whether a certain matter represents one or more claim.[256]

The title insurer and errors and omissions carrier may vie for control over the underlying litigation. The title insurer's first duty is to its insured. The errors and omissions carrier does not share in that duty to the owner or lender insured, and seeks to control the litigation only to protect *its* insured, the title agent. Thus, the insurer must handle the litigation in the manner that is proper for the sake of the insured. In some cases, the insured has control over litigation strategy, not the insurer, as when the insurer is defending under a reservation of rights that presents a conflict of interest. The title insurer thus may not cede control of the litigation, including selection of defense counsel, to the title agent or its errors and omissions carrier. The title insurer may have to explain its obligations under the policy to the agent and its carrier in order to avoid the argument that the insurer has failed to take action that could have limited the agent's liability to the insurer.

[253] Nos. CIV.A. 95-348, CIV.A. 95-1069, 1997 WL 149973 (E.D.La.) (unpublished).

[254] 695 So.2d 475 (Fla.App. 3 Dist. 1997).

[255] *The Abstract & Title Guar. Co., Inc. v. Chicago Ins. Co.*, 489 F.3d 808 (7th Cir. (Ind.) 2007) (insurer permitted to decline defense of title agent after paying policy limits into court in an interpleader action, based on state law so permitting, even though E & O policy did not expressly grant that right).

[256] In *ALPS Property & Cas. Ins. Co. v. Bowles Rice, LLP*, 2018 WL 3639832 (N.D.W.V. 2018) (unpublished), the court held that the fact that a law firm had two agency contracts with the same insurer, signed by two different offices and having different terms, was not a sufficient basis on which to assert that a loss paid on one policy involving a single mortgage was actually two occurrences.

Appendix A--Letters and Forms

1 Acknowledgment of receipt of claim

*[Addressee]

Re: Insured: *
Claim no. *
Policy no. *

Dear *:

This letter is in response to your * of * providing a notice of claim concerning the above-referenced title insurance policy. The company has begun its investigation of the claim.

*[Your claim has been assigned to the following person for administration: Name, address, other contact information.]

*[Please complete, sign and return the enclosed claim notice form at your earliest convenience.]

*[Please prepare a proof of loss that identifies and establishes the nature of any loss for which you seek reimbursement, and return that information at your earliest convenience.]

Please feel free to contact me at the above address or by telephone if you have questions or need assistance.

2 Acceptance of defense--no reservation of rights--addressed to attorney retained

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

* Title Insurance Company (the Company) received a tender from the Insured of *his/her/its defense in the Action. The Company hereby retains you to represent the Insured to defend *him/her/it in the Action *[with respect to Counts * and * in the Action]. *[The Company does not by this letter consent to pay attorneys' fees for any other representation by you of the Insured *[, including the prosecution of any counterclaims, cross-claims or claims against third parties that may be available to the Insured in relation to the Action, except *.] The Company has not retained you to provide advice to the Insured as to the coverage of the title insurance policy.

I have enclosed a copy of the complaint and other pertinent documents. Please contact the Insured at * to begin coordinating this defense.

I am enclosing the Company's standards for outside counsel. Please carefully read and abide by those standards. I ask you to send all correspondence, pleadings, documents and other writings created or received by you, except those which are confidential communications between you as attorney and the Insured as client. *[Please also prepare a litigation budget per the enclosed standards and return it to me for review.]

The Company is ready to assist the Insured and you in your defense of the Action.

3 Acceptance of defense with reservation of rights--to insured

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

I write in response to your tender of defense in the Action to * Title Insurance Company (the Company). The Company has retained an attorney to defend you in the Action. The attorney we have retained is:

*[Name, address and other contact information for attorney]

*[The Company has not retained *[attorney]'s fees in representing you except as stated herein, including the prosecution of any counterclaims, cross-claims or claims against third parties that may be available to you in relation to the Action, except *.]

The Company has not retained attorney * to provide advice to you concerning questions or issues about the coverage under the Policy.

The Company has accepted your defense in the Action subject to a reservation of rights. The complaint makes the following allegations: * [recite allegations] Based on those allegations, the Company reserves the right *[to retender the defense of this action, and/or] to deny liability for any judgment rendered against the Insured, or the cost of any settlement obtained by the Insured, under the following circumstances:

*[list policy terms providing bases for reservations]

The Company retains the right to supplement this reservation of rights based on any additional facts which may become known to the Company in the future.

Please give attorney * your full cooperation in this matter.

4 Acceptance of defense with reservation of rights--retainer of attorney who tendered defense

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

I write in response to your tender of defense in the Action to * Title Insurance Company (the Company) on behalf of the Insured. The Company hereby retains you to defend the Insured in the Action.

*[The Company does not by this letter consent to pay your fees except as stated herein, including the prosecution of any counterclaims, cross-claims or claims against third parties that may be available to the Insured in relation to the Action, except *.]

The Company has not retained you to provide advice to the Insured concerning questions or issues about the coverage under the Policy.

This defense is accepted subject to a reservation of rights. The complaint makes the following allegations: * [recite allegations] Based on those allegations, the Company reserves the right *[to retender the defense of this action, and/or] to deny liability for any judgment rendered against the Insured, or the cost of any settlement, under the following circumstances:

*[list policy terms providing bases for reservations]

The Company retains the right to supplement this reservation of rights based on any additional facts which may become known to the Company in the future.

I look forward to a successful conclusion of this matter. I enclose the Company's standards for outside counsel. I ask you to review and abide by these standards in your representation of the Insured under the terms of this engagement. *[Please also prepare a litigation budget per the enclosed standards and forward it to me for review.]

5 Acceptance of defense with reservation of rights--covered counts only—California Cumis counsel

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

I write in response to your tender of defense in the Action to * Title Insurance Company (the Company) on behalf of the Insured. Based on my investigation, the Company hereby agrees to advance attorney's fees and costs incurred in defending your client's title to the insured property, but only to the extent coverage is afforded under the above-referenced policy.

I invite your attention to Conditions 5 of the 2006 ALTA policy, which sets forth the Company's duty of defense:

> 5. DEFENSE AND PROSECUTION OF ACTIONS
> (a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

Conditions 5(a) states that the Company shall have a duty to defend the Insured only as to "those stated causes of action alleging matters insured against by this policy." My analysis of the complaint is that Counts * and * invoke one or more of the Covered Risks of the policy (hereafter, the Covered Matters), and counts * and * do not, because *. Therefore, the Company hereby accepts the Insured's defense as to the Covered Matters only.

If you feel that I have failed to take into consideration facts or authorities in reaching this conclusion, or you believe that certain non-accepted causes of action fall within coverage, please resubmit your request with your own analysis, and it will be reviewed again.

*[The Company does not by this letter consent to pay your fees except as stated herein, including the prosecution of any counterclaims, cross-claims or claims against third parties that may be available to the Insured in relation to the Action, except *.] The Company has not retained you to provide advice to the Insured concerning questions or issues about the coverage under the Policy.

This defense is accepted subject to a reservation of rights. The complaint makes the following allegations: * [recite allegations]. As to the Covered Matters, the Company reserves the right to assert certain defenses based on the following provisions of the title insurance policy:

*[list appropriate exclusions and exceptions]

The Company reserves any and all rights as to the above-described defenses, including but not limited to the following:

1. To continue its independent investigation of this matter;

2. To assert any defense which, though not apparent at this time, becomes apparent at a later date;

3. Upon completion of the investigation, to withdraw from advancing any and all attorney's fees and costs in defending the Insured in this action, upon reasonable notice;

4. To commence a declaratory relief action against our Insured on the issue of policy coverage; and

5. To seek reimbursement of litigation costs, attorney's fees and reasonable settlement expenses which the Company may make or incur on behalf of the Insured, if appropriate.

Issues may come to our attention in the future which have a bearing on the Company's duty to defend the Insured. I will bring any such matter to your attention and advise you as to how the Company will proceed in light of that issue. The Company retains the right to supplement this reservation of rights based on any additional facts which may become known to the Company in the future.

Since the Company has accepted the tender of defense with a reservation of rights, I direct your attention to California Civil Code § 2860, **Conflict of Interest Between Insured and Insurer--Appointment of Independent Counsel**. Specifically, please note paragraph (c):

> When the insured has selected independent counsel to represent him or her, the insurer may exercise his right or require that the counsel selected by the insured

> possess certain minimum qualifications which may include that the selected counsel have (1) at least five (5) years of tort litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. <u>The insurer's obligation to pay fees to such independent counsel selected by the insured, is limited to rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended.</u> The provisions of this subdivision shall not validate other, different or other additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

[emphasis added] In light of the above, please contact me so that we may discuss your qualifications and fees. Your firm resume and list of billing rates would be most appreciated in aid of our effort to verify compliance with the requisites of § 2860.

6 Acceptance of partial defense--retention of separate counsel--addressed to insured's personal counsel

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

I write in response to your tender of defense in the Action to * Title Insurance Company (the Company) on behalf of the Insured. Based on my investigation, the Company hereby agrees to advance attorney's fees and costs incurred in defending your client's title to the insured property, but only to the extent coverage is afforded under the above-referenced policy.

I invite your attention to Conditions 5 of the 2006 ALTA policy, which sets forth the Company's duty of defense:

> 5. DEFENSE AND PROSECUTION OF ACTIONS
> (a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

Conditions 5(a) states that the Company shall have a duty to defend the Insured only as to "those stated causes of action alleging matters insured against by this policy." My analysis of the complaint is that Counts * and * invoke one or more of the Covered Risks of the policy (hereafter, the Covered Matters), and counts * and * do not, because *. Therefore, the Company hereby accepts the Insured's defense as to the Covered Matters only. If you feel that I have failed to take into consideration facts or authorities in reaching this conclusion, or you believe that certain non-accepted causes of action fall within coverage, please resubmit your request with your own analysis, and it will be reviewed again.

The Company has retained an attorney to defend the Insured in the Action as to the Covered Matters. The attorney we have retained is:

*[Name, address and other contact information for attorney]

I ask you to coordinate the Insured's defense with attorney *, and to secure the Insured's full cooperation so that the matter can be brought to a successful and expeditious conclusion. Please see Conditions 6 of the 2006 ALTA policy for a description of the Insured's duty to cooperate in litigation in which the Company is providing a defense to the Insured.

7 Acceptance of partial defense--apportionment of fees by insured's choice of counsel

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

I write in response to your tender of defense in the Action to * Title Insurance Company (the Company) on behalf of the Insured. Based on my investigation, the Company hereby agrees to advance attorney's fees and costs incurred in defending your client's title to the insured property, but only to the extent coverage is afforded under the above-referenced policy.

I invite your attention to Conditions 5 of the 2006 ALTA policy, which sets forth the Company's duty of defense:

> 5. DEFENSE AND PROSECUTION OF ACTIONS
> (a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

Conditions 5(a) states that the Company shall have a duty to defend the Insured only as to "those stated causes of action alleging matters insured against by this policy." My analysis of the complaint is that Counts * and * invoke one or more of the Covered Risks of the policy (hereafter, the Covered Matters), and counts * and * do not, because * (the Non-Covered Matters). Therefore, the Company hereby accepts the Insured's defense as to the Covered Matters only. If you feel that I have failed to take into consideration facts or authorities in reaching this conclusion, or you believe that certain non-accepted causes of action fall within coverage, please resubmit your request with your own analysis, and it will be reviewed again.

The Company hereby agrees to pay your attorneys' fees and costs in defending the Insured against the Covered Matters. *[The Company does not by this letter consent to pay your fees except as stated herein, including the prosecution of any counterclaims, cross-claims or claims against third parties that may be available to the Insured in relation to the Action, except *.] The Company has not retained you to provide advice to the Insured concerning questions or issues about the coverage under the Policy.

Because the Company is obligated to defend the Insured only against the Covered Matters, the Company hereby undertakes to advance attorney's fees and costs only as to those matters. We ask that you segregate your time entries and costs between the Covered Matters and the Non-Covered Matters, and send invoices to me for the Covered Matters only. We recognize that there may be instances in which your services cannot be segregated between the Covered Matters and Non-Covered Matters. However, you must make an effort to so segregate your billings.

*[If for simplicity's sake you do not want to make an allocation of time, we will be amenable to a suggestion for a reasonable percentage apportionment. For example, because there are * causes of action, * of which are Covered Matters, we are willing to pay *[fractional share] of your total fees and costs in defense of the Action. Please advise if you wish to adopt this procedure.]

I look forward to a successful conclusion of this matter. I enclose the Company's standards for outside counsel. Please carefully read and abide by those standards. *[Please also prepare a litigation budget per the enclosed standards and forward it to me for review.]

8 Reservation of rights--retender of defense to insured

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

The Insured tendered *his/her/its defense in the Action to * Title Insurance Company (the Company) on *. The Company agreed to defend the Insured under a reservation of rights, as explained in a letter dated *. In that reservation of rights letter, the Company explained that it was reserving the right to retender the defense of the Action to the Insured in the event that *.

The Company hereby exercises its right to retender the Insured's defense in the Action to the Insured, because it has determined that there is no potential for coverage under the policy for the matters alleged by the plaintiff in the Action. The basis for this retender is the following: *.

The Company will not pay the attorneys' fees, costs and expenses incurred in defending the Insured in the Action from * forward. *[Please submit your final invoice to me at your earliest convenience.] *[I have asked attorney * to submit his/her final invoice to me so that the Company may pay the last defense costs that it has agreed to pay.] *[The Company reserves the right to seek reimbursement from the Insured for all attorneys' fees and costs it has paid to date to defend the Insured in the Action.]

Please note that, although the provisions of the policy recited above provide a sufficient basis for the Company to retender the defense of the Action to the Insured, additional terms and conditions of the policy may also apply, and there may be facts not known to the Company today that would serve as a further basis for such retender. The Company does not waive the right to assert all facts and policy provisions that support its decision to retender the defense of the Action.

9 Preliminary analysis of no duty to defend

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

This letter is in response to the request made by the Insured, *, to * Title Insurance Company (the Company) to provide a defense for the Insured in the Action. I have reviewed the allegations made by the plaintiff in the complaint filed in the Action, to determine if those allegations create at least the potential for coverage under the Policy. I have also compared those allegations to the terms of the Policy, particularly its Covered Risks and Exclusions. *[I have also conducted a further investigation consistent with an insurer's duty in the State of * in the analysis of a requested defense in litigation.]

Conditions 5(a) of the Policy states that, on written request by the Insured, the Company shall be obligated to defend the Insured "in litigation in which any third party asserts a claim covered by this policy adverse to the Insured." Conversely, it states, the Company "will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy." Further, Conditions 5(a) states that this obligation "is limited to only those stated causes of action alleging matters insured against by this policy."

I have made the following analysis of the allegations in the Action and the terms of the Policy. *[quotation of Covered Risks, why allegations do not invoke a Covered Risk, recitation of duty to defend standard that is applied in the jurisdiction, quotation of applicable exclusion or other policy provision]

Therefore, I conclude that the allegations in this Action against the Insured do not create the potential for coverage under the Policy, and therefore the Policy does not obligate the Company to provide a defense to the Insured in the Action. Based on my analysis, the Company hereby declines to defend the Insured in the Action. If you are aware of an interpretation of the Policy that would alter this conclusion, please provide that information to me at your earliest convenience.

Please note that, although the provisions of the Policy recited above provide a sufficient basis for the Company to decline to defend the Insured in the Action, additional terms and conditions of the Policy may also apply, and there may be facts not known to the Company today that would serve as a further basis for such declination. The Company does not waive the right to assert all facts and policy provisions that support its decision to decline to defend the Insured in the Action.

10 Preliminary analysis of no duty to defend and filing of declaratory judgment action

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

This letter is in response to the request made by the Insured, *, to * Title Insurance Company (the Company) to provide a defense for the Insured in the Action. I have reviewed the allegations made by the plaintiff in the complaint filed in the Action, to determine if those allegations create at least the potential for coverage under the Policy. I have also compared those allegations to the terms of the Policy, particularly its Covered Risks and Exclusions. *[I have also conducted a further investigation consistent with an insurer's duty in the State of * in the analysis of a requested defense in litigation.]

Conditions 5(a) of the Policy states that, on written request by the Insured, the Company shall be obligated to defend the Insured "in litigation in which any third party asserts a claim covered by this policy adverse to the Insured." Conversely, it states, the Company "will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy." Further, Conditions 5(a) states that this obligation "is limited to only those stated causes of action alleging matters insured against by this policy."

I have made the following analysis of the allegations in the Action and the terms of the Policy. *[quotation of Covered Risks, why allegations do not invoke a Covered Risk, recitation of duty to defend standard that is applied in the jurisdiction, quotation of applicable exclusion or other policy provision]

Based on the above analysis, the Company has concluded that the allegations in this Action against the Insured do not create the potential for coverage under the Policy, and therefore the Policy does not obligate the Company to provide a defense to the Insured in the Action. The Company has elected to seek a court determination as to whether or not it has a duty to defend the Insured in the Action. *[That declaratory judgment action has been filed in * court.] *[The Company may move the court to stay the Action until the court has issued an order regarding the Company's duty to defend the Insured.]

*[Notwithstanding its conclusion that it has no such duty, the Company hereby agrees to pay

the cost of defending the Insured in the Action until it receives an order in the declaratory judgment action determining its duties. The Company hereby accepts the defense of the Insured under a full reservation of rights for the reasons described above. The Company will retender the defense of the Action to the Insured, if so permitted, when an order is entered in the declaratory judgment action.]

*[If you are aware of an interpretation of the Policy that would alter this conclusion, please provide that information to me at your earliest convenience.]

Please note that, although the provisions of the Policy recited above provide a sufficient basis for the Company to decline to defend the Insured in the Action, additional terms and conditions of the Policy may also apply, and there may be facts not known to the Company today that would serve as a further basis for such declination. The Company does not waive the right to assert all facts and policy provisions that support its decision to decline to defend the Insured in the Action.

11 Payment of loss without release of insurer

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

This letter is in response to the claim of loss submitted by the Insured under the Policy. The Company has completed its investigation of the Claim. Allow me to restate the facts as I understand them.

*[Statement of facts]

The Company's investigation indicates that the above facts invoke Covered Risk *, which indemnifies the Insured against *[quote the Covered Risk] (the Covered Matter). The Company's investigation has not revealed that the Covered Risk is negated by an exclusion or limitation in the Policy. Therefore, the Company has determined that it will consider the Claim to be covered by the Policy, subject to the Policy's Conditions and other terms.

To date, the Insured has not submitted a proof of loss. Conditions 4 of the Policy states:

> In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

The Policy explains at Conditions 8 that it indemnifies the Insured against "actual monetary loss or damage" suffered by the Insured that is caused by the Covered Matter:

> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.
>
> (a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of
>
> (i) the Amount of Insurance; or
>
> (ii) the difference between the value of the Title as insured and the value of

the Title subject to the risk insured against by this policy.

The Company has elected to make its own determination of the amount of "actual monetary loss or damage" caused by the Covered Matter, at its own expense.

Partial loss or encumbrance:
*[The Company has obtained the enclosed appraisal that opines on the "difference value" in the property due to the Covered Matter.] *[insert mathematical formula analysis from Form 16]

Complete failure of title:
*[The Company has obtained the enclosed appraisal that opines on the value of the insured property as of the date of loss, which was *.]

I enclose the Company's check in the amount of $*, which represents the Insured's actual monetary loss or damage as determined by the Company. Although the Company believes that this payment represents the full amount of loss payable for the Claim, it agrees that the Insured's acceptance and deposit of the check is not a release of the Company, but an acceptance of policy benefits.

If the Insured believes that there is any additional loss payable under this Claim, the Company hereby requests that the Insured so inform the Company and also submit a proof of loss. Any such proof of loss must conform to the measure of loss as described in the Policy.

Please note that this payment is made by the Company based on its present understanding of the facts and the Policy terms applicable to the Claim. Other terms and conditions of the Policy may apply, and there may be facts not known to the Company today that would cause the Company to reconsider its determination that the Claim is covered by the Policy. The Company does not waive the right to reconsider its coverage determination, or to assert all facts and policy provisions that would support such a reconsideration of its coverage determination.

12 Notice of insurer's intent to clear title—2006 ALTA policy

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

This letter is in response to the claim of loss submitted by the Insured under the Policy. The Company has completed its investigation of the Claim. Allow me to restate the facts as I understand them.

*[Statement of facts]

The Company's investigation indicates that the above facts invoke Covered Risk *, which indemnifies the Insured against *[quote the Covered Risk] (the Covered Matter). The Company's investigation has not revealed that the Covered Risk is negated by an exclusion or limitation in the Policy. Therefore, the Company has determined that it will consider the Claim to be covered by the Policy to the extent that it is willing to undertake certain actions, described below, subject to the Policy's Conditions and other terms as described in this letter.

The Company has determined that there is a basis on which to seek to clear title in relation to the Covered Matter. The Company hereby elects to take action to clear title. This affirmative action to clear title is taken under Conditions 5(b) of the Policy, which states:

> The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

The Company has retained counsel to represent the Insured in clearing title, at the Company's sole expense. The attorney we have retained is:

*[Name, address and other contact information for attorney]

The Company has retained this attorney to perform the following tasks and functions (the Title Clearance Actions): *[describe the scope of work.] The Company does not by this letter consent to pay attorney *'s fees except as stated herein. The Company has not retained attorney * to provide advice or answer questions concerning the coverage of the Policy, either on behalf of the Insured or the Company. Because the counsel employed by the Company has been retained for the limited purpose of taking the Title Clearance Actions, please communicate directly with me regarding any other aspect of this Claim.

Please note the following concerning the Company's rights in taking the Title Clearance Actions. First, the Policy states that the Company may undertake action to clear title that, if successful, will reduce the Insured's loss or damage, even if such action will not fully remove the Covered Matter. Also, the Company may exercise this right even if it takes some time to accomplish the title clearance action, as long as the Company exercises its rights diligently. Further, no loss is payable to the Insured if the Covered Matter is removed or extinguished. See Conditions 9(a), which states:

> If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

In addition, no loss is payable to the Insured if the Company is unable to clear title until there is a final determination that the Title Clearance Actions are unsuccessful, as stated in Conditions 5(c) and 9(a):

> Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.
>
> *   *   *   *
>
> In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

However, Conditions 8(b) of the Policy provides two additional benefits to the Insured in the event the Company does not succeed in removing the Covered Matter by the Title Clearance Actions:

> If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,
> (i) the Amount of Insurance shall be increased by 10%, and
> (ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

I ask that you cooperate with and assist the Company in taking the Title Clearance Actions so that they may be brought to a successful and expeditious conclusion. Please see Conditions 6(a) of the Policy, which states:

> In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

Please note that Conditions 5(b) of the Policy states that "[t]he exercise of these rights shall not be an admission of liability or waiver of any provision of this policy." *[By its election to retain counsel to take the Title Clearance Actions, the Company does not waive the right to reconsider its determination that the Claim is covered by the Policy, or to assert all facts and policy provisions that would support such a reconsideration of its coverage determination.] *[By its election to retain counsel to take the Title Clearance Actions, the Company does not acknowledge that the Claim is covered by the Policy, or waive the right to deny the Claim or to assert all applicable policy defenses, exclusions and provisions.]

13 Notice of insurer's intent to clear title--Residential policy

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

This letter is in response to the claim of loss submitted by the Insured under the Policy. The Company has completed its investigation of the Claim. Allow me to restate the facts as I understand them.

*[Statement of facts]

The Company's investigation indicates that the above facts invoke Covered Risk *, which indemnifies the Insured against *[quote the Covered Risk] (the Covered Matter). The Company's investigation has not revealed that the Covered Risk is negated by an exclusion or limitation in the Policy. Therefore, the Company has determined that it will consider the Claim to be covered by the Policy to the extent that it is willing to undertake certain actions, described below, subject to the Policy's Conditions and other terms as described in this letter.

The Company has determined that there is a basis on which to seek to clear title in relation to the Covered Matter. The Company hereby elects to take action to clear title. This affirmative action to clear title is taken under Conditions 4(e) of the Policy, which states:

4. <u>OUR CHOICES WHEN YOU NOTIFY US OF A CLAIM</u>
After we receive your claim notice or in any other way learn of a matter for which we are liable, we can do one or more of the following:

* * * *

e. Take other action which will protect you.

The Company has retained counsel to represent the Insured in clearing title, at the Company's sole expense. The attorney we have retained is:

*[Name, address and other contact information for attorney]

The Company has retained this attorney to perform the following tasks and functions (the

Title Clearance Actions): *[describe the scope of work.] The Company does not by this letter consent to pay attorney *'s fees except as stated herein. The Company has not retained attorney * to provide advice or answer questions concerning the coverage of the Policy, either on behalf of the Insured or the Company. Because the counsel employed by the Company has been retained for the limited purpose of taking the Title Clearance Actions, please communicate directly with me regarding any other aspect of this Claim.

Please note the following concerning the Company's rights in taking the Title Clearance Actions. First, the Policy states that the Company may undertake action to clear title that, if successful, will reduce the Insured's loss or damage, even if such action will not fully remove the Covered Matter. Also, the Company may exercise this right even if it takes some time to accomplish the title clearance action, as long as the Company exercises its rights diligently. Further, no loss is payable to the Insured if the Covered Matter is removed or extinguished. See Conditions 6(b), which states:

> If we remove the claim against your title within a reasonable time after receiving notice of it, we will have no further liability for it.

In addition, the Policy states in Conditions 5: "[w]e do not have to pay your claim until your case is finally decided." However, Conditions 6(b) of the Policy provides an additional benefit to the Insured while the Company is taking the Title Clearance Actions:

> If you cannot use any of your land because of a claim against your title, and you rent reasonable substitute land or facilities, we will repay you for your actual rent until:
> the cause of the claim is removed
> or
> . we settle your claim

I ask that you cooperate with and assist the Company in taking the Title Clearance Actions so that they may be brought to a successful and expeditious conclusion. Please see Conditions 5 of the Policy, which states:

> 5. <u>HANDLING A CLAIM OR COURT CASE</u>
> You must cooperate with us in handling any claim or court case and give us all relevant information.

*[By its election to retain counsel to take the Title Clearance Actions, the Company does not waive the right to reconsider its determination that the Claim is covered by the Policy, or to assert all facts and policy provisions that would support such a reconsideration of its coverage determination.]

*[By its election to retain counsel to take the Title Clearance Actions, the Company does not acknowledge that the Claim is covered by the Policy, or waive the right to deny the Claim or to assert all applicable policy defenses, exclusions and provisions.]

14 Appraiser retainer letter--addressed to appraiser

This is to confirm that I have retained you to perform an appraisal on the above property. Please determine the diminution in value of the property, if any, caused by the existence of *[describe the covered matter] (the Title Issue). I have enclosed the following documents that describe the real estate to be appraised: *.

Your appraisal method should be designed to calculate the insureds' actual loss as defined in the policy, which is not the standard method used by an appraiser to determine the value of real estate. Please consider this letter to be your instruction letter, authorizing you to perform valuations that are based on certain conditions that are not standard appraisal methods as described, for example, in the Uniform Standards of Professional Appraisal Practice (USPAP).

The correct method for valuation of a title insurance claim involving a title defect or encumbrance is to derive two values for the property as of the same date. The first valuation is of the property in its true condition, which is subject to the Title Issue. The second valuation is with the hypothetical assumption that the Title Issue does not exist. The following is a statement by a court of the measure of loss under a title insurance policy, which I ask you to assume to be a correct statement for this valuation:

> ... liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted.

Overholtzer v. Northern Counties Title Ins. Co., 116 Cal.App.2d 113, 253 P.2d 116 (1953).

I ask you to use the *Overholtzer* method in performing your appraisal. Please produce two values for the property. The first value is to be for the property in its true condition, which is as follows: *. The second value is to be under the hypothetical assumption that *. Based on the *Overholtzer* method, both valuations must be performed as of *, which I will ask you to assume to be the date on which the insured discovered the Title Issue.

In conducting these valuations, please do not make any extraordinary assumptions, as that term is defined in USPAP. For example, please do not assume that the property could be rezoned or subdivided, or that utility service that does not presently exist could be brought to the property. Also, the only hypothetical condition that you should assume is the one stated above, that title is not subject to the Title Issue. Further, please do not conduct a highest-and-best-use analysis. *Overholtzer* requires the title insurer to pay a loss based on the use to which the property [was] being devoted" on the date the insured discovered the Title Issue. That use may or may not correspond with what you would consider to be the highest and best use of the property.

Let me reiterate that I seek your objective opinion of value. Please send me your professional resume with your appraisal report. I will pay your invoice when received. Please call me if you have any questions about the method to be used or the assumptions you are to make in producing these values.

15 Appraisal method--insured obtaining appraisal

You have advised that you *[your clients] intend to obtain an appraisal of the property. Please give me the appraiser's name and resume at your earliest convenience. In order to arrive at a valuation that accurately reflects the amount of loss payable under a title insurance policy. Let me describe that method so that you may present an appraisal that the Company will consider to be a credible proof of loss.

The appraisal must be designed to establish the diminution in value of the property, if any, caused by the existence of *[describe the covered matter] (the Title Issue). The appraisal method should be designed to calculate the insureds' actual loss as defined in the policy, which is not the standard method used by an appraiser to determine the value of real estate. You should issue an instruction letter to the appraiser authorizing him or her to perform valuations that are based on certain conditions that are not standard appraisal methods as described, for example, in the Uniform Standards of Professional Appraisal Practice (USPAP).

The correct method for valuation of a title insurance claim involving a title defect or encumbrance is to derive two values for the property as of the same date. The first valuation is of the property in its true condition, which is subject to the Title Issue. The second valuation is with the hypothetical assumption that the Title Issue does not exist. The following is a statement by a court of the measure of loss under a title insurance policy, which the appraiser should be instructed to assume to be a correct statement for purposes of this valuation:

> ... liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted.

Overholtzer v. Northern Counties Title Ins. Co., 116 Cal.App.2d 113, 253 P.2d 116 (1953).

The appraiser should be instructed to use the *Overholtzer* method in performing the appraisal. That method requires the appraiser to produce two values for the property. The first value is to be for the property in its true condition, which is as follows: *. The second value is to be under the hypothetical assumption that *. Based on the *Overholtzer* method, both valuations must be performed as of *, which was the date on which the insured discovered the Title Issue.

In conducting these valuations, the appraiser should be told not to make any extraordinary assumptions, as that term is defined in USPAP. For example, he or she should be instructed not to assume that the property could be rezoned or subdivided, or that utility service that did not exist on the valuation date could be brought to the property. Also, the only hypothetical condition that the appraiser should assume is that title is not subject to the Title

Issue. Further, the appraiser should be told not to conduct a highest-and-best-use analysis. *Overholtzer* requires that the title insurer pay a loss based on "the use to which the property [was] being devoted" on the date the insured discovered the Title Issue. That use may or may not correspond with what the appraiser would consider to be the highest and best use of the property.

16 Mathematical formula for partial loss of land or easement

This letter is in response to the claim of our Insured under the above policy. We have now completed our preliminary investigation of the matter. Allow me to restate the facts as I understand them and give you our preliminary analysis of the claim.

[Statement of facts]

Based on the above facts, it is my analysis that a loss is payable under the policy to the insured. The loss is *[state nature of loss].

The measure of loss under the policy is defined in paragraph 6 of the Conditions and Stipulations, which states:

> 6. Determination and Payment of Loss
>
> (a) The liability of the Company under this policy shall in no case exceed the least of:
>
> (i) the actual loss of the insured claimant; or
> (ii) the amount of insurance stated in Schedule A.

The courts have consistently read the measure of loss in situations of this type as follows:

> liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted.

Overholtzer v. Northern Counties Title Ins. Co., 116 Cal.App.2d 113, 253 P.2d 116 (1953); Allison v. Ticor Title Ins. Co., 907 F.2d 645, (7th Cir. 1990); 979 F.2d 1187 (7th Cir. 1992).

One method of determining amount of the reduction in value is to obtain the opinion of an appraiser. To follow the Overholtzer rule, the appraisal must be done as of the date of discovery of the defect. The appraiser produces two values: the value of the property subject to the easement, and the value assuming that no easement existed. The loss is the **difference between** the two figures.

It is my experience, and the Company's, that it is very difficult for an appraiser to value the diminution in value caused by the existence of a defect in title such as a *. To avoid a purely subjective valuation, we frequently employ the following mathematical formula:

1. Determine the fair market value of the property without the title defect.

2. Determine the number of square feet for the entire lot.

3. Divide the fair market value by the number of square feet, to get a value per square foot.

4. Determine the number of square feet in the affected area.

5. Multiply the number of affected square feet by the value per square foot.

*[6. Divide the number arrived at in (5) by 2, to reflect the fact that an easement is equal to about half the value of full ownership of the land.]

*[This valuation method is weighted in favor of the insured because the value of all improvements is spread out over the unimproved portion of the property.]

The above formula produces the following figures in this case:

Property value	$*		
Total number of square feet (* x * feet)		*	
Value per square foot	$*		
Affected area (* x * feet)		*	
Value of affected area in fee		$*	
*[Loss (fee value divided by 2)			<u>$*</u>]

I have enclosed our check in the above amount. *[Your clients are authorized to deposit the check when they have signed the enclosed release and returned it to me in the envelope provided.]

17 Template--preliminary analysis of no coverage

*[Addressee]

Re: * (the "Insured")
Claim no. *
Policy no. * (the "Policy")
* [Case caption] (the "Action")

Dear *:

This letter is in response to the claim of loss submitted by the insured under the Policy, in which the insured has asserted policy coverage for *[describe the claim] (the Claim). The Company has completed its investigation of the Claim. Allow me to restate the facts as I understand them.

*[Statement of facts]

Now allow me to give you my analysis of this claim.

*[Recitation of policy provisions]

*[Application of policy provisions to facts]

Based on the foregoing analysis, the Company has concluded that the Claim is not covered by the terms of the title insurance policy.

*[The above analysis represents the Company's analysis of policy coverage based on the facts known to it. If you are aware of facts or an interpretation of the policy which might alter the above analysis or conclusions, please provide that information to me at your earliest convenience.]

*[The Company therefore denies the Claim.]

Please note that this the above analysis is made by the Company based on its present understanding of the facts and the Policy terms applicable to the Claim. Other terms and conditions of the Policy may apply, and there may be facts not known to the Company today that would serve as further bases for a determination that the Claim is not covered by the Policy. The Company does not waive the right to assert any additional facts or policy terms or defenses.

18 Follow-up after denial of claim of loss

Re: Insured: *
Our file no. *
Policy no. *
Agent file no. *

Dear *:

You will recall that I gave you my analysis of coverage regarding this claim by my letter of *. I invited you to forward facts or an interpretation of the commitment and policy which might alter my analysis. I have not heard from you to date.

I have scheduled this file for a final review on *. If I have not heard from you by that time, I will assume that the proposed insured has elected not to contest my analysis, and I will close my file. Thank you again for your notice. *[I have enclosed a statutory notice of insureds' rights.]

19 Rights in adjacent street not insured

This dispute concerns *[description of issue concerning adjacent street]. You may have a valid claim to these rights, but they are not insured by the policy. The policy insures only the land described in Schedule A. It does not insure any appurtenant interests outside the boundaries of the described property. The policy states:

> 1. Definition of Terms
> The following terms when used in this policy mean:
> *   *   *
> (d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

Please see Offenhartz v. Heinsohn, 30 Misc.2d 693, 150 N.Y.S. 2d 78 (Sup. Ct. 1956).

The title insurance policy does not insure any rights in any street adjacent to the insured property. The insurer is not responsible for determining what rights the insured might have in a road. In Havstad v. Fidelity Nat'l Title Ins. Co., 58 Cal.App.4th 654, 68 Cal.Rptr.2d 487, 97 Cal. Daily Op.Serv. 8107 (1 Dist. 1997), mod. Oct. 20, 1997, rev.den., a policy insuring land in a subdivision was found not to insure any rights in an area on the recorded plat marked as "not a public street." The court made it clear that the policy insures only the land shown in the policy. Any reference to a map or plat does not draw into coverage any appurtenant rights which might be created by or referred to in such map.

> Thus, the written title insurance contract provisions "clearly and explicitly" insure a fee title in lots 1 and 23; "clearly and explicitly" do not cover "any property beyond the lines of the area described or referred to in schedule A, nor any right, title, interest estate or easement in abutting streets"; and "clearly and explicitly" contain no separate indorsements covering an easement in the nonabutting property known as "not a public street." An ordinary reading of the land's description indicates coverage for two pieces of property--lot 1 and lot 23. Reference to the subdivision maps is included to provide guidance as to where the graphic representation of the property can be located. In our view, the policy is completely unambiguous in its description of the land covered... .

20 Disputed improvement not located on Land

This dispute concerns *[describe improvement not located on Land]. While you may have a valid claim of ownership to these improvements, the policy does not insure that you own them. The title insurance policy insures title to the land described in the policy. It does not insure title to land not described in the policy. The policy states:

> 1. Definition of Terms
> The following terms when used in this policy mean:
> *　　*　　*
>
> (d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

Because the improvements are not located on the insured property, title to the land on which they rest is not insured.

21 Land erroneously included in policy and deed

The insurer is not liable to indemnify the insured when the policy includes land which the insured did not intend to buy or pay for. The policy does not protect against matters agreed to by the insured, or that do not result in any loss or damage. The Exclusions from coverage state:

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> *　*　*　*
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> (a) created, suffered, assumed or agreed to by the insured claimant;
>
> *　*　*　*
>
> (c) resulting in no loss or damage to the insured claimant... .

In this case, the facts recited above show that the land that the insured agreed to purchase did not include the parcel in dispute. This is similar to the situation in Lawyers Title Ins. Corp. v. Golf Links Development Corp., 87 F.Supp.2d 505 (W.D.N.C. 1999). In Golf Links, the legal description accidentally included a platted lot that had already been deeded away by the seller. The policy also mistakenly included the lot. The insured claimed to have purchased the lot and sued the insurer for its value. The court reformed the policy to take out the lot. The insured argued that the insurer should be liable because it made a mistake. The insurer said that it merely repeated the buyer's own mistake. The court agreed with the insurer:

> [N]egligence on the part of one party [which causes the mistake] does not preclude a finding of mutual mistake. In other words, the fact that the mistake arises because the party who is seeking reformation supplied the incorrect information does not make the mistake unilateral.

The insured's failure to obtain the disputed land also results in no loss or damage to the insured. A case involving very similar circumstances is Cohen v. Security Title & Guar. Co., 212 Conn. 436, 562 A.2d 510 (Conn. 1989), in which the deed and policy description included land which the insured had never intended to purchase. The court held that the insured "had suffered no compensable loss." The court reached the same result on the same facts in Aja v. Appleton, 86 Nev. 639, 472 P.2d 524 (1970) and Booth v. New Jersey Highway Authority, 60 N.J.Super. 534, 159 A.2d 460 (1960).

22 Physical barrier to access

The policy insures against the "[l]ack of a right of access to and from the land." Insuring Provision 4. This coverage assures a right of access, but not that an abutting public street is physically open and improved. This limitation on the access coverage has been recognized by a number of reported decisions construing the policy.

For example, in Krause v. Title & Trust Co. of Florida, 390 So.2d 805 (Fla.App. 1980), the insureds had a right of access, but wanted the insurer to pay for the substantial fill required to make it useable by normal vehicles. The court held that the policy insures only that there is a right of access. Similarly, in Title & Trust Co. of Florida v. Barrows, 381 So.2d 1088 (Fla.App.1979), a platted "street" was only the extension of a sandy beach, and was covered by the tide in the spring and fall. The court held:

> In the case here before us, there is no dispute that the public record shows a legal right of access to appellant's property via the platted Viejo Street. The title insurance policy only insured against record title defects and not against physical infirmities of the platted street.

381 So.2d at 1090. Finally, in Gates v. Chicago Title Ins. Co., 813 S.W.2d 10 (Mo.App. 1991), the insured testified that the trek from public street into his property was "indescribable" and a mere "goat path." The court held, however, that the policy insures only a right of access, not that the access right will permit convenient use. Further, it found the insurer was not responsible for inspecting the property for the insured, or for insuring that the access route was passable. Thus, the court found no coverage for the inconvenient access right.

*[The Krause policy also contained an exception for matters which would be shown on an accurate survey, as does the policy issued in this case. The Krause court found that the survey exception placed the burden on the insured to discover any deficiency in the physical condition of the street:

> The policy here specifically excepted any facts revealed by an accurate survey. The physical condition of the existing access was easily ascertainable by a simple inspection of the site by the purchasers. As the title company insured the quality of the title as shown by the record and there was access of record, it was not required to aid in the suit by appellants Krause and Beane to establish a grant of necessity.

390 So.2d at 806.]

23 "Reasonable" access not insured

The policy insures against the "[l]ack of a right of access to and from the land." Insuring Provision 4. This coverage assures a right of access. It does not assure a "reasonable" or convenient means of traveling from a public street to the property, or that the property is accessible by vehicle.

For example, in Gates v. Chicago Title Ins. Co., 813 S.W.2d 10 (Mo.App. 1991), the insured testified that the trek from public street into his property was "indescribable" and a mere "goat path." There was no question, however, that there was a public street next to his property. The court held that the policy insures only the right of access, not a convenient route. The court found the insured, not the insurer, was responsible for inspecting the property and making sure that the access route was passable. Similarly, access over a logging road was found to be a sufficient means of access for property located in a forested area. United Bank v. Chicago Title Ins. Co., 168 F.3d 37 (1st Cir. Me. 1999).

24 Street not insured as being public, open, unobstructed or at grade

The policy insures that the insured has a right of access to and from the property. However, it does not insure that an adjacent street has any legal or physical status. First, the policy does not assure that a street adjacent to the insured property is a public road. See Rialto Building & Loan Ass'n v. Commonwealth Title Co., 327 Pa. 93, 192 A. 635 (1937) (street was not open and was an easement, not dedicated in fee; policy made exception for "Streets not physically opened" and thus dedication to public not insured); Shaver v. Title Guaranty & Trust Co., 163 Tenn. 232, 43 S.W.2d 212 (1931) (description referring to road was not assurance that the road existed or was open; in fact, abutting land was privately owned and access later halted over it, but no claim was payable); J & S Building Co., Inc. v. Columbian Title & Trust Co., 1 Kan.App.2d 228, 563 P.2d 1086 (1977) (attempted reservation of reversionary rights in dedicated streets was ineffective; insured's title to street on vacation was not defective or unmarketable because of invalid reversion right).

The policy also does not assure that any abutting "public" street is open or improved. For example, in Title & Trust Co. of Fla. v. Barrows, 381 So.2d 1088 (Fla.App. 1979), the insured land abutted a platted street which was "merely a continuation of a sandy beach" and covered by high tide in the spring and fall. However, the court ruled that the insured had a right of legal access and the policy did not insure "against physical infirmities of the platted street." Similarly, in Hocking v. Title Ins. & Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951), a plat was recorded but the streets were not constructed. In fact, the entire subdivision was mere desert. The court found it "elementary" that the insured's problem was the condition of the improvements on the land, not the title to same, and thus not covered by the policy.

Finally, the policy does not assure that any adjacent street is at a grade which will permit the insured to build a connecting driveway. It also does not insure against a municipal action to **change** the grade of the adjacent street, even when a map showing the intended changes to the street is filed or available for review. See Sperling v. Title Guarantee & Trust Co., 227 App. Div. 5, 236 N.Y.S. 553 (1929); Mafetone v. Forest Manor Homes, Inc., 34 App.Div.2d 566, 310 N.Y.S.2d 17 (1970).

25 Marketability of title not "salability" of property--Residential policy

The policy protects against loss caused by unmarketability of the title to the property. This coverage concerns a purchaser's willingness to accept the **title** to the property. It does not insure that the property itself is "salable"in the sense that a purchase can easily be found for it. The policy states:

> *[Residential policy]
> COVERED TITLE RISKS
> This Policy covers the following title risks, if they affect your title on the Policy Date.
> * * * *
> 11. Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan.
>
> *[1992 policy]
> ... * TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:
> * * * *
> 3. Unmarketability of the title... .

Property can have perfectly good (marketable) title, yet have little or no value on the resale market.

Marketability of title means a title which is reasonably certain. In our state, marketability of title is measured as:

> *[state law standard for marketability of title]

The distinction between marketability of title and salability of the land is well-established in case law. Case law is also clear that the title insurance policy insures marketability of title, not salability of the land.

For example, in one case an insured bought a lot in a "subdivision" which existed only on paper and was physically just desert. The insured argued that the land had no value:

> In this connection she points out that "street improvements obviously enhance the value of subdivision lots," that "obviously the sales value of such property is a long

> ways from the sum of $13,550.00 which she paid for the property, if it has any value at all," and that "Certainly no one would pay that price for two small areas of vacant, unimproved desert land."

Hocking v. Title Ins. & Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951). The court disagreed, holding:

> One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable.
>
> *   *   *
>
> Although it is unfortunate that plaintiff has been unable to use her lots for the building purposes she contemplated, it is our view that the facts which she pleads do not affect the marketability of her title to the land, but merely impair the market value of the property. She appears to possess fee simple title to the property for whatever it may be worth... .

Similarly, an insured claimed that her house had been built at an elevation below the flood plain, making it impossible to resell. The appeals court affirmed judgment for the insurer, stating:

> Camp stated in her affidavit that she has listed the house for sale and has received no offers for it.
>
> The district court reasoned that under Arkansas law, Camp had a valid claim only if the breach of the restrictive covenant amounted to a cloud on the title, and thereby impaired marketability. The court concluded that the breach reduced the value of the property, but did not affect Camp's title to the property. Since the breach did not extinguish Camp's title to the property, or raise any reasonable doubt as to the validity of her title, the title was not unmarketable, the risk against which Commonwealth insured.

Camp v. Commonwealth Land Title Ins. Co., 787 F.2d 1258 (8th Cir. 1986). See also: Chicago Title Ins. Co. v. Kumar, 24 Mass. App. Ct. 53, 506 N.E.2d 154 (1987) (hazardous material on premises does not make title unmarketable); Nishiyama v. Safeco Title Ins. Co., 85 Cal.App.3d Supp. 1, 149 Cal. Rptr. 355 (1978) (illegal lot split does not make title unmarketable); Edwards v. St. Paul Title Ins. Co., 39 Colo.App. 235, 563 P.2d 979 (1977) (existence of special tax district does not make title unmarketable).

26 Commitment cancelled--lapse of effective period

You are hereby advised that the above-referenced title insurance commitment is null and void, and is hereby cancelled because it has expired by its terms. The commitment provides:

> This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate 180 days after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company.

The last effective date of the commitment was *. More than 180 days have passed since that date. *[The transaction for which the commitment was issued is not evidenced in the public record.]

27 Commitment cancelled--failure to pay premium

You are hereby advised that the above-referenced title insurance commitment is null and void, and is hereby cancelled because the premium has not been paid. A fundamental principle of insurance is that the insurer does not undertake a risk unless it has been paid the premium.

The commitment states:

> * Title Insurance Company, a * corporation, herein called the Company, for a valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest covered hereby in the land described or referred to in Schedule A, upon payment of the premiums and charges therefor; all subject to the provisions of Schedules A and B and to the Conditions and Stipulations hereof.

Requirement (b) on Schedule B, Part 1 is:

b. Payment to the Company of the premiums, fees and charges for the policy.

*[Insert form re: expiration of commitment if applicable]

28 Commitment cancelled--failure to disclose material fact

The commitment to insure says that the proposed insured must disclose any title defect of which he or she becomes aware.

> 2. If the proposed Insured has or acquired actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.

Conditions paragraph 2. The United States Supreme Court stated this duty of disclosure as follows:

> Insurance policies are traditionally contracts *uberrimae fidei* [the most abundant good faith] and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option.

Stipcich v. Insurance Co., 277 U.S. 311, 316, 48 Sup.Ct. 512, 72 L.Ed. 895. This is an ongoing duty to disclose.

When the proposed insured knows about the title defect before closing, but does not tell the insurer, the policy is void. For example, in Kirwan v. Chicago Title Ins. Co., 9 Neb.App. 372, 612 N.W.2d 515 (Neb.App. 2000), *aff'd* 261 Neb. 609, 624 N.W.2d 644 (2001), the court found that, when the insured failed to disclose a title defect before closing, the policy did not protect against it.

> The clear language of the commitment allows Chicago Title to exclude or limit coverage on Schedule B when the policy is issued for an adverse claim which comes to light after the commitment but before the policy is issued. However, nondisclosure results in a new and undisclosed adverse claim being excluded from coverage. By the time the Kirwans disclosed the Vanderwerfs' claim, the commitment had "evaporated" by its express terms and the policy controlled... .

The same conclusion was reached in Commonwealth Land Title Ins. Co. v. Ozark Global, L.C., 1997 WL 124213 (S.D.Ala. 1997) (unpublished).

29 Commitment cancelled--failure to pay adequate consideration

You are hereby advised that the above-referenced title insurance commitment is null and void, and is hereby cancelled. The commitment to issue a policy is conditioned on satisfaction of Requirement 1 of Schedule B, Part I:

1. Payment to or for the account of the grantors or mortgagors of the full consideration for the estate or interest to be insured.

It has come to our attention through *[identify source of information] that the proposed insured has not paid full consideration for the property to be insured.

30 Commitment cancelled--failure to meet requirement

You are hereby advised that the above-referenced title insurance commitment is null and void, and is hereby cancelled, because the following requirement has not and cannot now be met:

*

Reported cases establish that no coverage exists until the commitment requirements have been met. A defective instrument does not satisfy the requirement that such an instrument be delivered or recorded. For example, when a forgery in a deed to be insured was alleged after closing but before the policy was issued, the court held that a forged deed does not satisfy the requirement that a warranty deed be recorded. Glass v. Stewart Title Guaranty Co., 354 S.E.2d 187 (1987).

In a similar case, a closing attorney falsely represented to a loan assignee that a transaction had closed and loan funds been disbursed, when in fact the funds had not been disbursed, the deed had not been delivered and prior liens had not been paid off. The assignee's claim was rejected by the court because the requirements for policy issuance had not been met, and thus there was no policy. The misrepresentations of the closer did not create policy coverage. First Financial Savings & Loan Ass'n v. Title Ins. Co. of Minnesota, 557 F. Supp. 654 (1982).

31 Commitment--no loss suffered because no reliance

A proposed insured may claim loss under a commitment only to the extent that he or she has acted in reliance on the commitment. The Conditions of the commitment state:

> 3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and Stipulations and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.

[emphasis added] Under the facts stated above, it is my analysis that the proposed insured did not rely on the title insurance commitment in electing to close on the purchase of the property.

Numerous reported decisions have upheld the commitment term that loss does not occur, even if the commitment is in error, when the proposed insured does not change his or her position in dependence on the erroneous information in the commitment. For example, a lack of reliance was established conclusively when the proposed insured did not apply for title insurance until after taking title. See W.E. Erickson Const., Inc. v. Chicago Title Ins. Co., 641 N.E.2d 861 (Ill.App. 1994); Manley v. Cost Control Marketing & Management., Inc., 583 A.2d 442 (Pa.Super.Ct. 1990); Driscoll v. Title Guarantee & Trust Co., 119 Misc. 754, 197 N.Y.S. 323 (Sup.Ct. App. Term 1922); and Lawyers Title Ins. Corp. v. Research Loan & Invest. Corp., 361 F.2d 764 (8th Cir. 1966). Similarly, a lender failed to show reliance when it does not see the title insurance commitment before making the loan. Lawrence v. Chicago Title Ins. Co., 192 Cal.App. 3d 70, 237 Cal.Rptr. 264 (1987).

The fact that coverage is conditioned on reliance does not make the commitment illusory.

> Chicago Title's promise under the title commitment is neither empty nor optional. The commitment only excludes recovery for damages caused by a defect in title if the insured did not rely on the commitment to acquire the title. It clearly covers losses suffered by an insured who relies on the commitment. Such a promise is not illusory, but contingent upon the loss occurring after the insurance takes effect.

W.E. Erickson Const., Inc. v. Chicago Title Ins. Co., 641 N.E.2d 861, 864 (Ill.App. 1994).

32 Loan policy does not insure repayment of debt or value of land

The loan policy does not insure the enforceability of the debt for which the insured *[mortgage] *[deed of trust] is given as security, or that the debt will be repaid. Rather, the policy insures only against the matters shown in the Insuring Provisions, all of which have to do with the title to the Land or the lien of the insured *[mortgage] *[deed of trust].

This limitation on policy coverage has been upheld in numerous reported decisions. For example, one court stated:

> A mortgagee title insurance policy does not guarantee the mortgagee that the mortgagor will make the mortgage payments. See Narbeth Bldg. & Loan Ass'n v. Bryn Mawr Trust Co., 126 Pa.Super. 74, 190 A. 149, 151 (1937) ("The provisions of [a mortgagee title policy] did not constitute the [title insurance] company a surety for the mortgaged debt, nor a guarantor of its payment.") All a policy of that kind does is insure the adequacy of the title to the mortgaged property. Miller v. Commercial Standard Ins. Co., 248 So.2d 675 (Fla.Dist.Ct.App. 1971). The lender, and not the title insurer, shoulders the credit risk in a real estate loan. Chicago Title Ins. Co. v. Citizens and Southern Nat'l Bank, 821 F.Supp. 1492, 1495 (N.D.Ga. 1993) (a declaratory judgment action brought by the insurer against the insured to determine coverage under a mortgagee title policy wherein the court observed "sound legal policy should dictate that the [insured] would have borne [the] risk absent specific language to the contrary.") A mortgagee title insurer is under no duty to prosecute a foreclosure action.

First Federal Savings Bank v. Stewart Title Guar. Co., 451 S.E.2d 916, 922 (S.C.App. 1994). Similarly, when a lender was sued under various theories, including RICO, based on alleged forgeries and alterations to loan documents, the court found that the complaints "do not question either the validity or enforceability of the mortgages, and do not assert title defects." First Federal Savings Bank v. Stewart Title Guar. Co., 451 S.E.2d 916, 922 (S.C.App. 1994).

The policy also does not assure that the loan can be sold for any particular price, or that the property is worth as much as the debt. See Glavinich v. Commonwealth Land Title Ins. Co., 163 Cal.App.3d 263, 209 Cal.Rptr. 266 (1984) (notice of default affected resale value of loan, but not the validity of the lien); Demopoulos v. The Title Ins. Co., 61 N.M. 254, 298 P.2d 938 (1956); Lawyers Title Ins. Corp. v. JDC (America) Corp., 818 F.Supp. 1543 (S.D. Fla. 1993), aff'd 52 F.3d 1575 (11th Cir. 1995); Couch on Insurance, §§ 57:189, 205. Rather, if the value of the property is less than the debt, the property value becomes the ceiling of policy liability. Focus Investment Associates, Inc. v. American Title Insurance Co., 992 F.2d 1231, 1237, note 10 (1st Cir. 1993).

33 Police power matter

The policy does not protect against the government's exercise of its police power right, unless there is notice in the public records on the Date of Policy that the government is taking such action:

*[Residential policy]

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
   . land use
   . improvements on the land
   . land division
   . environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.

*[1992 policy]

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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.

Various actions by governmental bodies under the police power have been held in reported cases to be excluded from the coverage of the policy. For example, in Marriott Financial Services, Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975), affirming 23 N.C.App. 377, 209 S.E.2d 423 (1974), an insured suggested that its right of access was denied because of a municipal ordinance restricting access to the property. The municipality would not issue a driveway permit. The court held that there was no notice of the claimed restriction on the right of access in the public records affecting the real estate on the Date of Policy. Thus, the matter was excluded under the police power exclusion. Similarly, in Nishiyama v. Safeco Title Ins. Co., 85 Cal. App. 3d Supp. 1, 149 Cal. Rptr. 355 (1978), lots in a subdivision were sold in violation of a law requiring governmental approval of the subdivision plat. The court held that such a law does not make title to the property unmarketable:

> It is true that it may be necessary for plaintiffs to comply with reasonable conditions with respect to their property as could have been required of the grantor as a condition of subdividing the latter's tract of land under the provisions of the Subdivision Map Act and any county ordinances ... but such conditions cannot be said to make the title unmarketable (and in the absence of clarifying amendments to the complaint which plaintiffs declined to make we do not see how the potentiality of such conditions can be said to render the real property without fair market value).

34 Environmental exclusion--pollution on property

The effect of any law regulating environmental protection is excluded from policy coverage, unless there is notice in the public records on the Date of Policy:

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

No such notice was in the public records on the Date of Policy. My analysis is, therefore, that this matter is therefore excluded from coverage under the policy.

In addition, the physical presence of hazardous waste on the insured property on the Date of Policy has been consistently held not to impair the marketability of the title to the land. See Lick Mill Creek Apartments v. Chicago Title Ins. Co., 283 Cal. Rptr. 231 (App. 1991); Chicago Title Insurance Co. v. Kumar, 506 N.E.2d 154 (Mass. App. 1987).

35 Zoning dispute

The policy *[does not protect against (1992 policy)] *[provides only a limited protection against (Residential policy)] the effect of zoning ordinances, and their violation. Zoning laws regulate the use of, but not the title to, property. For that reason, zoning matters are generally excluded from the coverage of the title insurance policy:

*[Residential policy]

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
   - land use
   - improvements on the land
   - land division
   - environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.

Your policy does provide protection against zoning violations, as a result of which:

12. You are forced to remove your existing structure -- other than a boundary wall or fence -- because:
    - it extends on to adjoining land or on to any easement
    - it violates a restriction shown in Schedule B
    - it violates an existing zoning law

13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.

*[1992 policy]

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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 exclusion has been enforced in various reported decisions. See Bronen v. New York Abstract Co., 19 A.D.2d 821, 243 N.Y.S.2d 664 (1963); and Marriott Financial Services, Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975), affirming 23 N.C.App. 377, 209 S.E.2d 423 (1974).

36 Building code violation

The policy does not protect against a violation of the municipal building code. Building code ordinances regulate the use of, but not the title to, property. For that reason, the effect of any violation of such ordinances is excluded from the coverage of the title insurance policy:

*[Residential policy]

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
   . land use
   . improvements on the land
   . land division
   . environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.

*[1992 policy]

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

A number of reported decisions have enforced this exclusion from policy coverage. Chu v. Chicago Title Ins. Co., 89 App.Div.2d 574, 452 N.Y.S.2d 229 (1982) (refusal to issue certificate of occupancy not covered); Arapahoe Land Title, Inc. v. Contract Financing, Ltd., 28 Colo.App. 393, 472 P.2d 754 (1970) (building code violation not protected against); Hocking v. Title Ins. & Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951) (refusal to issue building permit not covered).

One reported decision found that a building code violation suit pending at the Date of Policy rendered title unmarketable. However, that decision, Radavanov v. Land Title Co. of America, 545 N.E. 2d 351 (Ill. App. 1989), was different from this situation. *[Distinguish case from present facts]

37 Subdivision law violation

The policy does not protect against a violation of the land subdivision or platting laws. These laws regulate the use of, but not the title to, property. For that reason, the effect of any violation of such law is excluded from the coverage of the title insurance policy:

*[Residential policy]

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
   . land use
   . improvements on the land
   . land division
   . environmental protection

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.

*[1992 policy]

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

A number of reported decisions have enforced this exclusion from policy coverage. For example, a decision found that it applied when the developer failed to file and obtain approval for a plat. Busch

v. Nervik, 38 Wash.App. 541, 687 P.2d 872 (1984); Nishiyama v. Safeco Title Ins. Co., 85 Cal.App.3d Supp. 1, 149 Cal.Rptr. 355 (1978). The exclusion has also been held to apply when the subdivider failed to post bonds for street improvements, which in turn caused the municipality to refuse to issue a building permit. Hocking v. Title Ins. & Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951).

38 Tortious conduct in obtaining title

Based on the above facts and analysis, it is my opinion that *[adverse party] is claiming that the insured obtained title by tortious conduct, including *[list allegations, such as fraud, coercion, duress]. However, there is no claim that the title to the property is defective.

The policy does not create a duty to *[indemnify] *[defend] an insured under such circumstances. This case is similar to Safeco Title Ins. Co. v. Moskopoulos, 172 Cal. Rptr 248, 116 Cal.App.3d 658 (1981), in which the court said:

> The facts alleged in the Klass action pertain to the conduct of appellant and Bea in their relations with the Williamses. The Klass action relates not to appellant's title in the property, but to the manner in which he acquired title.

172 Cal. Rptr at 252.

Even if the allegations are considered to affect title, however, the matter complained of is still a matter created or agreed to by the insured, and thus excluded. The policy excludes challenges to title which are in fact caused by the insured's own acts. Exclusion 3(a) states:

> The following matters are expressly excluded from the coverage of this policy:
>
> 3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant... .

This exclusion formed a second basis for the Moskopoulos ruling.

Moskopoulos is one in a series of cases which have held that suits for fraud and unconscionable or inequitable conduct in the obtaining of title are not covered by the policy. A similar case involved an insured whose seller sued for rescission based on fraud and economic coercion involving a deed/option back transaction. The court found that the insured was not entitled to be defended in the seller's suit. Bidart v. American Title Ins. Co., 734 P.2d 732 (Nev. 1987). Likewise, when the insured was accused of having obtained title from an incompetent by fraud, there was no duty to defend. Rosenblatt v. Louisville Title Co., 218 Ky. 714, 292 S.W. 333 (App. 1927). Where an insured was accused of having an extra parcel of the seller's land added onto the deed, either by fraud or mistake, the court held that the fraud count was not covered and there was no duty to defend. Title Ins. Corp. of Penn. v. Wagner, 179 N.J.Super 234, 431 A.2d 179 (1981). A corporation insured sued for having taken title merely as the alter ego of the seller was not entitled to be defended in a suit by the seller's wife claiming a dower interest. Brick Realty Corp. v. Title Guar. & Trust Co., 161 Misc. 296, 291 N.Y.S. 637 (City Ct. 1936). The insurer was not obligated to defend an insured accused by her mother/grantor of obtaining a deed by fraud and undue influence, even though the insured later won the case. Mattson v. St. Paul Title Ins. Co. of the South, 641 S.W.2d 16 (Ark. 1982). The insurer had no duty to defend an action to set aside the insured deed as a fraud on creditors. Ginger v. American Title Ins. Co., 29 Mich. App. 279, 185 N.W.2d 54 (1970).

Similarly, the policy does not protect the insured against a claim that the insured has wrongly interfered with the neighbor's property. In Sabatino v. First American Title Ins. Co., 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999), the insured was sued because he cut the neighbor's underground sewer pipe, interfering with the neighbor's easement rights. The court found no duty to defend or pay, because the issue was not the easement, but the interference with it. The court said that "[s]uch claims are ancillary to the purpose of the title insurance policy."

39 Misrepresentation or concealment by insured

Based on the above facts, it appears that the applicant for insurance had knowledge of material facts regarding the matter on which claim is now made. The failure of an insurance applicant to disclose facts material to the risk to be undertaken is considered a misrepresentation or concealment which renders the policy coverage voidable. Our United States Supreme Court has stated:

> Insurance policies are traditionally contracts *uberrimae fidei* [the most abundant good faith] and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option.

Stipcich v. Insurance Co., 277 U.S. 311, 316, 48 Sup.Ct. 512, 72 L.Ed. 895.

The title insurer's right to void policy coverage for misrepresentation or concealment has been repeatedly upheld. Lesamiz v. Lawyers Title Ins. Corp., 51 Wash.2d 835, 322 P.2d 351 (1958); Parker v. Title & Trust Co., 233 F.2d 505 (9th Cir. 1956); Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332, 382 A.2d 933 (App.Div. 1978); Vaughn v. United States Title Guaranty & Indemnity Co., 137 App.Div. 623, 122 N.Y.S. 393 (1910); and Conway v. Title Ins. Co., 277 So.2d 890 (Ala. 1973); Lawyers Title Insurance Corporation v. Research Loan and Investment Corporation, 361 F.2d 764 (8th Cir.1966); Stearns v. Title Ins. & Trust Co., 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (1971); rule approved in Lawyers Title Ins. Corp. v. D.S.C. of Newark Enterprises, Inc., 544 So. 2d 1070 (Fla.App. 1989).

Therefore, please be advised that the above-referenced policy is hereby cancelled and declared null and void. Enclosed is our check in the amount of *[amount], which was the full premium paid by the applicant for this policy.

40 No loss--Exclusion 3(c)

Based on the above facts and analysis, it is my opinion that the insured has not sustained a loss, and therefore the Company is not obligated to indemnify. No loss is payable unless there is proof that the insured has suffered a loss as a result of a covered claim. The policy states:

*[Residential policy]

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

* * * *

3. Title Risks:

* * * *

. that result in no loss to you

*[1992 policy]

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

* * * *

3. Defects, liens, encumbrances, adverse claims or other matters:

* * * *

(c) resulting in no loss or damage to the insured claimant... .

This exclusion has been applied in various circumstances. For example, when a loan application was rejected because of a claimed title defect which did not actually exist, title was not defective, and no loss was payable. Graham v. Lawyers Title Ins. Corp., 20 App.Div. 440, 46 N.Y.S. 1055 (1897). Also, when the policy included a parcel of land which the insured did not intend to purchase and did not pay for, the insured suffered no loss when it was found that he did not own the land. Cohen v. Security Title & Guaranty Co., 212 Conn. 436, 562 A.2d 510 (Conn. 1989). A title matter discovered shortly before closing did not cause a loss when the purchaser completed the sale without adjusting the purchase price as a result of the defect. Second Benton Harbor v. St. Paul Title Ins. Corp., 126 Mich.App. 580, 337 N.W.2d 585 (1983).

41 Post-policy matter--Residential policy

No loss is payable under the policy for matters which first affect the insured land after the Policy Date. The policy provides:

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

* * * *

3. Title Risks:

* * * *

. that first affect your title after the Policy Date -- this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks

Title insurance is unique in that it insures against problems which were created in the past, not those which might come into being in the future. The policy's purpose is to insure you that, at the time you purchase, no liens or defects affect the property. Anything which occurs after that date is either caused by you as owner or happens because you are the owner.

Your policy insures your title as of *[date]. You do not pay any renewal premium for the policy. It remains in effect as long as you own the property. However, it does not insure against anything which affects the property after the policy date.

*[Claim matter] arose *[was recorded] on *[date]. That matter did not exist on the Policy Date, and therefore is excluded under the policy provision recited above.

42 Post-policy matter--1992 policy

No loss is payable under the policy for matters which first affect the insured land after the Date of Policy. The policy provides:

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

* * * *

3. Defects, liens, encumbrances, adverse claims or other matters:

* * * *

(d) attaching or created subsequent to Date of Policy... .

Title insurance is unique in that it insures against problems which were created in the past, not those which might come into being in the future. The policy's purpose is to insure you that, at the time you purchase, no liens or defects affect the property. Anything which occurs after that date is either caused by you as owner or happens because you are the owner.

Your policy insures your title as of *[date]. You do not pay any renewal premium for the policy. It remains in effect as long as you own the property. However, it does not insure against anything which affects the property after the policy date.

*[Claim matter] arose *[was recorded] on *[date]. That matter did not exist on the Date of Policy, and therefore is excluded under the policy provision recited above.

43 Construction liens after policy date--owner's 1992 policy

No loss is payable under the policy for matters which first affect the insured land after the Date of Policy. The policy provides:

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

* * * *

3. Defects, liens, encumbrances, adverse claims or other matters:

* * * *

(d) attaching or created subsequent to Date of Policy... .

Title insurance is unique in that it insures against problems which were created in the past, not those which might come into being in the future. The policy's purpose is to insure you that, at the time you purchase, no liens or defects affect the property. Anything which occurs after that date is either caused by you as owner or happens because you are the owner.

Your policy insures your title as of *[date]. You do not pay any renewal premium for the policy. It remains in effect as long as you own the property. However, it does not insure against anything which affects the property after the policy date.

The *[construction] *[mechanic's] lien was filed on *[date]. The Date of Policy is *. Thus, the lien was filed after the Date of Policy, and is excluded under the policy provision recited above.

44 Lack of adequate consideration--Exclusion 3(e)

The policy does not protect against claims which would not have arisen if the insured had paid adequate value for the property. The policy states:

> **EXCLUSIONS FROM COVERAGE**
>
> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> *   *   *   *
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> *   *   *   *
>
> (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

One commentator has explained the purpose of the exclusion as follows:

> This exclusion fits in the category of those that prevent coverage of matters that the insurer cannot discover via a title search and for which the insured bears some responsibility. It prevents coverage where an insured owner or lender is deemed not to have been a purchaser for value. Such an insured will not be protected by state recording laws against claims of subsequent bona fide purchasers. The effect of the exclusion is that insureds who are not protected by state recording laws also will not be protected by their title insurance policies.
>
> Thus, under state recording statutes that give priority to subsequent bona fide purchasers for value, insured donees and devisees of real property may not only lose their priority, but also may not be indemnified for their losses because of this exclusion in their title insurance policies.

Palomar, Title Insurance Law, § 6.08, p. 6-69.

45 Delay damages--Residential policy

The policy states that, except for actual rent paid by the insured, no loss is payable if the title defect is corrected within a reasonable time:

6. Limitation Of The Company's Liability

a. We will pay up to your actual loss or the Policy Amount in force when the claim is made--whichever is less.

b. If we remove the claim against your title within a reasonable time after receiving notice of it, we will have no further liability for it.
If you cannot use any of your land because of a claim against your title, and you rent reasonable substitute land or facilities, we will repay you for your actual rent until:
- the cause of the claim is removed
  or
- we settle your claim

A court decision and leading commentator both confirm that no loss is payable for costs incurred because of construction delay, if the title matter is resolved in a reasonable time:

> We agree with appellant and hold that only paragraph 7(b) [the equivalent of 6(b) in this policy] applies to the facts of this case. A title policy indemnifies rather than guarantees the state of the insured title. The policy does not guarantee that litigation will not occur, but, in fact, assumes the opposite, that many types of title defect litigation can occur. The insured's claim must await an adverse title determination by a court. "The claim only lies once a court speaks, and not before, and not if the court's judgment is favorable." D. Burke, Law on Title Insurance (1986 & 1988 Supp.), section 9.4.3., titled Staying the Claim for Pending Litigation.

Lawyers Title Ins. Co. v. Synergism One Corp., 572 So.2d 517 (Fla.App. 1990). In the Synergism case, the court found that a period of 33 months was not unreasonable for the clearing of title.

46 Parties in possession exception generally

The policy contains an exception removing coverage for:

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

The legitimate purpose of the parties in possession exception was well explained in Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co., 216 So.2d 255, 257 (Fla.App. 1968):

> The rationale for including an actual possession exclusion in a title insurance policy stems from the fact that possession of the land is notice of an interest in it. Blackburn v. Venice Inlet Co., Fla.1948, 38 So.2d 43. When a person, who does not appear in the chain of title, is found in possession of property it may indicate, for example, that he is making claim to the property by adverse possession, or that he is claiming under an unrecorded deed. A title examiner, however, seldom visits the land the title to which he is concerned with. J. McBrayer, Examination of Florida Titles Section 275 (1958). Thus, both to protect themselves and to put their client on notice of this state of affairs, title examiners and title insurance companies generally exclude from their title opinions and policies claims of parties in actual possession of the land insured.

47 Adverse possession or prescriptive easement

The policy contains exceptions for:

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

Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

Easements or claims of easements not shown by the public records.

Reported cases have uniformly held that *[adverse possession][prescriptive easement] claims are removed from coverage by one or all of the above exceptions. These exceptions exist because the title insurer has no way of protecting itself against such risks. In Louisville Title Ins. Co. v. Guerard, 409 So.2d 514 (Fla. App. 1982), the Florida Appeals Court said:

> In the instant case, the only causes of action alleged in the Ropers' complaint were for a prescriptive easement and statutory way of necessity. Unrecorded easements, however, were not within the coverage of the title insurance policy. Even if the Ropers proved their case and got a judgment against appellee, appellant would have been under no duty to indemnify appellee. Therefore, applying the rationale in Capoferri, appellant had no duty to defend.

Also, in Brenner v. Lawyers Title Ins. Corp., 397 S.E.2d 100, 104 (1990), the Virginia Supreme Court said:

> ...any claim relating solely to the driveway portion was excluded from coverage under the Survey Exception [(c)] because it is undisputed that the driveway and its use "would have been disclosed by an accurate survey and inspection of the premises," in the language of the Exception. ...Thus, the insurer had no duty to defend because it appears clearly that it would not be liable under its contract for any judgment based upon the allegations of the Preshlock complaint.

48 Tenant in possession

The policy contains an exception removing coverage for:

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

The exception excludes coverage against the rights of tenants in the property whose possession would be apparent on inspection, but whose interests are not disclosed by recorded instruments. Carefree Villages, Inc. v Keating Properties, Inc., 489 So 2d 99, 11 FLW 1095 (Dist. 2 1986); Alabama Title & Trust Co. v. Millsap, 71 F.2d 518 (5th Cir. 1934). In the Millsap case, the court stated:

> Rights of parties in actual possession of land are properly excepted from the coverage of title insurance policies where the circumstances reflecting possession should be apparent to one who visits and inspects the property.

As another court said:

> coverage will not be extended for conditions that are physically observable by an inspection of the premises. An example would be a tenant in obvious possession of the real property.

Lawyers Title Ins. Corp. v. D.S.C. of Newark Ent., 544 So. 2d 1070, 1072 (Fla. App. 1989).

49 Trespasser

The policy contains an exception removing coverage for:

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

A trespasser is a party occupying property without right or permission. The policy does not insure against the possibility of someone possessing the land without any right to do so. Thus, a claim concerning a trespasser is not within the ambit of the policy's coverage.

For example, in Southwest Title Ins. Co. v. Woods, 449 S.W.2d 773 (Tex. 1970), a company cut timber on the insured land after the insured bought it. The logger had a deed, but the party who gave it the deed had never been conveyed the timber rights. Thus, the logger was found to be a trespasser. The insured sued the insurer for the timber lost. The court said:

> The policy does not, either expressly or by implication, purport to insure against damage done to the land by a trespasser under the circumstances of this case.

The Woods court also found that there was no loss suffered as a result of the fact that the trespasser had color of title from a recorded deed. This fact did not create a defect in the insured's title, and therefore did not cause a loss:

> A party is not charged with constructive notice of a recorded instrument which is not in his chain of title. The conveyance from Darnell Lumber Company to Gross & Janes is not connected in any way with the title under which plaintiff claims, because the deed from Massey to Darnell is not on record. Plaintiff is not charged with constructive knowledge of either instrument. [citations] Having purchased and paid value for the land without actual or constructive knowledge of either conveyance, plaintiff took the property free and clear of any rights or claims that Gross & Janes might otherwise have been entitled to assert. The two timber deeds did not, therefore, prevent plaintiff's having "good and indefeasible title" as guaranteed by his title insurance policy.

Thus, the parties in possession exception merely restates the fact that "loss" caused by a party having no right to possess the property is outside the ambit of the policy.

50 Shortage in acreage

The policy contains an exception for:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

This "survey" exception removes any assurance as to the quantity of acreage being conveyed. Contini v. Western Title Ins. Co., 40 Cal.App.3d 536, 115 Cal.Rptr. 257 (1974); Banas v. Heiney, 66 Pa.D. & C. 286 (1973); Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 222 N.J.Super. 363, 536 A.2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992).

For example, in the Walker Rogge case cited above, the insured walked the land with the seller and was shown a 1975 survey describing the land as about 18.3 acres. The purchase contract set the price at "$16,000 per acre" and referred to the property as "19 acres more or less." The policy used the description from the 1975 survey. Later, the insured discovered that the 1975 survey was inaccurate, and that the parcel had always contained about 12 acres, not 19. The New Jersey Supreme Court held that the policy did not insure the acreage of the parcel. The court stated:

> In the absence of a recital of acreage, a title company does not insure the quantity of land. Title companies are in the business of guaranteeing title, not acreage. [citations omitted] To obtain such insurance, an insured should provide the title company with an acceptable survey that recites the quantity of land described or obtain from the company an express guaranty of the quantity of land insured in the policy.
>
> * * *
>
> Whatever else the phrase "other matters" might mean in a survey exception, it clearly refers to the dimensions of the lot lines and the size of the lot. The size of a tract simply cannot be ascertained with any certainty from a search of public records alone. The reason is that land exists on the ground, not on paper. When a description refers to a point in the line of another, only a survey can reveal the actual size of a piece of property and the amount of land included in a deed. A shortage in acreage is one of the facts that an accurate survey and inspection would disclose.

562 A.2d at 216.

51 Shortage in distance

The policy does not assure that distances found on plats or in metes and bounds descriptions are accurate. For example, in Lynburn Enterprises, Inc. v. Lawyers Title Ins. Corp., 191 Ga.App. 710, 382 S.E. 2d 599 (1989), the insured property was described by courses and distances. The property was bounded by public streets or alleys on all sides. A survey was obtained and the survey exception removed. Later, the insured discovered that the insured property was actually about 15% smaller than as measured in the survey. The court found that the shortage was not the title insurer's responsibility:

> It follows that plaintiff purchased exactly what it bargained for--property lying between Bancroft Circle, Second Street and the public alley. The mere fact that the length of the call lines did not meet plaintiff's expectations is of no consequence. Plaintiff received good title to the land in question. See Land Trust Co. v. Morgan, 22 Ga.App. 388, 95 S.E. 1006. This action to recover title insurance proceeds cannot, therefore, be permitted to stand. See Shaver v. Title Guaranty, etc., Co., 163 Tenn. 232, 43 S.W.2d 212, 213, wherein it was held: "It is true ... that the object of a purchaser in procuring an abstract of title, or a guaranty of title, is to secure himself additionally in the performance of the obligations of the grantor, but we think his security, while so increased, is thus limited; that is, it indemnifies only as to the title which the grantor has undertaken to convey and for which he has made himself responsible.

382 S.E. 2d 599, 600 (1989). Therefore, the policy does not insure the accuracy of distances recited in the Schedule A legal.

52 Overlap

The policy contains an exception for:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

This exception removes coverage against legal description overlaps which are not clearly evident from the public records. An overlap of descriptions occurs "where [one] deed covers a portion of the land described in a prior deed held by [another]." RLB, Inc. v. US Life Title Ins. Co. of New York, 774 S.W.2d 607 (Tenn. App. 1989).

In the RLB case, the competing deeds each contained metes and bounds descriptions. In 1943, when the TVA bought to the south, its northerly boundary line was the north line of a road. The road was later moved south. When the insured purchased, its deed conveyed to the north line of the existing road, which the county surveyor had incorrectly assumed was in its former location. Thus, the insured description contained land owned by the TVA between the new roadway and the true boundary. The court held that the overlap was excepted even though it was created by instruments in the public records. It held that, while the competing deeds were recorded, the existence of the overlap could only be discovered in the field because it depended on the location of the roadway.

Similarly, in Downing v. Eubanks, 557 N.E.2d 1027 (Ind. App. 1990), an overlap was created by two deeds from a common grantor. The insured deed was the second conveyance. The court denied the insured's claim to the land. As to the policy claim, the court stated: "[a]n accurate survey of Tract 1 would have resulted in the overlap being covered by the policy." The Downing court came to this conclusion because a survey of the overlapping Tract 2 did indeed show the overlap area.

53 Matters visible on inspection

The policy contains an exception for:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

This exception removes coverage for matters which would be discoverable on an inspection of the property by a prospective purchaser. The purpose of the inspection clause of the above exception has been described as follows:

> A survey and inspection serve related but different purposes. The purpose of an inspection, which is performed by merely visiting the property, is to disclose such matters as physical encroachments, evidence of adverse use, and monuments. By comparison, a survey, as this case demonstrates, can involve extensive research and field work. Unlike a mere inspection, a survey relates the property as described in recorded instruments to the land as it exists.

Walker Rogge, Inc. v. Chelsea Title & Guarantee Co., 116 N.J. 517, 562 A.2d 208, 217 (1989); subs. appeal, 603 A.2d 557 (N.J. Super. 1992). In other words, the inspection is a duty of the purchaser as a part of a good faith purchaser's duty to investigate the property. An inspection of the property shows visible possession by another. As stated by one court:

> All the authorities agree that possession, in order to constitute notice, must be actual possession of the party, or his agent or tenant, consisting of acts of occupancy which are open, visible and unequivocal, and in nature sufficient upon the observation of a subsequent purchaser to put him on inquiry as to rights of the possessor.

Shaver v. National Title & Abstract Co., 361 S.W.2d 867, 869 (Tex. 1962) (citing DeGuerin et al. v. Jackson (Tex.Civ.App. 1932), 50 S.W.2d 443, aff'd 124 Tex. 424, 77 S.W.2d 1041).

54 Unrecorded easement

The policy contains a standard exception for "easements or claims of easements not shown by the public records." This exception removes coverage against easements which are written but unrecorded. See Daniel v. Coastal Bonded Title Co., 539 So. 2d 567 (Fla. App. 1989). Also excepted are claims of easements by necessity. In Carstensen v. Chrisland Corp., 442 S.E.2d 660 (Va. 1994), the court stated:

> The easement by necessity at issue in this case clearly was unrecorded at the time the policies were issued. Furthermore, this exclusion reinforces the nature of a title insurance company's business, which is to provide insurance coverage for the validity of the title to the extent diligent examination could or should have discovered defects at the time of policy issuance. Title insurance indemnifies the policyholder for those discoverable, but undiscovered, defects in the title, not for every claim which ultimately might affect the title.

442 S.E.2d at 663. Similarly, the exception removes coverage for easements claimed by prescription and implication. Bailey v. State Farm Ins. Co. held:

> Schedule B of the policy excludes, "easements, liens, encumbrances, or claims thereof, which are not shown by the public records." The Flagg litigation asserted a right to the easement by prescription, implication, balancing of hardships, and estoppel. None of these would appear in the public records. Strictly construing the policy exclusion against Fidelity, the claims in the litigation are plainly excluded from coverage under the policy.

810 F.Supp. 267 (N.D. Cal. 1992). See also Gebrayel v. Transamerica Title Ins. Co., 888 P.2d 83 (Or.App. 1995) (claim of prescriptive or implied easement).

55 Exception not required for matters not affecting title

Based on the above facts and analysis, it is my opinion that the *[subject of claim] is not a matter affecting title for which the Company had a duty to make an exception.

Under the title insurance policy, the insurer is not liable if it fails to disclose matters which do not constitute liens or encumbrances on title. Numerous cases have so held. See, for example: Luboff v. Security Title & Guaranty Co., 46 Misc. 2d 599, 260 N.Y.S.2d 279 (Sup.Ct. 1965) (no duty to show developer agreement which was not a defect, lien or encumbrance); Sala v. Security Title Ins. & Guarantee Co., 27 Cal.App.2d 693, 81 P.2d 578 (1938); (no duty when lis pendens not shown, then removed as cloud on title); Peterson v. Title & Trust Co. of Fla., 431 So.2d 311 (Fla.App. 1983) (no duty to show or resolve applicability of restrictions not shown); Laurence v. Kruckmeyer, 124 Ariz. 488, 605 P.2d 466 (App. 1979) (no duty to show easement as affecting parcels which it did not affect).

56 Exception gives adequate notice of defect

Based on the above facts and analysis, it is my opinion that the *[commitment or policy] gives adequate notice of the existence and character of the *[subject of claim]. An exception is adequate if it gives effective notice of the title matter:

> It is generally acknowledged that a title insurer's duty of disclosure regarding an instrument affecting title is satisfied by a statement of the nature of the document, recording information, etc. The underwriter is not required to set forth its contents [citation omitted], nor to provide an explanation as to its legal effect or implications [citation omitted]. An exception to coverage that is "plain and understandable" in its statement of the subject will be effective [citation omitted].

Ellis, Title Insurance Law Handbook, p. 270.

The insurer is not required to highlight an item for an exception to be considered valid. For example, when an easement was shown only as being set forth in a mortgage on the property, and no exception was made for the easement itself, such notice was sufficient when the insured also had actual knowledge of the easement from the seller. The court stated:

> Granted the company did not indicate the easement in bold face or red letters, the fact remains that the information was made available. The effect of an easement, valid or not, was a factor to be resolved as between vendor and purchaser depending upon the terms of their contract. It was not for Inter-County, as Tomgil quietly intimates, to negotiate, re-negotiate or bear the brunt of any disabilities of Tomgil's contract.

Sullivan v. Tomgil Building Corp., 260 N.Y.S. 2d 465 (Sup. Ct. 1965).

The insurer also does not have a duty to identify the parties to an instrument, its nature, terms or significance. For example, the insurer has no duty to explain the effect of wetlands designation, when the fact of such designation is disclosed. Manley v. Cost Control Mktg & Man., Inc., 583 A.2d 442 (Pa.Super.Ct. 1990). The insurer also was found not to have a duty to explain the risk of subsidence from mining operations, when the fact of a mineral reservation was properly noted. Holmes v. Alabama Title Co., 507 So.2d 922 (Ala. 1987).

57 Special terms contained in exception

Based on the above facts and analysis, it is my opinion that the Company was not required to highlight or identify the terms of the *[name of instrument] in the *[commitment or policy]. The exception for the *[name of instrument] gave the insured notice of its existence. The insured had a duty to evaluate the significance of all of the matters reported in the title commitment.

The insured's independent duty to investigate the matters reported in the title commitment is confirmed by numerous reported decisions. For example, in Roscoe v. U.S. Life Title Ins. Co. of Dallas, 105 N.M. 589, 734 P.2d 1272 (1987), the title insurer was found not to have a duty to advise that a mortgage had a balloon payment term. The court said:

> It is well-settled that a person entering into a contract has a duty to read and familiarize himself with its contents before he signs and delivers it. ...Roscoe's failure to read and familiarize himself with the terms of the mortgage he agreed to assume, when that information was readily available, clearly indicates a lack of reasonable diligence. Had Roscoe made reasonable inquiry or examined the original mortgage, he would have discovered the balloon payment. ...Here, USLife's policy insures against loss or damages due to "[a]ny defect or lien or encumbrance on such title." Schedule B of the policy specially excludes from coverage any loss or damage resulting from the mortgage in question. This exception is clear and unambiguous.

Similarly, the insurer was not required to indicate in its exception for a deed of trust that it contained a due-on-sale clause.

> It is not the purpose of a title policy to set forth in full detail a detailed explanation of the full terms and provisions of each instrument affecting the property, but give only sufficient information to put them on notice of the existence of such instruments. If every title exception in a title policy set forth the full details of every instrument involved, it would more resemble an abstract of title than a title policy. Under Lyon's theory, if the property was subject to an oil gas and mineral lease, it would be necessary to set forth in minute detail the many things that are involved in this type of lease, such as the length of the primary term, the amount of delay rentals, the amount of royalty payable, etc. See Jernigan v. Page, ... where it was pointed out that the purpose of the recording statutes in Texas was to provide notice to all persons of the existence of recorded material and the effect of same, so that a person interested in the property could look at the full instrument by examining the record.

Lyons v. Montgomery, 685 S.W.2d 390 (Tex.App. 1985); aff'd in relevant part, 701 S.W.2d 641 (Tex. 1985).

58 Notice of Claim

Please use this form when presenting a claim under your title insurance policy. **Complete each item. Type or print legibly.** *[**Please take notice that it is a crime to present a false or fraudulent insurance claim or statement of loss. *statute reference**]

Policy No. ____________________ Date of Policy________________________

Name(s) of insured(s) ____

Address ______________________________________

____

Phone (____)____________

Insured Property Address ____

Your attorney, if any: ____

Attorney's address ____

Attorney's Phone (____)____________

VERY IMPORTANT: HAVE YOU BEEN SUED?

____**YES.** I received the papers on _____/_____/_____. **Call the Company at * today. Ask for a claims attorney. Have the suit papers (summons and complaint) available to read from when you call.** Send this form and the suit papers to the Company **today**.

____**NO.**

Please describe your claim. Describe the issue, identify when you learned of it, the current status, information about the other involved parties, the loss you claim, and what you ask the Company to do (for example, remove a lien, defend a lawsuit or pay a loss). Enclose any letter, survey, notice or other document which further identify the issue.

Description of claim:

____

____

____

Current status:

____

____

Names and addresses of other parties involved:

____

____

Amount of claimed loss, and basis for claimed loss:

____

____

Action you wish to have insurer take:

____

____

The undersigned acknowledge(s) a duty under the policy to cooperate with the Company in the handling of this matter and to provide further information required by the Company.

Date:________________________________

____

____

59 Release of insurer

FULL RELEASE

1. Release. Insured does hereby fully release Insurer from any and all liability, actions, causes of action, claims and demands, direct or indirect, based on the Policy or any other obligation of the Insurer, in any way arising or resulting from *[state nature of claim].

2. Policy. "Policy," as used herein, shall mean Insurer's policy of title insurance no. * dated *.

3. Insurer and Insured. Insurer, as used herein, shall mean * Title Insurance Company and its officers, directors, stockholders, servants, agents, employees, sub-contractors, representatives, successors and assigns. Insured, as used herein, shall mean the undersigned party or parties. *[, and all parties claiming through him, her or them, including but not limited to officers, directors, stockholders, servants, agents, employees, sub-contractors, representatives, heirs, personal representatives, successors, assigns, sellers of the real estate to the Insured, purchasers of the Insured's interest in the real estate, and real estate brokers retained by Insured, its seller or purchaser, if any.]

4. Consideration. The consideration for the execution of this Release is the payment of the sum of $* and other good and valuable consideration. The parties stipulate and acknowledge that the consideration described herein is adequate and has been received. The parties all declare that they fully understand the terms and conditions of this Release, and have entered into same voluntarily and without any coercion or duress.

5. Reduction of Insurance Amount. Insured acknowledges that, according to the terms of the Policy, the Amount of Insurance has been reduced by $*, being the amount of loss paid by the Insurer other than attorneys' fees, if any.

6. No Admission of Liability. Neither this Release nor any payment, concession, or other action by any person or Party hereto is or shall be construed to be an admission of liability or wrongdoing, liability being expressly denied by all Parties. This Release is the product of offers and counteroffers of settlement.

7. Entire Agreement. This release contains the entire agreement between the Insurer and Insured.

I HAVE READ THE FOREGOING RELEASE AND FULLY UNDERSTAND IT.

Dated this _____ day of _______________________, 20___.

____
*

____
*

Subscribed and sworn to before me
this ____ day of __________, 20___.

____
Notary Public, State of *
My commission
is/expires:________________

60 Release of insurer--subrogation rights expressly granted

FULL RELEASE AND SUBROGATION AGREEMENT

1. Release. Insured does hereby fully release Insurer from any and all liability, actions, causes of action, claims and demands, direct or indirect, based on the Policy or any other obligation of the Insurer, in any way arising or resulting from *[state nature of claim] (the Claim).

2. Policy. "Policy," as used herein, shall mean Insurer's policy of title insurance no. * dated *.

3. Insurer and Insured. Insurer, as used herein, shall mean * Title Insurance Company and its officers, directors, stockholders, servants, agents, employees, sub-contractors, representatives, successors and assigns. Insured, as used herein, shall mean the undersigned party or parties. *[, and all parties claiming through him, her or them, including but not limited to officers, directors, stockholders, servants, agents, employees, sub-contractors, representatives, heirs, personal representatives, successors, assigns, sellers of the real estate to the Insured, purchasers of the Insured's interest in the real estate, and real estate brokers retained by Insured, its seller or purchaser, if any.]

4. Consideration. The consideration for the execution of this Release is the payment of the sum of $* and other good and valuable consideration. The parties stipulate and acknowledge that the consideration described herein is adequate and has been received. The parties all declare that they fully understand the terms and conditions of this Release, and have entered into same voluntarily and without any coercion or duress.

5. Reduction of Insurance Amount. Insured acknowledges that, according to the terms of the Policy, the Amount of Insurance has been reduced by $*, being the amount of loss paid by the Insurer other than attorneys' fees, if any.

6. No Admission of Liability. Neither this Release nor any payment, concession, or other action by any person or Party hereto is or shall be construed to be an admission of liability or wrongdoing, liability being expressly denied by all Parties. This Release is the product of offers and counteroffers of settlement.

7. Subrogation Rights. Insured hereby acknowledges that Insured has been made whole by Insurer, and that Insurer is subrogated to and is entitled to all rights and remedies which Insured may have against any other person or entity (the Third Party Claims) regarding the Claim. This agreement shall be considered a transfer of the Third Party Claims. Insured hereby authorizes Insurer to sue, compromise or settle in Insured's name and to use Insured's name in any transaction or litigation involving the Third Party Claims, and pledges its utmost cooperation with Insurer in pursuing same.

8. **Entire Agreement.** This release contains the entire agreement between the Insurer and Insured.

I HAVE READ THE FOREGOING RELEASE AND FULLY UNDERSTAND IT.

Dated this _____ day of _______________________, 20___.

____
*

____
*

Subscribed and sworn to before me
this ____ day of __________, 20___.

____
Notary Public, State of *
My commission
is/expires:________________

61 Release checklist

1. **Scope of Release**
   Disputed matter fully described in clear language
   All claim issues covered by release
   If attorney retained for insured, duty to pay attorneys' fees terminated

2. **Parties to be Released**
   Insurer
   Insurer's officers, directors and employees
   Agent or approved attorney, and that party's agents, officers, directors and employees
   Other parties in the chain of title or escrow production: abstractor, escrow agent
   Coinsurers and reinsurers

3. **Parties to Give Release**
   Insured(s)
   Party injured by insured
   Plaintiff in suit against insured

4. **Rights or Duties Which Survive Release**
   Assignment of causes of action, subrogation rights, rights in collateral
   Duty to cooperate in ongoing or contemplated subrogation or other recoupment efforts

62 Request for proof of loss

The insured has asked the Company to resolve its claim by payment of a loss. The title insurance policy allows the insurer to resolve covered matters in several different ways. The insurer may:

1. Pay the insured his or her actual loss [Conditions and Stipulations 6].

2. Defend an insured who has been sued [Conditions and Stipulations 4(a)].

3. Prosecute an action on behalf of the insured to establish or clear title [Conditions and Stipulations 4(b) and 9(a)].

4. Pay the insured policy limits [Conditions and Stipulations 6(a)].

5. Pay the party adverse to the insured [Conditions and Stipulations 4(b) and 6(b)].

6. Cure the insured's title by obtaining a deed, easement, release or other instrument [Conditions and Stipulations 4(b) and 6(b)].

The insurer never has all six options in a particular claim, but when there is more than one option, the insurer has the right to choose which one it will exercise.

Payment of a loss may be appropriate if a loss exists. Let me remind you that the policy requires the insured to submit a proof of loss. Paragraph 5 of the Conditions & Stipulations states:

> 5. <u>PROOF OF LOSS OR DAMAGE</u>.
>
> In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.
>
> In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall

> produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph shall terminate any liability of the Company under this policy as to that claim.

Thus, the insureds have a duty to provide information regarding the facts concerning the loss, plus evidence of the claimed damages. If the insureds wish to have the Company consider payment of loss as an option in resolving the claim, assuming it is determined that the claim is covered, please forward a proof of loss.

63 No present challenge to title - "watchful waiting"

The Company has no obligation to clear title unless and until title as insured is challenged. See Manneck v. Lawyers Title Ins. Corp., 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771, 777 (1994), in which the policy protected against the enforced removal of certain structures, and the insurer was found not to have a duty to act until someone sought to remove those structures. Similarly, in Eliopoulos v. Nations Title Ins. Of New York, 1996 U.S.Dist. LEXIS 515 (N.D.N.Y. 1996), the title insurer was found to have no "affirmative duty to clear title" when there were "perceived" challenges to title, but no direct attack had yet been made by an adverse party.

In this situation, the Company recognizes that it will have an obligation to resolve a challenge to title which is covered by the policy. Although no action is required or advisable at present, the Company stands prepared to fulfill its duties when and if required.

64 Measure of loss payable if title clearance unsuccessful

[notice of intent to clear title]

We have undertaken action to clear title based on our analysis that there is a likelihood of success. However, as with any litigation, there is no guarantee that the court will establish title as insured.

If the action is resolved in favor of the insured, the Company will have established title as shown in the policy and there will be no loss payable. The policy provides:

> 9. LIMITATION OF LIABILITY.
>
> (a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

Conditions & Stipulations paragraph 9. If the action is not resolved in your favor, it is our present opinion that the Company will be obligated to compensate the insured. The measure of loss under the policy is as follows:

> (a) The liability of the Company under this policy shall not exceed the least of:
>
> (i) the Amount of Insurance stated in Schedule A; or,
>
> (ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

Condition & Stipulations paragraph 7.

65 Tender of policy limits

The title insurance policy provides that the insurer may "pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay." Conditions & Stipulations, paragraph 6(a)(i). After the amount of policy has been paid or tendered, the insurer has no more liability under the policy.

> Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

Conditions & Stipulations, paragraph 6(a)(ii). The duty to defend any litigation covered by the policy ceases when the policy limits have been paid or tendered. See Batdorf v. Transamerica Title Ins. Co., 41 Wash.App. 254, 702 P.2d 1211 (1985); Crocker & Co. v. Transamerica Title Ins. Co., 33 Cal.Rptr.2d 313 (Cal.App. 1 Dist. 1994).

The amount of insurance is $*. The Company hereby tenders to the insured the amount of insurance. [Our check in that amount is enclosed.] By this tender, all of the Company's obligations under the policy are terminated.

66 Apportionment of fees--covered and non-covered causes

The Company is obligated to pay for the insured's attorney's fees and expenses only as to those causes of action which are covered or potentially covered by the policy. The ALTA 1992 form of policy issued to the insured provides that:

> [T]he Company...shall provide for the defense of an insured in litigation..., but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. ...The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

Conditions & Stipulations 4(a).

One accepted means of providing defense of covered causes of action is for the insurer to retain one counsel to represent the insured, and agree upon an equitable division of fees and expenses. The insurer pays the portion attributed to covered claims, and the insured pays for the portion allocated to non-covered claims. See Enron Corp. v. Lawyers Title Ins. Corp., 940 F.2d 307 (8th Cir. 1991).

In this matter, the Company agrees to pay *% of fees and expenses. This percentage appears at this time to represent an equitable division of costs. The Company agrees, and reserves the right, to reevaluate this decision as the case progresses.

67 Recoupment against seller who created defect

The insurer's failure to report an encumbrance created by the seller is not a bar to recovery against the seller. Here is a sample of the courts' pronouncements on that issue:

> In Harvey v. J & H Holdings Inc., 310 So.2d 371 (Ct.App. 1975), the court reasoned: "There is no question that the sellers should have had knowledge of the easement. The record shows it was the sellers who granted the easement... . The sellers also contend that the easement in issue was duly recorded among the public records and, therefore, the title insurer had constructive knowledge of its existence. It is apparent that the title insurer was put on constructive notice of the easement. As a consequence, it was negligent in not disclosing the existence of the said encumbrance to the buyer after it had examined the title.
>
> "It cannot be said, however, that the title insurer owed the same duty to the sellers that it did to the buyer. Put another way, the sellers do not stand in the shoes of the buyer. We can find absolutely nothing in the record to indicate that the encumbrance, i.e., easement, supra, should be excluded from the operation of the covenant of the sellers to convey title by general warranty deed free and clear of all encumbrances. The sellers simply did not convey title to the property as they had agreed to do."
>
> "There is no showing, on this record, of reliance, damage or an expectation of a search and disclosure. This defendant knew of the assessments long before the plaintiff ever issued a preliminary commitment. When the defendant's agent ordered title insurance, the defendant had already listed the property subject to the buyer assuming the sewer assessment. The defendant's awareness and knowledge are evidenced by the deletion of the assumption requirement from the listing. Again, long before asking the plaintiff to insure title, the defendant had contractually agreed with its purchasers (the only insureds) to convey title free of the assessments. There is no showing that this defendant expected an 'abstract' of title or that even if it had, that it relied thereon in any manner. In fact, had the assessments been disclosed, the defendant would have had to pay them from the closing proceeds. The defendant is merely paying, through subrogation, that which it had knowledge of and had agreed to pay long before the plaintiff became involved." Transamerica Title Ins. Co. v. Johnson, 103 Wash.2d 409 693 P.2d 697, 700-1 (1985).
>
> In Kenny v. Safeco Title Ins. Co., 113 Cal.App.3d 557, 169 Cal.Rptr. 808, 810 (1980), the court stated: "There is a contention by appellants that because they agreed to pay the premium on the policy of title insurance in the escrow as consideration for the sale that this would bootstrap their position and create a 'duty of care' on the part

of the title insurer or render the agreement between the buyer and the title insurer a third party beneficiary contract for benefit of appellant. Appellant would still be an incidental beneficiary and, as such, have no cause of action against respondents."

68 Demand on indemnitor

You will recall that you gave this company your personal indemnity as an inducement for the Company to protect its insureds against [*nature of title defect]. That coverage has been provided and the Company has assumed its obligations.

The Company hereby demands that you immediately take action to [*specify]. In the event that you do not comply, we will immediately take legal action against you based on your obligations under the indemnity.

In addition, in the event the Company is required to pay any lien claim, or incur any expense in this matter, it will stand in the shoes of its insureds and may take all legal action the insureds have the right to take against you. This would include [*specify].

We trust that you are taking this situation very seriously. Only prompt and decisive action by you will cause our Company to pause for even the slightest time before taking all appropriate action. I must receive your written plan of action not later than [*specify].

69 Voluntary conveyance terminating coverage

When the insured voluntarily conveys the property, the policy terminates, except as discussed below. The grantee from the insured is not an insured under the policy. "Insured" is defined in the policy as the named insured and parties who take from the named insured "by operation of law." The policy states:

> "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 of 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.

Conditions & Stipulations 1(a). After a voluntary conveyance, the policy remains in effect for the limited purpose of protecting the insured against liability for covenants of warranty it has given in that conveyance. This is stated in paragraph 2 of the Conditions and Stipulations of the policy:

> 2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE.
> The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

Numerous examples of voluntary transfers are discussed in case law.

When the insured conveys to the trustee of his own trust, the insured ceases to be covered by the policy and the trustee is not an insured. Covalt, Trustee, v. First American Title Ins. Co., 1997 WL 4273 (10th Cir. Wyoming 1997) (unpublished). A transfer from the insureds to their family limited liability company was found to terminate the policy in Gebhardt Family Investment, L.L.C. v. Nations Title Ins. Co., 132 Md.App. 457, 752 A.2d 1222 (Md.App. 2000). The court said that the insureds no longer had a policy, and the LLC was not an insured.

> The problem of the cloud on title is now the problem of the L.L.C. and not the Gebhardts. If any loss is suffered because of the cloud on title, it will be suffered by the L.L.C., which was not an insured under the policy either before or after the conveyance.

Similarly, the transfer of title from one affiliated corporation to another terminates the policy. Pioneer Nat'l Title Ins. Co. v. Child, Inc., 401 A.2d 68 (Del. 1979); Lawyers Title Ins. Corp. v. Cae-Link Corp., 45 F.3d 426 (4th Cir. 1995) (unpublished).

70 Road, waterbody not "Land"

The policy does not insure any right or title in any road or waterway abutting the land as described on Schedule A. The definition of Land in the policy is:

> "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, **the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways**, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

Conditions & Stipulations 1(d). The policy has been found not to insure the insured's title to an easement appurtenant to the Land but not described on Schedule A. Offenhartz v. Heinsohn, 30 Misc.2d 693, 150 N.Y.S. 2d 78 (Sup. Ct. 1956). Similarly, the policy has been held not to insure any right in an adjacent street or alley. J & S Building Co., Inc. v. Columbian Title & Trust Co., 1 Kan.App.2d 228, 563 P.2d 1086 (1977); Schaible v. Louisville Title Ins. Co., 118 Ohio App. 328, 194 N.E.2d 588 (1963); Havstad v. Fidelity Nat'l Title Ins. Co., 58 Cal.App.4th 654, 68 Cal.Rptr.2d 487 (1 Dist. 1997), mod. Oct. 20, 1997, rev.den. Dec. 10, 1997.

71 Access--alternate right available

The policy insures that the insured has "a right of access to and from the land." There is no coverage under the policy as long as the insured has one legal access route to the property. For example, when property had access via three separate easements, the insurer had no duty to assert the insured's claim to a prescriptive easement over a fourth route. Talley v. Baker, 617 N.Y.S.2d 80 (A.D. 4 Dept. 1994). Similarly, when one access right failed, there was no coverage because an alternate access existed, even though it was only passable on foot or by horse (in the insured's words, a "goat path"), and was twice the distance from the nearest highway.

> It is true that the western road, the route by which plaintiff Gates had a right of access, was a difficult one and, in its present condition, of only limited usefulness, but if plaintiff had a right of access, even though over a rough and nearly impassable route, he makes no case under his title insurance policy. A title insurance company may not be expected to investigate the physical condition of a way of legal access to the insured property to determine if it is passable. In fact, the insurance policy expressly excludes from coverage "loss or damage by reason of ... (3) Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate survey and inspection of the premises."

Gates v. Chicago Title Ins. Co., 813 S.W.2d 10, 11-2 (Mo.App. 1991).

72 Police power--denial of permit

The policy does not protect the insured against the denial of a permit for the use of the property. Such matters do not affect the title to the land. The exclusions of the policy provide as follows:

<u>EXCLUSIONS FROM COVERAGE</u>

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Governmental police power.

   * * * *

   (c) Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or regulating the character, dimensions or location of any improvements now or hereafter erected on the land, or prohibiting 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.

The denial of a permit is based on governmental regulation of the use of the property, and is an exercise of the government's police power, and is thus excluded from coverage. See Aldrich v. Hawrylo, 656 A.2d 1304, 1309 (N.J. Super. 1995); and Hocking v. Title Ins. & Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951). Similarly, when the government restricts the use of property to protect environmental features on the property, that restriction on use is excluded. Manley v. Cost Control Marketing and Management Inc., 583 A.2d 442, 444 (Sup.Ct.Pa. 1990).

73 Construction escrow negligence

A construction escrowee is not obligated to determine the identity of all of the parties providing labor or material to the project. The escrowee does not visit the job site, and has no first-hand contact with any contractor other than those identified. The escrowee relies on the owner and general contractor to accurately inform the escrowee as to who has worked on the job.

This principle has been established by case law. For example, in Gordon v. New Mexico Title Co., 77 N.M. 217, 421 P.2d 433 (1966), the insurer conducted the escrow for the permanent loan on a new house. It accepted affidavits from the purchaser and builder to the effect that all work was complete and all laborers paid. Later, liens were filed. The insurer was sued, on the theory that local custom and practice created an implied duty of the escrowee to investigate whether or not all lien claimants had really been paid, not merely rely on the affidavits submitted. The court found no proof of such a custom and practice, and therefore no duty had been proven.

74 Easement abandonment--post-policy matter

The policy insures the insured's rights in the access easement shown on Schedule A of the policy. The policy also contains the following exceptions from coverage:

> Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.
>
> * * * *
>
> Rights or claims of parties in possession not shown by the public records.

The fee owner of the land over which the easement runs does not deny that the easement was valid when created. Rather, the fee owner alleges that the easement has been abandoned by lack of use. Use or lack of use of an easement is a matter of possession which is not disclosed by the public records.

The primary purpose of the "standard" exceptions for survey matters, unrecorded easements, parties in possession and similar rights is to remove from coverage various matters which affect title but which cannot be found in the public records. See Palomar, *Title Insurance Law*, § 7.02[3], 7-12. This rationale has been endorsed repeatedly by the courts as being fair and enforceable. For example:

> The exceptions set forth in Schedule B refer generally to situations which may affect the title but which would not be reflected by an examination of the public records. A title insurance company has no other feasible method of protecting itself from these circumstances... .

McDaniel v. Lawyers' Title Guaranty Fund, 327 So.2d 852, 855 (Fla.App. 1976). Or, as a later Florida opinion stated even more succinctly:

> Absent a specific undertaking to that effect, [the policy] does not presume to insure against infirmities not of record.

Krause v. Title & Trust Co. of Florida, 390 So.2d 805, 806 (Fla.App. 1980). See also Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 222 N.J.Super. 363, 536 A.2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992); Muscat v. Lawyers Title Ins. Corp., 135 Mich.App. 26, 351 N.W. 2d 893 (1984); Lawyers Title Ins. Corp. v. Knopf, 109 Md.App. 134, 674 A.2d 65, 72 (1996) (the survey exception applies if "the problem was something not susceptible of ascertainment through title examination but only through an accurate survey.").

Further, the policy does not protect against failure of the insured's title caused by the insured's own lack of use of the easement after the Date of Policy. No loss is payable under the policy for matters which first affect the insured land after the Date of Policy. The policy provides:

> EXCLUSIONS FROM COVERAGE
>
> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> * * * *
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> * * * *
>
> (d) attaching or created subsequent to Date of Policy... .

Title insurance is unique in that it insures against problems created before the insured takes its interest in the property, not while the insured has title.

75 Off record risks excepted by standard exceptions

The primary purpose of the "standard" exceptions for survey matters, unrecorded easements, parties in possession and similar rights is to remove from coverage various matters which affect title but which cannot be found in the public records. See Palomar, *Title Insurance Law*, Clark Boardman Callaghan, § 7.02[3], 7-12. This rationale has been endorsed repeatedly by the courts as being fair and enforceable. For example:

> The exceptions set forth in Schedule B refer generally to situations which may affect the title but which would not be reflected by an examination of the public records. A title insurance company has no other feasible method of protecting itself from these circumstances... .

McDaniel v. Lawyers' Title Guaranty Fund, 327 So.2d 852, 855 (Fla.App. 1976). Or, as a later Florida opinion stated even more succinctly:

> Absent a specific undertaking to that effect, [the policy] does not presume to insure against infirmities not of record.

Krause v. Title & Trust Co. of Florida, 390 So.2d 805, 806 (Fla.App. 1980). See also Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 222 N.J.Super. 363, 536 A.2d 1309 (A.D. 1988), rev'd in part, aff'd in part, 116 N.J. 517, 562 A.2d 208 (1989); appeal after remand, 603 A.2d 557 (N.J. Super. 1992); Muscat v. Lawyers Title Ins. Corp., 135 Mich.App. 26, 351 N.W. 2d 893 (1984); Lawyers Title Ins. Corp. v. Knopf, 109 Md.App. 134, 674 A.2d 65, 72 (1996) (the survey exception applies if "the problem was something not susceptible of ascertainment through title examination but only through an accurate survey.").

For example, reported cases have uniformly held that adverse possession claims are removed from coverage by one or all of the above exceptions. These exceptions exist because the title insurer has no way of protecting itself against such risks. In Louisville Title Ins. Co. v. Guerard, 409 So.2d 514 (Fla. App. 1982), the Florida Appeals Court said:

> In the instant case, the only causes of action alleged in the Ropers' complaint were for a prescriptive easement and statutory way of necessity. Unrecorded easements, however, were not within the coverage of the title insurance policy. Even if the Ropers proved their case and got a judgment against appellee, appellant would have been under no duty to indemnify appellee. Therefore, applying the rationale in Capoferri, appellant had no duty to defend.

Also, in Brenner v. Lawyers Title Ins. Corp., 397 S.E.2d 100, 104 (1990), the Virginia Supreme Court said:

...any claim relating solely to the driveway portion was excluded from coverage under the Survey Exception [(c)] because it is undisputed that the driveway and its use "would have been disclosed by an accurate survey and inspection of the premises," in the language of the Exception. ...Thus, the insurer had no duty to defend because it appears clearly that it would not be liable under its contract for any judgment based upon the allegations of the Preshlock complaint.

76 No survey "coverage" unless exceptions removed

Courts have refused to nullify the survey exception after the fact on the theory that it should have been removed when the policy was issued, or that it would have been removed if a survey had been delivered at closing. The insurer has no obligation to get a survey for the insured or prompt the insured to get one. Kuhlman v. Title Ins. Co. of Minn., 177 F.Supp. 925 (W.D. Mo. 1959). Also, when the insured does not request or pay for "survey" coverage, liability may not be created by interpreting the exception to render it null.

> As Mr. Witkin puts it, '(f)or a premium of about double the usual sum, the company makes a survey and inspection, and the policy covers a great many of such off-record defects as would thereby be discovered.' (3 Witkin, Summary of Cal. Law, 8th ed., Real Property, s 168, p. 1906; see C.E.B., Cal. Real Estate Sales Transactions, s 17.17, p. 620.)
>
> What appellants are arguing is that the Western Title Insurance Company's policy of title insurance, although a standard policy of title insurance, protected appellants against the loss of acreage Edgardo Contini thought he was getting even though he admitted knowing the land he was buying had three government lots and the significance of the designation 'government lot.' What appellants are seeking from the Western Title Insurance Company policy is extended coverage without having requested that type of coverage and without having paid the additional premium. The court properly granted respondent Western Title Insurance Company's motion for judgment notwithstanding the verdict.

Contini v. Western Title Ins. Co., 40 Cal.App.3d 536, 115 Cal.Rptr. 257, 261 (1974). A buyer does not have a "reasonable expectation" of survey coverage which would estop the insurer from denying such coverage.

> We reject plaintiff's contention that the exclusion should be deemed void as against public policy; we perceive no unconscionability in permitting, or public policy basis for prohibiting, title insurers from excluding from coverage, if clearly expressed, matters which would be revealed by an accurate survey. Such an exclusion is not so broad that it renders the insurance policy a meaningless sham, but rather merely places on the insured the burden of obtaining an accurate survey of the property the insured is purchasing and the responsibility for any defects which that survey discloses.

Muscat v. Lawyers Title Ins. Corp. 135 Mich.App. 26, 351 N.W. 2d 893, 896 (1984). See also Muench v. Oxley, 90 Wash.2d 637, 584 P.2d 939 (Wash. 1978). The exception also is not removed *de facto* by an allegation in negligence that the insurer has a duty to examine a survey and tell the insured what it contains. Ely v. Munshower, 4 Pa.D. & C.3d 430 (1977).

Further, even the removal of the survey exception has been held not to shift the risk of a survey-type question from the insured to the insurer, when there is no suggestion that the parties intended or understood that such a risk-shifting was intended. In Malkin v. Realty Title Ins. Co. Inc.,244 Md. 112, 223 A.2d 155, 157 (1966), a former owner of the property had deeded a 10-foot strip of the property, a platted lot, for public street. The insured obtained a survey, which mistakenly described the full lot, but showed that the 10-foot strip was part of the paved roadway. The policy issued to Malkin used the survey legal description. Although the survey exception was removed, the court held that the insureds had "assumed" the risk that the strip was not owned by their grantor. As to the insureds' claim that they had paid an additional premium to get the survey exception removed, the court relied on the inspection clause. It said:

> we [do not] think it likely [that] either Mr. Malkin or his attorney thought that the appellee, for an additional $60, would undertake the obligation of evicting Montgomery County from its occupancy of part of the lot or, in the alternative, of paying the Malkins $2,500.

244 Md. 112, 223 A.2d 155, 157 (1966).

In this case, the insured did not take the measures required to obtain the removal of the survey exception, and paid no premium for such coverage. The Company did not agree to, nor did it, give such coverage.

77 Boundary line dispute

The policy contains an exception removing coverage for:

Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.

The issue in this claim is the location of the boundary line. This is a "boundary line dispute" excepted from the policy. The dispute is not disclosed in the real estate records. It could only be discovered by an inspection of the property or an accurate survey.

This exception from coverage has been held to apply to boundary line disputes. See American Title Ins. Co. v. Carter, 670 So.2d 1115 (Ct.App.Fla. 1996) (when both deeds called to the same line, the problem was not an overlap but a question of "where 'on the ground' that line should be drawn," and thus a boundary line dispute); Stearns v. Title Ins. & Trust Co., 18 Cal.App.3d 162, 95 Cal.Rptr. 682 (1971); and Kuhlman v. Title Ins. Co. of Minn., 177 F.Supp. 925 (W.D. Mo. 1959).

78 Voluntary settlement

There is no loss payable under the policy if the insured voluntarily settles the claim matter without prior written consent of the insurer. I direct your attention to paragraph 8(c) of the Conditions & Stipulations:

> 8. <u>LIMITATION OF LIABILITY</u>.
>
> * * * *
>
> (c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

Voluntary settlement has been found to negate policy coverage. See Chrysler First Financial Corp. of America v. Chicago Title Insurance Co., 595 N.Y.S.2d 302, 307 (Sup.Ct. 1993); aff'd 641 N.Y.S.2d 13 (N.Y.A.D. 1 Dept. 1996); Stewart Title Guar. Co. v. Lunt Land Corp., 162 Tex. 435, 347 S.W.2d 584 (1961); and Worthey v. Sedillo Title Guar., Inc., 85 N.M. 339, 512 P.2d 667 (1973).

79 Encroachment

The survey exception removes coverage against encroachments of improvements from neighboring property onto the insured property, and vice versa.

> "To encroach" may be defined in ordinary terms as "to enter by gradual steps or by stealth into the possessions or rights of another." Webster's Third New International Dictionary 747 (1976). The same source defines "encroachment" as "an instance of encroaching (as in the building of a structure in a public park or a fence that projects over a neighbor's land)." Id.

Kayfirst Corp. v. Washington Terminal Co., 813 F.Supp. 67, 76, note 8 (D.D.C. 1993).

The survey exception has been found unambiguous in the context of encroachments. Muscat v. Lawyers Title Ins. Corp., 135 Mich.App. 26, 351 N.W.2d 893 (1984). The exception has been found to apply to the encroachment of the insured's house onto the neighbor's property. The survey exception negates any assurance of title to buildings encroaching onto neighboring land. Walters v. Marler, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (1978); Cook Consultants, Inc. v. Larson, 677 S.W.2d 718 (Tex.App. 1984), aff'd in relevant part in Larson v. Cook Consultants, Inc., 690 S.W.2d 567 (1986); Heyd v. Chicago Title Ins. Co., 218 Neb. 296, 354 N.W.2d 154 (1984).

80 Exception conspicuous, plain and clear

The matter at issue was removed from coverage by an exception in Schedule B of the policy. An exception negates coverage if it gives effective notice of the matter disclosed.

> It is generally acknowledged that a title insurer's duty of disclosure regarding an instrument affecting title is satisfied by a statement of the nature of the document, recording information, etc. The underwriter is not required to set forth its contents [citation omitted], nor to provide an explanation as to its legal effect or implications [citation omitted]. An exception to coverage that is "plain and understandable" in its statement of the subject will be effective [citation omitted].

Ellis, *Title Insurance Law Handbook*, p. 270. An exception is "conspicuous, plain and clear" when it is not capable of two or more constructions, and is not buried in affirmative assuring provisions but is listed as an exception to coverage. Fidelity National Title Ins. Co. v. National Westminster Bank, U.S.A., 1998 WL 31512, 134 F.3d 377 (Table) (9th Cir. Cal.) (unpublished). When an exclusion from coverage is plain, "the insurer is under no duty to advise the insured of the effect of the exclusion on coverage." Id. at 4.

81 Escrow--Escrowee owes no duty to third parties

The Company did not owe you a duty to *[recite alleged duties]. An escrowee is a neutral party in the transaction.

> The escrow relationship is a stakeholder relationship that carries special duties. ...An escrow agent acts as a neutral third party.

Bell v. Safeco Title Ins. Co., 830 S.W.2d 157 (Tex.App. 1992). See also Citizens National Bank of Roswell v. Davisson, 229 U.S. 213, 223 (1913); Wilson v. Carver Fed. Savings & Loan Ass'n, 774 S.W.2d 106 (Tex.App.--Beaumont 1989); and Bowles v. Key Title Co., 163 Or.App. 9, 986 P.2d 1236 (Or.App. 1999) (escrowee's duty is "to hold and dispose of 'stakes,' pursuant to the parties' instructions... .").

The escrowee is a limited agent of the parties to the escrow.

> [T]he escrow holder is generally considered the agent of both parties to the escrow, and he owes an obligation to each party measured by an application of the ordinary principles of agency. Such agency has been held to be for the limited purpose of the escrow, and to continue until the escrow is closed.

30A C.J.S. Escrows § 10 (footnotes omitted). See also Blackburn v. McCoy, 1 Cal.App.2d 648, 654, 37 P.2d 155 (1935); Gurley v. Bank of Huntsville, 349 So.2d 43 (Ala. 1977); Shaheen v. American Title Ins. Co., 120 Ariz. 505, 508, 586 P.2d 1317, 1320 (Ct.App. 1978); Fretz v. First American Title Ins. Co., 161 Ariz. 174, 777 P.2d 672 (App. 1989); Hannon v. Western Title Ins. Co., 260 Cal. Rptr. 21, 23 (App. 1989); Kirby v. Palos Verdes Escrow Co., 183 Cal.App.3d 57, 64-65, 227 Cal.Rptr. 785 (1986)]; and Spaziani v. Millar, 215 Cal.App.2d 667, 682--683, 30 Cal.Rptr. 658. The escrowee's agency "is limited because the escrow agent only represents his principals insofar as he carries out the escrow instructions... ." Hannon v. Western Title Ins. Co., 260 Cal. Rptr. 21, 23 (App. 1989).

The escrowee owes no duty of care to persons who are not parties to the escrow. For example, in Rove v. First American Title Ins. Co., 1998 WL 696880 (Tex.App.-Dallas) (unpublished), the Stephen Moses consortium contributed earnest money used by a housing coalition to purchase property. The earnest money group was not a party to the escrow agreement. The deal stalled, and the individuals notified the escrowee that they wanted their money back. It was not returned because the escrow principals told the escrowee not to give it back. The trial court held that the escrowee owed the Moses consortium no duty of care because it was not a party to the escrow. It also noted that the escrowee did have a duty of care as to the buyer and seller, both of whom had given contrary instructions. It said:

> First American would have breached both its duty to exercise a high degree of care in holding the earnest money and its duty to carry out the terms of the real estate contract if it had released the funds to the [Stephen Moses group] over the objections of RTC and the Coalition.

Similarly, when the escrow agreement states that the escrowee is acting solely for the benefit of a lender, the borrowers' signatures on the agreement are their assent to the fact that the escrowee owes them no duty. The borrowers may not circumvent this by claiming to be third party beneficiaries of the escrow. The escrowee was not the fiduciary of the borrowers in disbursing the loan funds, since a fiduciary duty is owed only to the party who makes the deposit. Fantino v. Lenders Title and Guar. Co., 303 Ill.App.3d 204, 707 N.E.2d 756, 236 Ill.Dec. 629 (Ill.App. 2 Dist. 1999).

82 Escrow--No duty to give legal advice

> An escrowee is not the legal advisor to any party to the escrow.
>
> An escrow holder, by definition, is a neutral party with no obligation to either party to the transaction except to carry out the terms of the escrow instructions. "They owe no duty to advise the parties on their legal rights...[and] [t]hey have no reason to protect the rights of any one party as against another." State Bar v. Security Escrows, Inc., 233 Or. 80. 82. 377 P.2d 334 (1962).

McDonald v. Title Ins. Co. of Oregon, 49 Or.App. 1055, 621 P.2d 654, 657 (1980). The escrowee is not an attorney or advisor to the parties to the escrow. State Bar v. Security Escrows. Inc., 233 Or. 80, 377 P.2d 334 (1962).

The insurer/escrowee does not assume the role of attorney just because a party to the escrow is used to dealing with settlement agents who are attorneys, or because certain documents refer to the escrowee as "approved attorney."

> ...First American is a title insurance company, not a professional corporation qualified to render the professional services of an attorney pursuant to Code §§ 13.1-542 through -556. An attorney-client relationship cannot be created by a non-attorney acting as an attorney. If the non-attorney employees of First American engaged in acts reserved to attorneys, charges of unauthorized practice of law may lie, as noted by the trial court, but not claims for legal malpractice.

Carstensen v. Chrisland Corp., 442 S.E.2d 660, 669 (Va. 1994). An escrowee does not have a duty to explain the legal effect of a document, even when the escrowee drafted the instrument. National Bank of Washington v. Equity Investors, 81 Wash.2d 886, 506 P.2d 20 (1973), *rev'd other grounds* 86 Wash.2d 545, 546 P.2d 440 (1976) (escrowee not bound to explain terms of subordination agreement). Similarly, the escrowee is not required to explain the effect of amendments to a closing document. Bell v. Safeco Title Ins. Co., 830 S.W.2d 157 (Tex.App. 1992) said:

> While Metro had a duty to point out the interlineations, it did not have a duty to explain the signing of the interlineations because to do so would have breached its duty to both parties to remain a neutral third party at the closing. Despite his advanced years, Bell, Sr., was an attorney who was mentally competent at the time he signed the interlineations. Metro owed no duty to give him legal advice on the consequences of initialing the interlineations and signing the deed.

Finally, the escrowee has no duty to warn a party that it may be taking an imprudent risk. Axley v. Transamerica Title Ins. Co., 88 Cal.App.3d 1, 151 Cal.Rptr. 570 (1978) (no duty of "reasonable care and diligence" requiring escrowee to advise lender not to take fourth position deed of trust).

Thus, courts have uniformly held that an escrowee is not the legal advisor to the escrow parties.

83 Escrow--Lender bound by payoff letter

You are obligated to release the above-described *[deed of trust] *[mortgage] based on the payment you received which was delivered in reliance on your payoff statement. You are legally bound to honor your payoff statement even if it contains an inaccurate payoff amount, loan number or other information.

In one recent decision, the court found a lender bound by its payoff figure when the lender gave the amount for the wrong loan to the same borrower. In Stewart Title Guar. Co. v. F.D.I.C., 936 S.W.2d 266 (Ct.App.Tenn. 1996), the closer called for a payoff amount, giving the borrower's name and the address of the property. The lender gave a payoff figure for a different loan to the same borrower. That amount was sent to the lender after closing, with reference to the property on the check. The lender deposited the check, but the deed of trust was never released. The court declared the deed of trust released, because the lender was bound by its payoff figure. The court held that this was "a classic case for the application of the doctrine of equitable estoppel."

A lender is also bound by the acts of its appointed loan servicer. An escrowee may deal with the servicing agent until it receives notice that the servicing contract has been terminated, or has good reason to know that the servicer is no longer appointed. The lender is obligated to *[discharge its mortgage lien] *[order a reconveyance deed] if the loan balance is paid to the servicer, even if the servicing agreement has been revoked and the lender does not receive the funds from the servicer. See Banco Santander Puerto Rico v. Select Title Service Inc., 692 So.2d 950 (Fla.Ct.App. 1997).

84 Assumed or agreed to in purchase contract

The policy excludes matters "created, suffered, assumed or agreed to" by the insureds. Exclusion 3(a). When the insured agrees in the purchase contract to take the property subject to an encumbrance or lien, the matter is excluded from policy coverage as a matter "agreed to" by the insured.

The exclusion was held to apply when the purchaser was made aware of restrictions before the purchase agreement was signed, and the restrictions were indirectly referenced in the commitment. The buyer's own attorney acted as closer for the insurer, stating in his "closing report" that the restrictions should be shown in the policy, which they were. Sullivan v. Tomgil Building Corp., 46 Misc.2d 613, 260 N.Y.S.2d 465 (Sup. Ct. 1965).

Similarly, the insurer was held not liable for any loss for the apparently accidental characterization of a condominium unit title as being in fee simple rather than a lease. The court noted that the insured accepted the lease and had received the condominium declaration and other documents, all of which accurately showed the interest as a leasehold. Rudolph v. Title & Trust Co. of Fla., 402 So.2d 1275 (Fla.App. 1981). Likewise, there was no policy coverage when the insured's purchase agreement said that "[t]he property is also sold subject to easements, if any created, or to be created, prior to or after conveyance of title...which may be placed on record by the Seller after execution hereof for the benefit of this property and/or community of which it is a part." Carstensen v. Chrisland Corp., 442 S.E.2d 660, 664 (Va. 1994). See also Commonwealth Land Title Ins. Co. v. Ozark Global, L.C., 1997 WL 124213 (S.D.Ala. 1997) (unpublished).

85 Reservation of right to recoup attorney's fees

The Company hereby reserves the right to retender the defense of this action to the insured, and/or to deny liability for any judgment rendered against the insured or the cost of any settlement obtained by the insured. The Company also reserves the right to demand payment from the insured for its cost in defending the insured in this action, in the event that the court rules, or the facts disclose, that there is no potential for coverage under the policy for any matter alleged in the complaint.

86 Access onto public street not insured

The policy insures against the "[l]ack of a right of access to and from the land." Insuring Provision 4. This coverage assures a right of access. It does not assure that the property abuts a public road.

For example, in United Bank v. Chicago Title Ins. Co., 168 F.3d 37 (1st Cir. Me. 1999), a resort in Maine sat at the end of 17 miles of logging roads. The former owner had gotten a license to travel over 11 miles of the roads at a cost of $100 per year, and the logging company would have given a license over the rest of the property if asked. The purchaser at a private auction claimed that he had been promised "deeded access," which presumably meant an easement. No matter what might have been promised the buyer, however, the court found that the title insurance policy did not say that the property would have an easement.

> The Chicago Title insurance policy nowhere provides any assurance of deeded access. All that is protected is a "right of access," which could be secured in a variety of ways. No doubt deeded access--e.g., a perpetual easement granted in a deed by the owner of the intervening property--would be more valuable than, say, an easement by necessity under state law or a year to year license... . [T]he policy does not cover... something different from and more valuable than a generic right of access.

Similarly, when the only means of access to the property was by water, the court found that may be a sufficient right of access for hunting land. See Riffle v. United General Title Ins. Co., 64 Ark.App. 185, 984 S.W.2d 47 (1998).

87 Loan policy--Mortgage invalid for lack of debt

The title insurance policy does not protect the insured if the mortgage is defective because the lender failed to give the loan funds to the borrower. For example, in Pacific American Construction v. Security Union Title Ins. Co., 377 Utah Adv.Rep. 22, 1999 UT 87, 987 P.2d 45 (1999), the policy was found not to protect against invalidity of the mortgage resulting from the lender's delivery of the loan funds to a party other than the borrower. The mortgage was found void for lack of consideration. The court said:

> As has been recognized elsewhere, "failure of consideration is not a covered loss" under the policy language at issue here. Gerrold v. Penn Title Ins. Co., 271 N.J.Super. 50, 637 A.2d 1293, 1295 (N.J.Super.Ct.App.Div.1994) (interpreting the same language).
>
> * * * *
>
> Our holding is necessitated by the rule that "a mortgage lien and a mortgage debt are two entirely different ... species.... [A] guarantee of the validity of the mortgage lien cannot and should not be construed as guaranteeing that the insurer has made a careful investigation of the origin of the mortgage debt and guarantees its payment or validity." Bank of Miami Beach v. Fidelity & Cas. Co., 239 So.2d 97, 99 (Fla.1970). "Generally stated, the provision [at issue here] insures against defects in the mortgage itself, but not against problems arising from or related to the underlying debt." Lawyers Title Ins. Corp. v. JDC (America) Corp., 52 F.3d 1575, 1583 (11th Cir.1995); see also 60 A.L.R.2d 972, 976 (1958) (stating "a title policy insuring a mortgagee insures only the title to the land securing his debt and not the debt"). In other words, the losses Pacific sustained did not result from a failure of the insured lien; they resulted instead from the failure of the underlying debt claim against Bodenvest. This is demonstrated by the fact that if Bodenvest had received funds from the loan at issue, the trust deed would have been enforceable against it.
>
> * * * *
>
> It would be unreasonable to expect a title company to insure a debt about which it typically would have only limited knowledge and over which the lender would have sole control. A lender--not a title company--is in the best position to insure that the debt underlying a mortgage is valid. Thus, absent specific policy language to the contrary, the lender bears the risk that the mortgage debt is invalid.
>
> In conclusion, we find that the insuring clauses of the Policy do not cover losses arising, as here, from a failure of the debt underlying the mortgage.

Also, in Fidelity Nat'l Title Ins. Co. of New York v. Consumer Home Mortgage, Inc., 272 A.D.2d 512, 708 N.Y.S.2d 445, 2000 N.Y. Slip.Op. 05066 (N.Y.A.D. 2 Dept. 2000), the lender's closing agent stole the loan funds. The mortgage was found to be void because the borrowers never received the loan funds. The court found no coverage under the title insurance policy.

88 Loan policy does not protect against impersonation

The title insurance policy does not protect against a borrower's impersonation of another person, as long as the insured mortgage can be foreclosed. Impersonation is a person's assumption of a different name. The true owner of the property may assume another's identity in taking title and mortgaging. This does not make title defective. Rather, an instrument signed by the true owner is binding and valid, no matter what name the owner assumed.

The company recognizes that the adoption of an assumed name or the stealing of someone else's identity is a significant credit risk for a lender. However, the title insurance policy does not make any assurance that the owner has taken title in his or her true legal name. In Brucha Mortgage Bankers Corp. v. Nations Title Ins. of New York, Inc., 712 N.Y.S.2d 151, 2000 N.Y. Slip Op. 07395 (A.D. 2 Dept. 2000), the lender gave a mortgage loan to a borrower who "falsely represented his identity." The court did not explain whether the borrower assumed a fictitious name or impersonated a real person with good credit. The loan went into default, and then the lender discovered that the property had also been appraised for more than value. The lender foreclosed and took title without protest from the borrower.

Brucha then sued Nations Title on the theory that the policy protected the lender against the borrower's use of a false identity. The appeals court gave the insurer summary judgment. The court noted cases holding that a lender has a title policy claim only to the extent that its security is impaired and to the extent of the resulting loss which it sustains. Therefore,

> [I]nasmuch as a valid title was transferred, and [Brucha] received a valid and enforceable first mortgage lien on the property, as evidenced by its ability to successfully foreclose, the defendant satisfied its obligations under the policy...

712 N.Y.S.2d at 152. The only person who may challenge the validity of the mortgage is the borrower. In this case, you have not presented any evidence that the borrower has challenged the validity of the insured mortgage. As in the Brucha case, the successful foreclosure of the mortgage will be evidence that the validity of the mortgage is not disputed.

89 Tortious conduct--trespass, interference with property rights

The title insurance policy does not protect against a claim that the insured has violated another property owner's rights in property, without raising a dispute about title. Thus, the policy does not protect the insured for trespassing, interfering with another person's easement rights, or similar conduct.

This principle is illustrated by Sabatino v. First American Title Ins. Co., 308 Ill.App.3d 819, 721 N.E.2d 693, 242 Ill.Dec. 414 (Ill.App. 2 Dist. 1999). In that case, the insureds built an addition to their home. They were sued by their neighbor, Mr. Hershenhorn, for cutting, rerouting and generally playing havoc with his sanitary sewer line, which ran under the surface of the Sabatino property, to make room for the addition. He sough an injunction against the Sabatinos' "deliberate, wrongful and intentional" disruption of the easement, but not a declaration of the easement itself.

The court held that the lawsuit concerned the insured's interference with the claimed easement, rather than seeking a judicial determination of its existence, and therefore did not trigger policy coverage. In addition, it found that the tortious conduct complained of all occurred after the date of policy was excluded by the post-policy exclusion:

> First, the underlying complaint does not seek a judicial determination of the existence of an implied easement. Rather, Hershenhorn seeks injunctive relief due to plaintiffs' intentional interference with his easement. Moreover, the purpose of title insurance is to protect a transfer of real estate from the possibilities of loss through defects that may cloud title. ... In this case, Hershenhorn's claims are not made against plaintiffs because defendant failed to find an unrecorded easement. Hershenhorn's claims against plaintiffs have arisen because of plaintiffs' allegedly tortious conduct in interfering with Hershenhorn's easement. Such claims are ancillary to the purpose of the title insurance policy. ...
>
> * * * * *
>
> In sum, the gravamen of the complaint is not the allegation of an unrecorded easement, but the redress for plaintiffs' intentional and wrongful conduct that occurred after the date of the policy. The complaint in the underlying action presumes the existence of an unrecorded easement by implication and only seeks injunctive relief due to intentional actions that occurred after the policy was issued. Because the policy excludes the type of conduct complained of and provides defendant with the option of establishing a value reflecting the impact of the unrecorded easement on plaintiffs' property, defendant's rejection of plaintiffs' tender of defense was proper. Accordingly, we find that defendant has no duty to defend... .

The Sabatino decision is equally applicable to similar lawsuits alleging tortious conduct by the insureds and not the title to the property.

90 Regulatory restriction on access

The policy insures that the insured has a right of access to and from the property. However, the policy does not protect against the government's exercise of its police power right, unless there is notice in the public records on the Date of Policy that the government is taking such action:

EXCLUSIONS FROM COVERAGE

> The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> 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 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.
>
> (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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 above exclusion was found to negate the access coverage in a case strongly similar to this claim. In Marriott Financial Services, Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975), affirming 23 N.C.App. 377, 209 S.E.2d 423 (1974), the municipality refused a subdivision application, in the course of which it clearly indicated that it would also refuse to issue a driveway permit. The insured claimed that the access coverage was invoked by the denial. The court held that, because there was no notice of the permit issue in the real estate records on the Date of Policy, the matter was excluded under the police power exclusion.

> The City Council's 18 August 1969 resolution rejecting Marriott's application for subdivision approval, in part, stated that "it would be contrary to the public peace, safety and welfare of the inhabitants of the City of Raleigh to approve any subdivision allowing access to Wake Forest Road within 200 feet of Crabtree Creek Bridge." This unequivocal language makes it clear that the City Council would exercise its police power to deny any application for a driveway permit from Wake Forest Road to the Marriott property, or any other property within 200 feet of Crabtree Creek Bridge.

> The provisions of Subsection (b) of the exclusions from coverage in subject policy in plain and unambiguous language exclude from coverage any loss or damage by reason of exercise of governmental police power unless notice of the exercise of such police power appears in the public records on 29 March 1969, the effective date of the policy. According to this record, such notice could not appear in the public records on the effective date of the policy.

A California decision followed the same principle. In Magna Enterprises, Inc. v. Fidelity Nat'l Title Ins. Co., 2002 WL 31555360 (Cal.App. 4 Dist.) (unpublished), the court found that the access coverage was not invoked although a rear lot owned by the insured did not abut the street, was at a grade two and a half feet below the frontage lot, was partly barricaded by a fence and building, and the insured claimed that the municipality would refuse to issue the permits necessary to change the grade to make access from back to front possible.

The court adopted this quote from a California treatise:

> A right of access can be different from practical or physical access. … If the insured property is landlocked, it has no right of access. If the insured property is contiguous to a public road but so steeply sloped as to make physical access impractical or extremely expensive, it still has a right of access.

(quoting *Title Insurance Practice* (Cont.Ed.Bar 2d ed.1999) § 6.27, p. 140). The court also pointed to several recent decisions limiting the scope of the access coverage: *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10 (Mo.Ct.App.1991) ("goat path" access sufficient); *Krause v. Title & Trust Co. of Florida*, 390 So.2d 805 (Fla.Ct.App.1980) (abutting road not at grade); and *Title & Trust Co. of Florida v. Barrows*, 381 So.2d 1088 (Fla.Ct.App.1979) (access cut off by flooding of roads).

As to the possible permit refusal, the *Magna* court said:

> Magna notes it believed the City would not approve such access and the City wanted a five foot tall wall between the repair center and the shopping center as a condition of approval of the shopping center redevelopment. This was inadequate to show Magna lacked legal access to the repair center property, especially since no evidence showed the City could or would prohibit such access if it were Magna's only possible access.

91 Prejudice by tardy notice of claim

The policy states that the insurer's duties are terminated to the extent that the insurer is prejudiced by tardy notice of a policy claim. Paragraph 3 of the Conditions & Stipulations of the policy states, in relevant part:

> If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

The termination-on-prejudice provision is repeated concerning tenders of defense, in Paragraph 4(d) of the Conditions & Stipulations:

> Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

Thus, when the insured gives the insurer late notice of a claim or tender of defense, it loses all coverage as to the matter if the insurer is harmed by the tardiness of the notice. Several courts have found prejudice under exactly the facts in this case. In one case, the court found that tender of a defense after judgment was entered in a foreclosure prejudiced the insurer:

> The delay of plaintiff in giving defendant notice of this foreclosure action prejudiced defendant as a matter of law since defendant was improperly deprived under condition 2(b) of the policy, of its right to defend said foreclosure action, and of its right to prevent or reduce any loss. Under the circumstances, the defendant is relieved of any liability in the second cause of action.

Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co., 595 N.Y.S.2d 302, 307 (Sup. Ct. 1993). Similarly, in Wainco Funding v. First American Title Ins. Co., 219 A.D.2d 598, 631 N.Y.S.2d 81 (A.D. 2 Dept. 1995), an insurer was found to have been prejudiced when the insured lender did not notify it of a tax lien foreclosure until after an unsuccessful appeal of the judgment, which apparently divested the insured lien. The Wainco court held:

> By depriving the defendant of the opportunity to participate in the tax lien proceeding in any way, the plaintiff's failure to give notice actually prejudiced the defendant [citation omitted].

631 N.Y.S.2d at 82.

The insured prejudiced the insurer's rights, and its ability to protect the insured from the subject of this claim, by its tardy tender of notice of claim. The coverage of the title insurance policy terminated for this matter due to this harm. The Company respectfully declines to indemnify the insured as to this matter.

92 No duty to bring lawsuit to clear title

The policy does not obligate a title insurer to bring an action to clear title. The policy contains a provision for defense of the insured, but that provision likewise does not obligate the insurer to prosecute a lawsuit. For example, in Schwartz v. Stewart Title Guar. Co., 1999 WL 475850 (Ohio App. 8 Dist.) (unpublished), the insured sued the developer-declarant, claiming, among other things, that the condominium declaration was defective because it was not signed by the record owner. The title insurer cured the defect with an affidavit and deed. No third party challenged the validity of the declaration. The insured sued the insurer for attorney fees in the prosecution of the action. The court found that there was no duty to clear title, because no one was attacking it, and any defect was cured.

Further, the Company has no obligation to clear title unless and until title as insured is challenged. See Manneck v. Lawyers Title Ins. Corp., 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771, 777 (1994), in which the policy protected against the enforced removal of certain structures, and the insurer was found not to have a duty to act until someone sought to remove those structures. Similarly, in Eliopoulos v. Nations Title Ins. Of New York, 912 F.Supp. 28 (N.D.N.Y. 1996), the title insurer was found to have no "affirmative duty to clear title" when there were "perceived" challenges to title, but no direct attack had yet been made by an adverse party.

Therefore, the Company had no duty to prosecute an action on behalf of the insured.

Appendix B--Policy Forms

American Land Title Association forms are subject to copyright and their use is restricted to ALTA licensees and ALTA members in good standing as of the date of use. All other uses are prohibited. The author thanks American Land Title Association for granting a license to reprint the following forms:

2016 ALTA Commitment for Title Insurance
2006 ALTA Commitment to Insure
2006 ALTA Plain Language Commitment Form
1970 ALTA Owner's Policy
1992 ALTA Owner's Policy
1987 ALTA Residential Owner's Policy
2010 ALTA Homeowner's Policy
2013 ALTA Homeowner's Policy
2006 ALTA Owner's Policy
1970 ALTA Loan Policy
1992 ALTA Loan Policy
2006 ALTA Loan Policy
ALTA Short Form Residential Loan Policy
ALTA Residential Limited Coverage Junior Loan Policy
ALTA United States of America Policy
ALTA 13-06 Leasehold Owner's Endorsement
ALTA 13.1-06 Leasehold Loan Endorsement
1990 California Land Title Ass'n Standard Coverage Owner's Policy
Texas Form T-7 Commitment for Title Insurance
Texas Form T-1 Owner's Policy 2009 Version
Texas Form T-1 Owner's Policy 2014 Version
Texas Form T-1R Owner's Policy--Residential
Texas Form T-2 Mortgagee Policy
Texas Form T-13 Mortgagee Policy Binder on Interim Construction Loan
1987 ALTA Closing Protection Letter
2008 ALTA Closing Protection Letter
2008 ALTA Closing Protection Letter—Limitations
2008 ALTA Closing Protection Letter—Single Transaction Limited Liability
2011 ALTA Closing Protection Letter—Single Transaction
2011 ALTA Closing Protection Letter—Multiple Transactions
2015 ALTA Closing Protection Letter—Single Transaction
2015 ALTA Closing Protection Letter—Multiple Transactions

COMMITMENT FOR TITLE INSURANCE
ISSUED BY
BLANK TITLE INSURANCE COMPANY

NOTICE

IMPORTANT—READ CAREFULLY: THIS COMMITMENT IS AN OFFER TO ISSUE ONE OR MORE TITLE INSURANCE POLICIES. ALL CLAIMS OR REMEDIES SOUGHT AGAINST THE COMPANY INVOLVING THE CONTENT OF THIS COMMITMENT OR THE POLICY MUST BE BASED SOLELY IN CONTRACT.

THIS COMMITMENT IS NOT AN ABSTRACT OF TITLE, REPORT OF THE CONDITION OF TITLE, LEGAL OPINION, OPINION OF TITLE, OR OTHER REPRESENTATION OF THE STATUS OF TITLE. THE PROCEDURES USED BY THE COMPANY TO DETERMINE INSURABILITY OF THE TITLE, INCLUDING ANY SEARCH AND EXAMINATION, ARE PROPRIETARY TO THE COMPANY, WERE PERFORMED SOLELY FOR THE BENEFIT OF THE COMPANY, AND CREATE NO EXTRACONTRACTUAL LIABILITY TO ANY PERSON, INCLUDING A PROPOSED INSURED.

THE COMPANY'S OBLIGATION UNDER THIS COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THIS COMMITMENT. THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

COMMITMENT TO ISSUE POLICY

Subject to the Notice; Schedule B, Part I—Requirements; Schedule B, Part II—Exceptions; and the Commitment Conditions, *Blank Title Insurance Company*, a ______________ (the "Company"), commits to issue the Policy according to the terms and provisions of this Commitment. This Commitment is effective as of the Commitment Date shown in Schedule A for each Policy described in Schedule A, only when the Company has entered in Schedule A both the specified dollar amount as the Proposed Policy Amount and the name of the Proposed Insured.

If all of the Schedule B, Part I—Requirements have not been met within ______ *(insert the time period)* after the Commitment Date, this Commitment terminates and the Company's liability and obligation end.

COMMITMENT CONDITIONS

1. DEFINITIONS

(a) "Knowledge" or "Known": Actual or imputed knowledge, but not constructive notice imparted by the Public Records.
(b) "Land": The land described in Schedule A and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is to be insured by the Policy.
(c) "Mortgage": A mortgage, deed of trust, or other security instrument, including one evidenced by electronic means authorized by law.
(d) "Policy": Each contract of title insurance, in a form adopted by the American Land Title Association, issued or to be issued by the Company pursuant to this Commitment.
(e) "Proposed Insured": Each person identified in Schedule A as the Proposed Insured of each Policy to be issued pursuant to this Commitment.
(f) "Proposed Policy Amount": Each dollar amount specified in Schedule A as the Proposed Policy Amount of each Policy to be issued pursuant to this Commitment.
(g) "Public Records": Records established under state statutes at the Commitment Date for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge.
(h) "Title": The estate or interest described in Schedule A.

2. If all of the Schedule B, Part I—Requirements have not been met within the time period specified in the Commitment to Issue Policy, this Commitment terminates and the Company's liability and obligation end.

3. The Company's liability and obligation is limited by and this Commitment is not valid without:
(a) the Notice;
(b) the Commitment to Issue Policy;
(c) the Commitment Conditions;
(d) Schedule A;
(e) Schedule B, Part I—Requirements; [and]
(f) Schedule B, Part II—Exceptions[; and
(g) a counter-signature by the Company or its issuing agent that may be in electronic form].

4. COMPANY'S RIGHT TO AMEND
The Company may amend this Commitment at any time. If the Company amends this Commitment to add a defect, lien, encumbrance, adverse claim, or other matter recorded in the Public Records prior to the Commitment Date, any liability of the Company is limited by Commitment Condition 5. The Company shall not be liable for any other amendment to this Commitment.

5. LIMITATIONS OF LIABILITY
(a) The Company's liability under Commitment Condition 4 is limited to the Proposed Insured's actual expense incurred in the interval between the Company's delivery to the Proposed Insured of the Commitment and the delivery of the amended Commitment, resulting from the Proposed Insured's good faith reliance to:
  (i) comply with the Schedule B, Part I—Requirements;
  (ii) eliminate, with the Company's written consent, any Schedule B, Part II—Exceptions; or
  (iii) acquire the Title or create the Mortgage covered by this Commitment.
(b) The Company shall not be liable under Commitment Condition 5(a) if the Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.
(c) The Company will only have liability under Commitment Condition 4 if the Proposed Insured would not have incurred the expense had the Commitment included the added matter when the Commitment was first delivered to the Proposed Insured.
(d) The Company's liability shall not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Conditions 5(a)(i) through 5(a)(iii) or the Proposed Policy Amount.
(e) The Company shall not be liable for the content of the Transaction Identification Data, if any.
(f) In no event shall the Company be obligated to issue the Policy referred to in this Commitment unless all of the Schedule B, Part I—Requirements have been met to the satisfaction of the Company.
(g) In any event, the Company's liability is limited by the terms and provisions of the Policy.

6. LIABILITY OF THE COMPANY MUST BE BASED ON THIS COMMITMENT
(a) Only a Proposed Insured identified in Schedule A, and no other person, may make a claim under this Commitment.
(b) Any claim must be based in contract and must be restricted solely to the terms and provisions of this Commitment.
(c) Until the Policy is issued, this Commitment, as last revised, is the exclusive and entire agreement between the parties with respect to the subject matter of this Commitment and supersedes all prior commitment negotiations, representations, and proposals of any kind, whether written or oral, express or implied, relating to the subject matter of this Commitment.
(d) The deletion or modification of any Schedule B, Part II—Exception does not constitute an agreement or obligation to provide coverage beyond the terms and provisions of this Commitment or the Policy.
(e) Any amendment or endorsement to this Commitment must be in writing [and authenticated by a person authorized by the Company].

(f) When the Policy is issued, all liability and obligation under this Commitment will end and the Company's only liability will be under the Policy.

7. IF THIS COMMITMENT HAS BEEN ISSUED BY AN ISSUING AGENT

The issuing agent is the Company's agent only for the limited purpose of issuing title insurance commitments and policies. The issuing agent is not the Company's agent for the purpose of providing closing or settlement services.

8. PRO-FORMA POLICY

The Company may provide, at the request of a Proposed Insured, a pro-forma policy illustrating the coverage that the Company may provide. A pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure.

[9. ARBITRATION

The Policy contains an arbitration clause. All arbitrable matters when the Proposed Policy Amount is $2,000,000 or less shall be arbitrated at the option of either the Company or the Proposed Insured as the exclusive remedy of the parties. A Proposed Insured may review a copy of the arbitration rules at <http://www.alta.org/arbitration>.]

2016 ALTA Commitment for Insurance

[***Transaction Identification Data for reference only:***
Issuing Agent:
Issuing Office:
ALTA® Universal ID:
Loan ID Number:
Commitment Number:
Issuing Office File Number:
Property Address:]
[Revision Number:]

SCHEDULE A

1. Commitment Date:

2. Policy to be issued:
   a. [2006 ALTA® Owner's Policy][2006 ALTA® Loan Policy][_____ ALTA® __________ Policy]
   Proposed Insured: ________________________
   Proposed Policy Amount: $__________________
   [(b) [2006 ALTA® Owner's Policy][2006 ALTA® Loan Policy][_____ ALTA® __________ Policy]
   Proposed Insured: ________________________
   Proposed Policy Amount: $__________________]
   [(c) [2006 ALTA® Owner's Policy][2006 ALTA® Loan Policy][_____ ALTA® __________ Policy]
   Proposed Insured: ________________________
   Proposed Policy Amount: $__________________]

3. The estate or interest in the Land described or referred to in this Commitment is _______ *(Identify estate covered, i.e., fee, leasehold, etc.)*

4. Title to the [______________] estate or interest in the Land is at the Commitment Date vested in:

5. The Land is described as follows:

BLANK TITLE INSURANCE COMPANY

By:________________________________
Authorized Signatory

SCHEDULE B, PART I
Requirements

All of the following Requirements must be met:

1. The Proposed Insured must notify the Company in writing of the name of any party not referred to in this Commitment who will obtain an interest in the Land or who will make a loan on the Land. The Company may then make additional Requirements or Exceptions.

2. Pay the agreed amount for the estate or interest to be insured.

3. Pay the premiums, fees, and charges for the Policy to the Company.

4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.
   (Documents to be listed here)

(Additional Requirements may be listed here by number)

SCHEDULE B, PART II
Exceptions

THIS COMMITMENT DOES NOT REPUBLISH ANY COVENANT, CONDITION, RESTRICTION, OR LIMITATION CONTAINED IN ANY DOCUMENT REFERRED TO IN THIS COMMITMENT TO THE EXTENT THAT THE SPECIFIC COVENANT, CONDITION, RESTRICTION, OR LIMITATION VIOLATES STATE OR FEDERAL LAW BASED ON RACE, COLOR, RELIGION, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, HANDICAP, FAMILIAL STATUS, OR NATIONAL ORIGIN.

The Policy will not insure against loss or damage resulting from the terms and provisions of any lease or easement identified in Schedule A, and will include the following Exceptions unless cleared to the satisfaction of the Company:

[1. Any defect, lien, encumbrance, adverse claim, or other matter that appears for the first time in the Public Records or is created, attaches, or is disclosed between the Commitment Date and the date on which all of the Schedule B, Part I—Requirements are met.]

(Additional Exceptions may be listed here by number)

2006 ALTA Commitment for Insurance (adopted June 17, 2006)

COMMITMENT FOR TITLE INSURANCE
Issued by
BLANK TITLE INSURANCE COMPANY

Blank Title Insurance Company, a _______ corporation ("Company"), for a valuable consideration, commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the Proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest in the land described or referred to in Schedule A, upon payment of the premiums and charges and compliance with the Requirements; all subject to the provisions of Schedules A and B and to the Conditions of this Commitment.

This Commitment shall be effective only when the identity of the Proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A by the Company.

All liability and obligation under this Commitment shall cease and terminate __________ (here state the time period)* after the Effective Date or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue the policy or policies is not the fault of the Company.

The Company will provide a sample of the policy form upon request.

IN WITNESS WHEREOF, Blank Title Insurance Company has caused its corporate name and seal to be affixed by its duly authorized officers on the date shown in Schedule A.**

BLANK TITLE INSURANCE COMPANY
BY: ____
PRESIDENT
Attest: ______________________________________
SECRETARY

SCHEDULE A

1. Effective Date:

2. Policy or Policies to be issued: Amount

   a. _____ Owner's Policy (Identify form used): $_____________

Proposed Insured:

   b. _____ Loan Policy (Identify form used): $______________

Proposed Insured:

3. The estate or interest in the land described or referred to in this Commitment is ______________________________

4. Title to the ____________________________ estate or interest in the land is at the Effective Date vested in:

5. The land referred to in this Commitment is described as follows:

SCHEDULE B

1. Requirements:

2. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

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

2006 ALTA Commitment for Insurance

CONDITIONS

1. The term mortgage, when used herein, shall include deed of trust, trust deed, or other security instrument.
2. If the proposed Insured has or acquired actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions.
3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions and Conditions and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.
4. This Commitment is a contract to issue one or more title insurance policies and is not an abstract of title or a report of the condition of title. Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

The policy to be issued contains an arbitration clause. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured as the exclusive remedy of the parties. You may review a copy of the arbitration rules at <http://www.alta.org/>.

2006 ALTA Plain Language Commitment Form (adopted June 17, 2006)

ALTA PLAIN LANGUAGE COMMITMENT FORM
Issued By
BLANK TITLE INSURANCE COMPANY

INFORMATION

The Title Insurance Commitment is a legal contract between you and the Company. It is issued to show the basis on which we will issue a Title Insurance Policy to you. The Policy will insure you against certain risks to the land title, subject to the limitations shown in the Policy.

The Company will give you a sample of the Policy form, if you ask.

The Policy contains an arbitration clause. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or you as the exclusive remedy of the parties. You may review a copy of the arbitration rules at <http://www.alta.org/>.

The Commitment is based on the land title as of the Commitment Date. Any changes in the land title or the transaction may affect the Commitment and the Policy.

The Commitment is subject to its Requirements, Exceptions and Conditions.

THIS INFORMATION IS NOT PART OF THE TITLE INSURANCE COMMITMENT. YOU SHOULD READ THE COMMITMENT VERY CAREFULLY.

If you have any questions about the Commitment, contact ______________ ________________________________.

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ALTA PLAIN LANGUAGE COMMITMENT FORM
Issued By
BLANK TITLE INSURANCE COMPANY

AGREEMENT TO ISSUE POLICY

We agree to issue policy to you according to the terms of the Commitment. When we show the policy amount and your name as the proposed insured in Schedule A, this Commitment becomes effective as of the Commitment Date shown in Schedule A.
If the Requirements shown in this Commitment have not been met within ________________ insert time period ________________ after the Commitment Date, our obligation under this Commitment will end. Also, our obligation under this Commitment will end when the Policy is issued and then our obligation to you will be under the Policy.

Our obligation under this Commitment is limited by the following:

The Provisions in Schedule A.

The Requirements in Schedule B-I.

The Exceptions in Schedule B-II.

The Conditions on Page ______.

This Commitment is not valid without SCHEDULE A and Sections I and II of SCHEDULE B.

(The countersignature clause is optional.)

SCHEDULE A

1. Commitment Date:

2. Policy (or Policies) to be issued:

   a. Owner's Policy Policy Amount $________

      Proposed Insured:

   b. Loan Policy Policy Amount $________

      Proposed Insured:

   c. Proposed Insured: Policy Amount $________

3. ________________ interest in the land described in this Commitment is owned, at the Commitment Date, by ______________________.

4. The land referred to in the Commitment is described as follows:

SCHEDULE B - SECTION I
REQUIREMENTS

The following requirements must be met:

a. Pay the agreed amounts for the interest in the land and/or the mortgage to be insured.
b. Pay us the premiums, fees and charges for the policy.
c. Documents satisfactory to us creating the interest in the land and/or the mortgage to be insured must be signed, delivered and recorded.

(A period may be added to the above or a colon may be added and specific documents typed in.)

d. You must tell us in writing the name of anyone not referred to in this Commitment who will get an interest in the land or who will make a loan on the land. We may then make additional requirements or exceptions.

(Additional requirements may be listed here.)

SCHEDULE B - SECTION II
EXCEPTIONS

Any policy we issue will have the following exceptions unless they are taken care of to our satisfaction.

CONDITIONS

1. DEFINITIONS
(a) "Mortgage" means mortgage, deed of trust or other security instrument.
(b) "Public Records" means title records that give constructive notice of matters affecting your title according to the state statutes where your land is located.

2. LATER DEFECTS
The Exceptions in Schedule B - Section II may be amended to show any defects, liens or encumbrances that appear for the first time in the public records or are created or attach between the Commitment Date and the date on which all of the Requirements (a) and (c) of Schedule B - Section I are met. We shall have no liability to you because of this amendment.

3. EXISTING DEFECTS
If any defects, liens or encumbrances existing at Commitment Date are not shown in Schedule B, we may amend Schedule B to show them. If we do amend Schedule B to show these defects, liens or encumbrances, we shall be liable to you according to Paragraph 4 below unless you knew of this information and did not tell us about it in writing.

4. LIMITATION OF OUR LIABILITY
Our only obligation is to issue to you the Policy referred to in this Commitment, when you have met its Requirements. If we have any liability to you for any loss you incur because of an error in this Commitment, our liability will be limited to your actual loss caused by your relying on this Commitment when you acted in good faith to:

Comply with the Requirements shown in Schedule B - Section I

or

Eliminate with our written consent any Exceptions shown in Schedule B - Section II.

We shall not be liable for more than the Policy Amount shown in Schedule A of this Commitment and our liability is subject to the terms of the Policy form to be issued to you.

5. CLAIMS MUST BE BASED ON THIS COMMITMENT
Any claim, whether or not based on negligence, which you may have against us concerning the title to the land must be based on this Commitment and is subject to its terms.

1970 ALTA Owner's Policy

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, BLANK TITLE INSURANCE COMPANY, a blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land;
4. Unmarketability of such title;

IN WITNESS WHEREOF, Blank Title Insurance Company has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A.

BLANK TITLE INSURANCE COMPANY

By________________________________
President

By________________________________
Secretary

1970 ALTA Owner's Policy

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of land, or the effect of any violation of any such law, ordinance or governmental regulation.

2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.

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

SCHEDULE A

Date of Policy: Amount of Insurance: $

1. Name of Insured:

2. The estate or interest in the land described in this Schedule and which is covered by this policy is: (a fee, a leasehold, etc.)

3. The estate or interest referred to herein is at Date of Policy vested in:

4. The land referred to in this policy is described as follows:

SCHEDULE B

This policy does not insure against loss or damage by reason of the following:

CONDITIONS AND STIPULATIONS

1. Definition of Terms

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company may have had against the named insured, those who succeed to the interest of such 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.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law impart constructive notice of matters relating to said land.

2. Continuation of Insurance after Conveyance of Title

This coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance or such estate or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

3. Defense and Prosecution of Actions - Notice of Claim to be given by an Insured Claimant

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured in an action to enforce a contract for a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

(d) Whenever the Company shall have brought any action or interposed a defense as required by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expenses so incurred.

4. Notice of Loss - Limitation of Action

In addition to the notices required under paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

5. Options to Pay or Otherwise Settle Claims

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment by the insured claimant and authorized by the Company.

6. Determination and Payment of Loss

(a) The liability of the Company under this policy shall in no case exceed the least of:

(i) the actual loss of the insured claimant; or

(ii) the amount of insurance stated in Schedule A.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such insure with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

7. Limitation of Liability

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

8. Reduction of Liability

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

9. Liability Noncumulative

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring either (a) a mortgage shown or referred to in Schedule B hereof which is a charge or lien on the estate or interest covered by this policy, or (b) a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy. The Company shall have the option to apply to the payment of any such mortgages any amount that otherwise would be payable hereunder to the insured owner of the estate or interest covered by this policy and the amount so paid shall be deemed payment under this policy.

10. Apportionment

If the land described in Schedule A consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement herein or by an endorsement attached hereto.

11. Subrogation Upon Payment or Settlement

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights and remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

12. Liability Limited to this Policy

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

13. Notices, Where Sent

All notices require to be given to the Company and any statement in writing required to be furnished the Company shall be addressed to it at ___________________________.

1992 ALTA Owner's Policy

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.
[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:________________________________
PRESIDENT

BY:________________________________
SECRETARY

1992 ALTA Owner's Policy

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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.

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.

3. Defects, liens, encumbrances, adverse claims or other matters:

   (a) created, suffered, assumed or agreed to by the insured claimant;

   (b) not 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 claimant prior to the date the insured claimant became an insured under this policy;

   (c) resulting in no loss or damage to the insured claimant;

   (d) attaching or created subsequent to Date of Policy; or

   (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

4. 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 creditors' rights laws, that is based on:

   (a) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or

   (b) 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:

      (i) to timely record the instrument of transfer; or

      (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

SCHEDULE A

[File No.]

Policy No.

Amount of Insurance $
[Premium $]
a.m.
Date of Policy [at p.m.]

1. Name of Insured:

2. The estate or interest in the land which is covered by this policy is:

3. Title to the estate or interest in the land is vested in:

[4. The land referred to in this policy is described as follows:]

If Paragraph 4 is omitted, a Schedule C, captioned the same as Paragraph 4, must be used.

SCHEDULE B

[File No.] Policy No.

EXCEPTIONS FROM COVERAGE

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

1.

[POLICY MAY INCLUDE REGIONAL EXCEPTIONS IF SO

2. DESIRED BY ISSUING COMPANY]

[VARIABLE EXCEPTIONS SUCH AS TAXES, EASEMENTS, CC & Rs, ETC.]

3.

4.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(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 of 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.

(b) "insured claimant": an insured claiming loss or damage.

(c) "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 matters affecting the land.

(d) "land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "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.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured.
If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the

matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

(i) To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

(ii) Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or,

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or

(ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT.

If the land described in Schedule [A][C] consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. LIABILITY NONCUMULATIVE.

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. ARBITRATION

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. SEVERABILITY.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at (fill in).

NOTE: Bracketed [ ] material optional

1987 ALTA Residential Owner's Policy

BLANK TITLE INSURANCE COMPANY

RESIDENTIAL TITLE INSURANCE POLICY -- ONE-TO-FOUR FAMILY RESIDENCES

<u>OWNER'S INFORMATION SHEET</u>

Your Title Insurance Policy is a legal contract between you and Blank Title Insurance Company.

It applies only to a one-to-four family residential lot or condominium unit. If your land is not either of these, contact us immediately.

The Policy insures you against certain risks to your land title. These risks are listed on page one of the Policy. The Policy is limited by:

. Exclusions on page

. Exceptions on Schedule B

. Conditions on pages

You should keep the Policy even if you transfer the title to your land.

If you want to make a claim, see Item 3 under Conditions on page___.

You do not owe any more premiums for the Policy.

This sheet is not your insurance Policy. It is only a brief outline of some of the important Policy features. The Policy explains in detail your rights and obligations and our rights and obligations. Since the Policy--and not this sheet--is the legal document, YOU SHOULD READ THE POLICY VERY CAREFULLY.

If you have any questions about your Policy, contact:

[Company name and address]

BLANK TITLE INSURANCE COMPANY

RESIDENTIAL TITLE INSURANCE POLICY

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ALTA Residential Owner's Policy

BLANK TITLE INSURANCE COMPANY
RESIDENTIAL TITLE INSURANCE POLICY -- ONE-TO-FOUR FAMILY RESIDENCES

OWNER'S COVERAGE STATEMENT

This policy insures your title to the land described in Schedule A -- if that land is a one-to-four family residential lot or condominium unit.

Your insurance, as described in this Coverage Statement, is effective on the Policy Date shown in Schedule A.

Your insurance is limited by the following:

. Exclusions on page

. Exceptions in Schedule B

. Conditions on pages

We insure you against actual loss resulting from:

. any title risks covered by this Policy -- up to the Policy Amount

and

. any costs, attorneys' fees and expenses we have to pay under this Policy

COVERED TITLE RISKS

This Policy covers the following title risks, if they affect your title on the Policy Date.

1. Someone else owns an interest in your title.

2. A document is not properly signed, sealed, acknowledged, or delivered.

3. Forgery, fraud, duress, incompetency, incapacity or impersonation.

4. Defective recording of any document.

5. You do not have any legal right of access to and from the land.

6. There are restrictive covenants limiting your use of the land.

7. There is a lien on your title because of:

   . a mortgage or deed of trust

   . a judgment, tax, or special assessment

   . a charge by a homeowner's or condominium association

8. There are liens on your title, arising now or later, for labor and material furnished before the Policy Date -- unless you agreed to pay for the labor and material.

9. Others have rights arising out of leases, contracts, or options.

10. Someone else has an easement on your land.

11. Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan.

12. You are forced to remove your existing structure -- other than a boundary wall or fence -- because:

    - it extends on to adjoining land or on to any easement
    - it violates a restriction shown in Schedule B
    - it violates an existing zoning law

13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.

14. Other defects, liens, or encumbrances.

COMPANY'S DUTY TO DEFEND AGAINST COURT CASES

We will defend your title in any court case as to that part of the case that is based on a Covered Title Risk insured against by this Policy. We will pay the costs, attorneys' fees, and expenses we incur in that defense.

We can end this duty to defend your title by exercising any of our options listed in Item 4 of the Conditions.

This Policy is not complete without Schedules A and B.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:______________________________
PRESIDENT

BY:______________________________
SECRETARY

ALTA Residential Owner's Policy

BLANK TITLE INSURANCE COMPANY

RESIDENTIAL TITLE INSURANCE POLICY

SCHEDULE A

Policy Number:

Policy Date:

Policy Amount:

1. Name of insured:

2. Your interest in the land covered by this Policy is:

3. The land referred to in this Policy is described as follows:

SCHEDULE B

EXCEPTIONS

In addition to the Exclusions, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

EXCLUSIONS

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
   - land use
   - improvements on the land
   - land division
   - environmental protection

   This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at Policy Date.
   This exclusion does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks.

2. The right to take the land by condemning it, unless:
   - a notice of exercising the right appears in the public records on the Policy Date
   - the taking happened prior to the Policy Date and is binding on you if you bought the land without knowing of the taking

3. Title Risks:
   - that are created, allowed, or agreed to by you
   - that are known to you, but not to us, on the Policy Date -- unless they appeared in the public records
   - that result in no loss to you
   - that first affect your title after the Policy Date -- this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks

4. Failure to pay value for your title.

5. Lack of a right:
   - to any land outside the area specifically described and referred to in Item 3 of Schedule A

     or
   - in streets, alleys, or waterways that touch your land

   This exclusion does not limit the access coverage in Item 5 of Covered Title Risks.

ALTA Residential Owner's Policy

BLANK TITLE INSURANCE COMPANY
RESIDENTIAL TITLE INSURANCE POLICY
CONDITIONS

1. DEFINITIONS
   a. Easement - the right of someone else to use your land for a special purpose.
   b. Land - the land or condominium unit described in Schedule A and any improvements on the land which are real property.
   c. Mortgage - a mortgage, deed of trust, trust deed or other security instrument.
   d. Public Records - title records that give constructive notice of matters affecting your title -- according to the state statutes where your land is located.
   e. Title - the ownership of your interest in the land, as shown in Schedule A.

2. CONTINUATION OF COVERAGE

   This Policy protects you as long as you:

   . own your title

   or

   . own a mortgage from anyone who buys your land

   or

   . are liable for any title warranties you make

   This Policy protects anyone who receives your title because of your death.

3. HOW TO MAKE A CLAIM
   a. You Must Give The Company Notice Of Your Claim

      If anyone claims a right against your insured title, you must notify us promptly in writing.

      Send the notice to __________________. Please include the Policy number shown in Schedule A, and the county and state where the land is located.

      Our obligation to you could be reduced if:

      . you fail to give prompt notice

      and

      . your failure affects our ability to dispose of or to defend you against the claim
   b. Proof Of Your Loss Must Be Given To The Company

      You must give us a written statement to prove your claim of loss. This statement must be given to us not later than 90 days after you know the facts which will let you establish the amount of your loss. The statement must have the following facts:

      . the Covered Title Risks which resulted in your loss

      . the dollar amount of your loss

      . the method you used to compute the amount of your loss

      You may want to provide us with an appraisal of your loss by a professional appraiser as a part of your statement of loss.

      We may require you to show us your records, checks, letters, contracts, and other papers which relate to your claim of loss. We may make copies of these papers.

      We may require you to answer questions under oath.

      Our obligation to you could be reduced if you fail or refuse to:

      . provide a statement of loss

      or

      . answer our questions under oath

      or

      . show us the papers we request,

      and

      . your failure or refusal affects our ability to dispose of or to defend you against the claim.

4. OUR CHOICES WHEN YOU NOTIFY US OF A CLAIM

   After we receive your claim notice or in any other way learn of a matter for which we are liable, we can do one or more of the following:

   a. Pay the claim against your title.
   b. Negotiate a settlement.
   c. Prosecute or defend a court case related to the claim.
   d. Pay you the amount required by this Policy.

e. Take other action which will protect you.

f. Cancel this policy by paying the Policy Amount, then in force, and only those costs, attorneys' fees and expenses incurred up to that time which we are obligated to pay.

5. HANDLING A CLAIM OR COURT CASE

You must cooperate with us in handling any claim or court case and give us all relevant information.

We are required to repay you only for those settlement costs, attorneys' fees and expenses that we approve in advance.

When we defend your title, we have a right to choose the attorney. We can appeal any decision to the highest court. We do not have to pay your claim until your case is finally decided.

6. LIMITATION OF THE COMPANY'S LIABILITY

a. We will pay up to your actual loss or the Policy Amount in force when the claim is made -- whichever is less.

b. If we remove the claim against your title within a reasonable time after receiving notice of it, we will have no further liability for it.

If you cannot use any of your land because of a claim against your title, and you rent reasonable substitute land or facilities, we will repay you for your actual rent until:

. the cause of the claim is removed

or

. we settle your claim

c. The Policy Amount will be reduced by all payments made under this policy --except for costs, attorneys' fees and expenses.

d. The Policy Amount will be reduced by any amount we pay to our insured holder of any mortgage shown in this Policy or a later mortgage given by you.

e. If you do anything to affect any right of recovery you may have, we can subtract from our liability the amount by which you reduced the value of that right.

7. TRANSFER OF YOUR RIGHTS

When we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must not do anything to affect these rights. You must let us use your name in enforcing these rights.

We will not be liable to you if we do not pursue these rights or if we do not recover any amount that might be recoverable.

With the money we recover from enforcing these rights, we will pay whatever part of your loss we have not paid. We have a right to keep what is left.

8. ARBITRATION

If it is permitted in your state, you or the Company may demand arbitration.

The arbitration shall be binding on both you and the Company. The arbitration shall decide any matter in dispute between you and the Company.

The arbitration award may:

. include attorneys' fees if allowed by state law

. be entered as a judgment in the proper court.

The arbitration shall be under the Title Insurance Arbitration Rules of the American Arbitration Association. You may choose current Rules or Rules in existence on Policy Date.

The law used in the arbitration is the law of the place where the property is located.

You can get a copy of the Rules from the Company.

9. OUR LIABILITY IS LIMITED TO THIS POLICY

This Policy, plus any endorsements, is the entire contract between you and the Company. Any claim you make against us must be made under this Policy and is subject to its terms.

2010 ALTA Homeowner's Policy (adopted 10/17/1998, revised 10/22/2003 and 2/3/2010)

HOMEOWNER'S POLICY OF TITLE INSURANCE

For a one-to-four family residence

Issued By

BLANK TITLE INSURANCE COMPANY

OWNER'S INFORMATION SHEET

Your Title Insurance Policy is a legal contract between You and Us.

It applies only to a one-to-four family residence and only if each insured named in Schedule A is a Natural Person. If the Land described in Schedule A of the Policy is not an improved residential lot on which there is located a one-to-four family residence, or if each insured named in Schedule A is not a Natural Person, contact Us immediately.

The Policy insures You against actual loss resulting from certain Covered Risks. These Covered Risks are listed beginning on page ___ of the Policy. The Policy is limited by:

- Provisions of Schedule A
- Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions On Page _____
- Exclusions on page __
- Conditions on pages __ and __.

You should keep the Policy even if You transfer Your Title to the Land. It may protect against claims made against You by someone else after You transfer Your Title.

IF YOU WANT TO MAKE A CLAIM, SEE SECTION 3 UNDER CONDITIONS ON PAGE __.

The premium for this Policy is paid once. No additional premium is owed for the Policy.

This sheet is not Your insurance Policy. It is only a brief outline of some of the important Policy features. The Policy explains in detail Your rights and obligations and Our rights and obligations. Since the Policy--and not this sheet--is the legal document,

YOU SHOULD READ THE POLICY VERY CAREFULLY.

If You have any questions about Your Policy, contact:

BLANK TITLE INSURANCE COMPANY

____

____

HOMEOWNER’S POLICY OF TITLE INSURANCE
For a one-to-four family residence
Issued By
BLANK TITLE INSURANCE COMPANY

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2010 ALTA Homeowner's Policy

HOMEOWNER'S POLICY OF TITLE INSURANCE
For a one-to-four family residence
Issued By
BLANK TITLE INSURANCE COMPANY

As soon as You Know of anything that might be covered by this Policy, You must notify Us promptly in writing at the address shown in Section 3 of the Conditions.

OWNER'S COVERAGE STATEMENT

This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy. The loss must result from one or more of the Covered Risks set forth below. This Policy covers only Land that is an improved residential lot on which there is located a one-to-four family residence and only when each insured named in Schedule A is a Natural Person.

Your insurance is effective on the Policy Date. This Policy covers Your actual loss from any risk described under Covered Risks if the event creating the risk exists on the Policy Date or, to the extent expressly stated in Covered Risks, after the Policy Date.

Your insurance is limited by all of the following:

- The Policy Amount
- For Covered Risk 16, 18, 19 and 21, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- The Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions
- The Exclusions on page
- The Conditions on pages and .

COVERED RISKS

The Covered Risks are:

1. Someone else owns an interest in Your Title.

2. Someone else has rights affecting Your Title because of leases, contracts, or options.

3. Someone else claims to have rights affecting Your Title because of forgery or impersonation.

4. Someone else has an Easement on the Land.

5. Someone else has a right to limit Your use of the Land.

6. Your Title is defective. Some of these defects are:
   a. Someone else's failure to have authorized a transfer or conveyance of your Title.
   b. Someone else's failure to create a valid document by electronic means.
   c. A document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded.
   d. A document upon which Your Title is based was signed using a falsified, expired, or otherwise invalid power of attorney.
   e. A document upon which Your Title is based was not properly filed, recorded, or indexed in the Public Records.
   f. A defective judicial or administrative proceeding.

7. Any of Covered Risks 1 through 6 occurring after the Policy Date.

8. Someone else has a lien on Your Title, including a:
   a. lien of real estate taxes or assessments imposed on Your Title by a governmental authority that are due or payable, but unpaid;
   b. Mortgage;
   c. judgment, state or federal tax lien;
   d. charge by a homeowner's or condominium association; or
   e. lien, occurring before or after the Policy Date, for labor and material furnished before the Policy Date.

9. Someone else has an encumbrance on Your Title.

10. Someone else claims to have rights affecting Your Title because of fraud, duress, incompetency or incapacity.

11. You do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right.

12. You are forced to correct or remove an existing violation of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B. However, You are not covered for any violation that relates to:
   a. any obligation to perform maintenance or repair on the Land; or
   b. environmental protection of any kind, including hazardous or toxic conditions or substances

unless there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.

13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B.

14. The violation or enforcement of those portions of any law or government regulation concerning:
   a. building;
   b. zoning;
   c. land use;
   d. improvements on the Land;
   e. land division; or
   f. environmental protection,

if there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists or declaring the intention to enforce the law or regulation. Our liability for this Covered Risk is limited to the extent of the violation or enforcement stated in that notice.

15. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 14 if there is a notice recorded in the Public Records, describing any part of the Land, of the enforcement action or intention to bring an enforcement action. Our liability for this Covered Risk is limited to the extent of the enforcement action stated in that notice.

16. Because of an existing violation of a subdivision law or regulation affecting the Land:
   a. You are unable to obtain a building permit;
   b. You are required to correct or remove the violation; or
   c. someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

17. You lose Your Title to any part of the Land because of the right to take the Land by condemning it, if:
   a. there is a notice of the exercise of the right recorded in the Public Records and the notice describes any part of the Land; or
   b. the taking happened before the Policy Date and is binding on You if You bought the Land without Knowing of the taking.

18. You are forced to remove or remedy Your existing structures, or any part of them - other than boundary walls or fences - because any portion was built without obtaining a building permit from the proper government office. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

19. You are forced to remove or remedy Your existing structures, or any part of them, because they violate an existing zoning law or zoning regulation. If You are required to remedy any portion of Your existing structures, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

20. You cannot use the Land because use as a single-family residence violates an existing zoning law or zoning regulation.

21. You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.

22. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it because Your neighbor's existing structures encroach onto the Land.

23. You are forced to remove Your existing structures which encroach onto an Easement or over a building set-back line, even if the Easement or building set-back line is excepted in Schedule B.

24. Your existing structures are damaged because of the exercise of a right to maintain or use any Easement affecting the Land, even if the Easement is excepted in Schedule B.

25. Your existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery or trees, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.

26. Someone else tries to enforce a discriminatory covenant, condition or restriction that they claim affects Your Title which is based upon race, color, religion, sex, handicap, familial status, or national origin.

27. A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.

28. Your neighbor builds any structures after the Policy Date -- other than boundary walls or fences -- which encroach onto the Land.

29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

30. Someone else owns an interest in Your Title because a court order invalidates a prior transfer of the title under federal bankruptcy, state insolvency, or similar creditors' rights laws.

31. The residence with the address shown in Schedule A is not located on the Land at the Policy Date.

32. The map, if any, attached to this Policy does not show the correct location of the Land according to the Public Records.

OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS

We will defend Your Title in any legal action only as to that part of the action which is based on a Covered Risk and which is not excepted or excluded from coverage in this Policy. We will pay the costs, attorneys' fees, and expenses We incur in that defense.

We will not pay for any part of the legal action which is not based on a Covered Risk or which is excepted or excluded from coverage in this Policy.

We can end Our duty to defend Your Title under Section 4 of the Conditions.

THIS POLICY IS NOT COMPLETE WITHOUT SCHEDULES A AND B.

BLANK TITLE INSURANCE COMPANY

By________________________________

BLANK TITLE INSURANCE COMPANY

HOMEOWNER'S POLICY OF TITLE INSURANCE

FOR A ONE-TO-FOUR FAMILY RESIDENCE

SCHEDULE A

Name and Address of Title Insurance Company:

Policy No.: [Premium: $_______________] Policy Amount: $ Policy Date [and Time]:

Deductible Amounts and Maximum Dollar Limits of Liability
For Covered Risk 16, 18, 19 and 21:

	Your Deductible Amount	Our Maximum Dollar Limit of Liability
Covered Risk 16:	___% of Policy Amount or $ (whichever is less)	$
Covered Risk 18:	___% of Policy Amount or $ (whichever is less)	$
Covered Risk 19:	___% of Policy Amount or $ (whichever is less)	$
Covered Risk 21:	___% of Policy Amount or $ (whichever is less)	$

Street Address of the Land:

1. Name of insured:

2. Your interest in the Land covered by this Policy is:

3. The Land referred to in this Policy is described as:

SCHEDULE B

EXCEPTIONS

In addition to the Exclusions, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

EXCLUSIONS

In addition to the Exceptions in Schedule B, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning:

   a. building;
   b. zoning;
   c. land use;
   d. improvements on the Land;
   e. land division; and
   f. environmental protection.

   This Exclusion does not limit the coverage described in Covered Risk 8.a., 14, 15, 16, 18, 19, 20, 23 or 27.

2. The failure of Your existing structures, or any part of them, to be constructed in accordance with applicable building codes. This Exclusion does not limit the coverage described in Covered Risk 14 or 15.

3. The right to take the Land by condemning it. This Exclusion does not limit the coverage described in Covered Risk 17.

4. Risks:

   a. that are created, allowed, or agreed to by You, whether or not they are recorded in the Public Records;
   b. that are Known to You at the Policy Date, but not to Us, unless they are recorded in the Public Records at the Policy Date;
   c. that result in no loss to You; or
   d. that first occur after the Policy Date - this does not limit the coverage described in Covered Risk 7, 8.e., 25, 26, 27 or 28.

5. Failure to pay value for Your Title.

6. Lack of a right:

   a. to any land outside the area specifically described and referred to in paragraph 3 of Schedule A; and
   b. in streets, alleys, or waterways that touch the Land.

   This Exclusion does not limit the coverage described in Covered Risk 11 or 21.

7. The transfer of the Title to You is invalid as a preferential transfer or as a fraudulent transfer or conveyance under federal bankruptcy, state insolvency, or similar creditors' rights laws.

CONDITIONS

1. DEFINITIONS
   a. Easement - the right of someone else to use the Land for a special purpose.
   b. Estate Planning Entity - a legal entity or Trust established by a Natural Person for estate planning.
   c. Known - things about which You have actual knowledge. The words "Know" and "Knowing" have the same meaning as Known.
   d. Land - the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property.
   e. Mortgage - a mortgage, deed of trust, trust deed or other security instrument.
   f. Natural Person - a human being, not a commercial or legal organization or entity. Natural Person includes a trustee of a Trust even if the trustee is not a human being.
   g. Policy Date - the date and time shown in Schedule A. If the insured named in Schedule A first acquires the interest shown in Schedule A by an instrument recorded in the Public Records later than the date and time shown in Schedule A, the Policy Date is the date and time the instrument is recorded.
   h. Public Records - records that give constructive notice of matters affecting Your Title, according to the state statutes where the Land is located.
   i. Title - the ownership of Your interest in the Land, as shown in Schedule A.
   j. Trust - a living trust established by a Natural Person for estate planning.
   k. We/Our/Us - Blank Title Insurance Company.
   l. You/Your - the insured named in Schedule A and also those identified in Section 2.b. of these Conditions.

2. CONTINUATION OF COVERAGE
   a. This Policy insures You forever, even after You no longer have Your Title. You cannot assign this Policy to anyone else.
   b. This Policy also insures:
      (1) anyone who inherits Your Title because of Your death;
      (2) Your spouse who receives Your Title because of dissolution of Your marriage;
      (3) the trustee or successor trustee of a Trust or any Estate Planning Entity to whom You transfer Your Title after the Policy Date;
      (4) the beneficiaries of Your Trust upon Your death; or
      (5) anyone who receives Your Title by a transfer effective on Your death as authorized by law.
   c. We may assert against the insureds identified in Section 2.b. any rights and defenses that We have against any previous insured under this Policy.

3. HOW TO MAKE A CLAIM
   a. Prompt Notice Of Your Claim
      (1) As soon as You Know of anything that might be covered by this Policy, You must notify Us promptly in writing.
      (2) Send Your notice to **Blank Title Insurance Company**, ________________, Attention: Claims Department. Please include the Policy number shown in Schedule A , and the county and state where the Land is located. Please enclose a copy of Your policy, if available.
      (3) If You do not give Us prompt notice, Your coverage will be reduced or ended, but only to the extent Your failure affects Our ability to resolve the claim or defend You.
   b. Proof Of Your Loss
      (1) We may require You to give Us a written statement signed by You describing Your loss which includes:
         (a) the basis of Your claim;
         (b) the Covered Risks which resulted in Your loss;
         (c) the dollar amount of Your loss; and
         (d) the method You used to compute the amount of Your loss.
      (2) We may require You to make available to Us records, checks, letters, contracts, insurance policies and other papers which relate to Your claim. We may make copies of these papers.
      (3) We may require You to answer questions about Your claim under oath.
      (4) If you fail or refuse to give Us a statement of loss, answer Our questions under oath, or make available to Us the papers We request, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

4. OUR CHOICES WHEN WE LEARN OF A CLAIM
   a. After We receive Your notice, or otherwise learn, of a claim that is covered by this Policy, Our choices include one or more of the following:
      (1) Pay the claim;
      (2) Negotiate a settlement;
      (3) Bring or defend a legal action related to the claim;
      (4) Pay You the amount required by this Policy;
      (5) End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
      (6) End the coverage described in Covered Risk 16, 18, 19 or 21 by paying You the amount of Your insurance then in force for the particular Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We

are obligated to pay;
(7) End all coverage of this Policy by paying You the Policy Amount then in force, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
(8) Take other appropriate action.

b. When We choose the options in Sections 4.a. (5), (6) or (7), all Our obligations for the claim end, including Our obligation to defend, or continue to defend, any legal action.
c. Even if We do not think that the Policy covers the claim, We may choose one or more of the options above. By doing so, We do not give up any rights.

5. HANDLING A CLAIM OR LEGAL ACTION
   a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.
   b. If You fail or refuse to cooperate with Us, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.
   c. We are required to repay You only for those settlement costs, attorneys' fees and expenses that We approve in advance.
   d. We have the right to choose the attorney when We bring or defend a legal action on Your behalf. We can appeal any decision to the highest level. We do not have to pay Your claim until the legal action is finally decided.
   e. Whether or not We agree there is coverage, We can bring or defend a legal action, or take other appropriate action under this Policy. By doing so, We do not give up any rights.

6. LIMITATION OF OUR LIABILITY
   a. After subtracting Your Deductible Amount if it applies, We will pay no more than the least of:
      (1) Your actual loss;
      (2) Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk, for claims covered only under Covered Risk 16, 18, 19 or 21; or
      (3) the Policy Amount then in force.

      and any costs, attorneys' fees and expenses that We are obligated to pay under this Policy.
   b. If We pursue Our rights under Sections 4.a.(3) and 5.e. of these Conditions and are unsuccessful in establishing the Title, as insured:
      (1) the Policy Amount then in force will be increased by 10% of the Policy Amount shown in Schedule A, and
      (2) You shall have the right to have the actual loss determined on either the date the claim was made by You or the date it is settled and paid.
   c. (1) If We remove the cause of the claim with reasonable diligence after receiving notice of it, all Our obligations for the claim end, including any obligation for loss You had while We were removing the cause of the claim.
      (2) Regardless of 6.c.(1) above, if You cannot use the Land because of a claim covered by this Policy:
         (a) You may rent a reasonably equivalent substitute residence and We will repay You for the actual rent You pay, until the earlier of:
            (i) the cause of the claim is removed; or
            (ii) We pay You the amount required by this Policy. If Your claim is covered only under Covered Risk 16, 18, 19 or 21, that payment is the amount of Your insurance then in force for the particular Covered Risk.
         (b) We will pay reasonable costs You pay to relocate any personal property You have the right to remove from the Land, including transportation of that personal property for up to twenty-five (25) miles from the Land, and repair of any damage to that personal property because of the relocation. The amount We will pay You under this paragraph is limited to the value of the personal property before You relocate it.
   d. All payments We make under this Policy reduce the Policy Amount then in force, except for costs, attorneys' fees and expenses. All payments We make for claims which are covered only under Covered Risk 16, 18, 19 or 21 also reduce Our Maximum Dollar Limit of Liability for the particular Covered Risk, except for costs, attorneys' fees and expenses.
   e. If We issue, or have issued, a Policy to the owner of a Mortgage that is on Your Title and We have not given You any coverage against the Mortgage, then:
      (1) We have the right to pay any amount due You under this Policy to the owner of the Mortgage, and any amount paid shall be treated as a payment to You under this Policy, including under Section 4.a. of these Conditions;
      (2) Any amount paid to the owner of the Mortgage shall be subtracted from the Policy Amount then in force ; and
      (3) If Your claim is covered only under Covered Risk 16, 18, 19 or 21, any amount paid to the owner of the Mortgage shall also be subtracted from Our Maximum Dollar Limit of Liability for the particular Covered Risk.
   f. If You do anything to affect any right of recovery You may have against someone else, We can subtract from Our liability the amount by which You reduced the value of that right.

7. TRANSFER OF YOUR RIGHTS TO US
   a. When We settle Your claim, We have all the rights and remedies You have against any person or property related to the claim. You must not do anything to affect these rights and remedies. When We ask, You must execute documents to evidence the transfer to Us of these rights and remedies. You must let Us use Your name in enforcing these rights and remedies.
   b. We will not be liable to You if We do not pursue these rights and remedies or if We do not recover any amount that might be recoverable.
   c. We will pay any money We collect from enforcing these rights and remedies in the following order:
      (1) to Us for the costs, attorneys' fees and expenses We paid to enforce these rights and remedies;

(2) to You for Your loss that You have not already collected;
(3) to Us for any money We paid out under this Policy on account of Your claim; and
(4) to You whatever is left.

d. If You have rights and remedies under contracts (such as indemnities, guaranties, bonds or other policies of insurance) to recover all or part of Your loss, then We have all of those rights and remedies, even if those contracts provide that those obligated have all of Your rights and remedies under this Policy.

8. <u>THIS POLICY IS THE ENTIRE CONTRACT</u>

This Policy, with any endorsements, is the entire contract between You and Us. To determine the meaning of any part of this Policy, You must read the entire Policy and any endorsements. Any changes to this Policy must be agreed to in writing by Us. Any claim You make against Us must be made under this Policy and is subject to its terms.

9. <u>INCREASED POLICY AMOUNT</u>

The Policy Amount then in force will increase by ten percent (10%) of the Policy Amount shown in Schedule A each year for the first five years following the Policy Date shown in Schedule A, up to one hundred fifty percent (150%) of the Policy Amount shown in Schedule A. The increase each year will happen on the anniversary of the Policy Date shown in Schedule A.

10. <u>SEVERABILITY</u>

If any part of this Policy is held to be legally unenforceable, both You and We can still enforce the rest of this Policy.

11. <u>ARBITRATION</u>

a. If permitted in the state where the Land is located, You or We may demand arbitration.
b. The law used in the arbitration is the law of the state where the Land is located.
c. The arbitration shall be under the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). You can get a copy of the Rules from Us.
d. Except as provided in the Rules, You cannot join or consolidate Your claim or controversy with claims or controversies of other persons.
e. The arbitration shall be binding on both You and Us. The arbitration shall decide any matter in dispute between You and Us.
f. The arbitration award may be entered as a judgment in the proper court.

12. <u>CHOICE OF LAW</u>

The law of the state where the Land is located shall apply to this policy.

2013 ALTA Homeowner's Policy (adopted 10/17/1998, revised 10/22/2003, 2/3/2010 and 12/2/2013)

HOMEOWNER'S POLICY OF TITLE INSURANCE

For a one-to-four family residence

Issued By

BLANK TITLE INSURANCE COMPANY

<u>OWNER'S INFORMATION SHEET</u>

Your Title Insurance Policy is a legal contract between You and Us.
It applies only to a one-to-four family residence and only if each insured named in Schedule A is a Natural Person. If the Land described in Schedule A of the Policy is not an improved residential lot on which there is located a one-to-four family residence, or if each insured named in Schedule A is not a Natural Person, contact Us immediately.
The Policy insures You against actual loss resulting from certain Covered Risks. These Covered Risks are listed beginning on page ___ of the Policy. The Policy is limited by:

- Provisions of Schedule A
- Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions On Page _____
- Exclusions on page __
- Conditions on pages __ and __.

You should keep the Policy even if You transfer Your Title to the Land. It may protect against claims made against You by someone else after You transfer Your Title.

IF YOU WANT TO MAKE A CLAIM, **SEE SECTION 3 UNDER CONDITIONS ON PAGE __**.

The premium for this Policy is paid once. No additional premium is owed for the Policy.
This sheet is not Your insurance Policy. It is only a brief outline of some of the important Policy features. The Policy explains in detail Your rights and obligations and Our rights and obligations. Since the Policy--and not this sheet--is the legal document,

YOU SHOULD READ THE POLICY VERY CAREFULLY.

If You have any questions about Your Policy, contact:

BLANK TITLE INSURANCE COMPANY
____
____

HOMEOWNER'S POLICY OF TITLE INSURANCE

For a one-to-four family residence

Issued By

BLANK TITLE INSURANCE COMPANY

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2013 ALTA Homeowner's Policy

HOMEOWNER'S POLICY OF TITLE INSURANCE

For a one-to-four family residence

Issued By

BLANK TITLE INSURANCE COMPANY

As soon as You Know of anything that might be covered by this Policy, You must notify Us promptly in writing at the address shown in Section 3 of the Conditions.

OWNER'S COVERAGE STATEMENT

This Policy insures You against actual loss, including any costs, attorneys' fees and expenses provided under this Policy. The loss must result from one or more of the Covered Risks set forth below. This Policy covers only Land that is an improved residential lot on which there is located a one-to-four family residence and only when each insured named in Schedule A is a Natural Person.
Your insurance is effective on the Policy Date. This Policy covers Your actual loss from any risk described under Covered Risks if the event creating the risk exists on the Policy Date or, to the extent expressly stated in Covered Risks, after the Policy Date.

Your insurance is limited by all of the following:

- The Policy Amount
- For Covered Risk 16, 18, 19 and 21, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- The Exceptions in Schedule B
- Our Duty To Defend Against Legal Actions
- The Exclusions on page
- The Conditions on pages and .

COVERED RISKS

The Covered Risks are:

1. Someone else owns an interest in Your Title.
2. Someone else has rights affecting Your Title because of leases, contracts, or options.
3. Someone else claims to have rights affecting Your Title because of forgery or impersonation.
4. Someone else has an Easement on the Land.
5. Someone else has a right to limit Your use of the Land.
6. Your Title is defective. Some of these defects are:
    a. Someone else's failure to have authorized a transfer or conveyance of your Title.
    b. Someone else's failure to create a valid document by electronic means.
    c. A document upon which Your Title is based is invalid because it was not properly signed, sealed, acknowledged, delivered or recorded.
    d. A document upon which Your Title is based was signed using a falsified, expired, or otherwise invalid power of attorney.
    e. A document upon which Your Title is based was not properly filed, recorded, or indexed in the Public Records.
    f. A defective judicial or administrative proceeding.
7. Any of Covered Risks 1 through 6 occurring after the Policy Date.
8. Someone else has a lien on Your Title, including a:
    a. lien of real estate taxes or assessments imposed on Your Title by a governmental authority that are due or payable, but unpaid;
    b. Mortgage;
    c. judgment, state or federal tax lien;
    d. charge by a homeowner's or condominium association; or
    e. lien, occurring before or after the Policy Date, for labor and material furnished before the Policy Date.
9. Someone else has an encumbrance on Your Title.
10. Someone else claims to have rights affecting Your Title because of fraud, duress, incompetency or incapacity.
11. You do not have actual vehicular and pedestrian access to and from the Land, based upon a legal right.
12. You are forced to correct or remove an existing violation of any covenant, condition or restriction affecting the Land, even if the covenant, condition or restriction is excepted in Schedule B. However, You are not covered for

any violation that relates to:

a. any obligation to perform maintenance or repair on the Land; or

b. environmental protection of any kind, including hazardous or toxic conditions or substances

unless there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists. Our liability for this Covered Risk is limited to the extent of the violation stated in that notice.

13. Your Title is lost or taken because of a violation of any covenant, condition or restriction, which occurred before You acquired Your Title, even if the covenant, condition or restriction is excepted in Schedule B.
14. The violation or enforcement of those portions of any law or government regulation concerning:
    a. building;
    b. zoning;
    c. land use;
    d. improvements on the Land;
    e. land division; or
    f. environmental protection,

    if there is a notice recorded in the Public Records, describing any part of the Land, claiming a violation exists or declaring the intention to enforce the law or regulation. Our liability for this Covered Risk is limited to the extent of the violation or enforcement stated in that notice.
15. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 14 if there is a notice recorded in the Public Records, describing any part of the Land, of the enforcement action or intention to bring an enforcement action. Our liability for this Covered Risk is limited to the extent of the enforcement action stated in that notice.
16. Because of an existing violation of a subdivision law or regulation affecting the Land:
    a. You are unable to obtain a building permit;
    b. You are required to correct or remove the violation; or
    c. someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.

    The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
17. You lose Your Title to any part of the Land because of the right to take the Land by condemning it, if:
    a. there is a notice of the exercise of the right recorded in the Public Records and the notice describes any part of the Land; or
    b. the taking happened before the Policy Date and is binding on You if You bought the Land without Knowing of the taking.
18. You are forced to remove or remedy Your existing structures, or any part of them - other than boundary walls or fences - because any portion was built without obtaining a building permit from the proper government office. The amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
19. You are forced to remove or remedy Your existing structures, or any part of them, because they violate an existing zoning law or zoning regulation. If You are required to remedy any portion of Your existing structures, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
20. You cannot use the Land because use as a single-family residence violates an existing zoning law or zoning regulation.
21. You are forced to remove Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the amount of Your insurance for this Covered Risk is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
22. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it because Your neighbor's existing structures encroach onto the Land.
23. You are forced to remove Your existing structures which encroach onto an Easement or over a building set-back line, even if the Easement or building set-back line is excepted in Schedule B.
24. Your existing structures are damaged because of the exercise of a right to maintain or use any Easement affecting the Land, even if the Easement is excepted in Schedule B.
25. Your existing improvements (or a replacement or modification made to them after the Policy Date), including lawns, shrubbery or trees, are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.
26. Someone else tries to enforce a discriminatory covenant, condition or restriction that they claim affects Your Title which is based upon race, color, religion, sex, handicap, familial status, or national origin.
27. A taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period

before the Policy Date because of construction or a change of ownership or use that occurred before the Policy Date.

28. Your neighbor builds any structures after the Policy Date -- other than boundary walls or fences -- which encroach onto the Land.
29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it.
30. Someone else owns an interest in Your Title because a court order invalidates a prior transfer of the title under federal bankruptcy, state insolvency, or similar creditors' rights laws.
31. The residence with the address shown in Schedule A is not located on the Land at the Policy Date.
32. The map, if any, attached to this Policy does not show the correct location of the Land according to the Public Records.

OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS

We will defend Your Title in any legal action only as to that part of the action which is based on a Covered Risk and which is not excepted or excluded from coverage in this Policy. We will pay the costs, attorneys' fees, and expenses We incur in that defense.

We will not pay for any part of the legal action which is not based on a Covered Risk or which is excepted or excluded from coverage in this Policy.

We can end Our duty to defend Your Title under Section 4 of the Conditions.

THIS POLICY IS NOT COMPLETE WITHOUT SCHEDULES A AND B.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:____________________________________
PRESIDENT

BY:____________________________________
SECRETARY

EXCLUSIONS

In addition to the Exceptions in Schedule B, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of those portions of any law or government regulation concerning:

   a. building;
   b. zoning;
   c. land use;
   d. improvements on the Land;
   e. land division; and
   f. environmental protection.

   This Exclusion does not limit the coverage described in Covered Risk 8.a., 14, 15, 16, 18, 19, 20, 23 or 27.

2. The failure of Your existing structures, or any part of them, to be constructed in accordance with applicable building codes. This Exclusion does not limit the coverage described in Covered Risk 14 or 15.

3. The right to take the Land by condemning it. This Exclusion does not limit the coverage described in Covered Risk 17.

4. Risks:

   a. that are created, allowed, or agreed to by You, whether or not they are recorded in the Public Records;
   b. that are Known to You at the Policy Date, but not to Us, unless they are recorded in the Public Records at the Policy Date;
   c. that result in no loss to You; or
   d. that first occur after the Policy Date - this does not limit the coverage described in Covered Risk 7, 8.e., 25, 26, 27 or 28.

5. Failure to pay value for Your Title.

6. Lack of a right:

   a. to any land outside the area specifically described and referred to in paragraph 3 of Schedule A; and
   b. in streets, alleys, or waterways that touch the Land.

   This Exclusion does not limit the coverage described in Covered Risk 11 or 21.

7. The transfer of the Title to You is invalid as a preferential transfer or as a fraudulent transfer or conveyance under federal bankruptcy, state insolvency, or similar creditors' rights laws.

8. Contamination, explosion, fire, flooding, vibration, fracturing, earthquake or subsidence.

9. Negligence by a person or an Entity exercising a right to extract or develop minerals, water, or any other substances.

HOMEOWNER'S POLICY OF TITLE INSURANCE

For a one-to-four family residence

Issued By

BLANK TITLE INSURANCE COMPANY

CONDITIONS

1. DEFINITIONS
   a. Easement - the right of someone else to use the Land for a special purpose.
   b. Estate Planning Entity - a legal entity or Trust established by a Natural Person for estate planning.
   c. Known - things about which You have actual knowledge. The words "Know" and "Knowing" have the same meaning as Known.
   d. Land - the land or condominium unit described in paragraph 3 of Schedule A and any improvements on the Land which are real property.
   e. Mortgage - a mortgage, deed of trust, trust deed or other security instrument.
   f. Natural Person - a human being, not a commercial or legal organization or entity. Natural Person includes a trustee of a Trust even if the trustee is not a human being.
   g. Policy Date - the date and time shown in Schedule A. If the insured named in Schedule A first acquires the interest shown in Schedule A by an instrument recorded in the Public Records later than the date and time shown in Schedule A, the Policy Date is the date and time the instrument is recorded.
   h. Public Records - records that give constructive notice of matters affecting Your Title, according to the state statutes where the Land is located.
   i. Title - the ownership of Your interest in the Land, as shown in Schedule A.
   j. Trust - a living trust established by a Natural Person for estate planning.
   k. We/Our/Us - Blank Title Insurance Company.
   l. You/Your - the insured named in Schedule A and also those identified in Section 2.b. of these Conditions.
2. CONTINUATION OF COVERAGE
   a. This Policy insures You forever, even after You no longer have Your Title. You cannot assign this Policy to anyone else.
   b. This Policy also insures:
      (1) anyone who inherits Your Title because of Your death;
      (2) Your spouse who receives Your Title because of dissolution of Your marriage;
      (3) the trustee or successor trustee of Your Trust or any Estate Planning Entity created for You to whom or to which You transfer Your Title after the Policy Date;
      (4) the beneficiaries of Your Trust upon Your death; or
      (5) anyone who receives Your Title by a transfer effective on Your death as authorized by law.
   c. We may assert against the insureds identified in Section 2.b. any rights and defenses that We have against any previous insured under this Policy.
3. HOW TO MAKE A CLAIM
   a. Prompt Notice Of Your Claim
      (1) As soon as You Know of anything that might be covered by this Policy, You must notify Us promptly in writing.
      (2) Send Your notice to **Blank Title Insurance Company**, , Attention: Claims Department. Please include the Policy number shown in Schedule A , and the county and state where the Land is located. Please enclose a copy of Your policy, if available.
      (3) If You do not give Us prompt notice, Your coverage will be reduced or ended, but only to the extent Your failure affects Our ability to resolve the claim or defend You.
   b. Proof Of Your Loss
      (1) We may require You to give Us a written statement signed by You describing Your loss which includes:
         (a) the basis of Your claim;
         (b) the Covered Risks which resulted in Your loss;
         (c) the dollar amount of Your loss; and
         (d) the method You used to compute the amount of Your loss.
      (2) We may require You to make available to Us records, checks, letters, contracts, insurance policies and other papers which relate to Your claim. We may make copies of these papers.
      (3) We may require You to answer questions about Your claim under oath.
      (4) If you fail or refuse to give Us a statement of loss, answer Our questions under oath, or make available to Us the papers We request, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

4. <u>OUR CHOICES WHEN WE LEARN OF A CLAIM</u>
   a. After We receive Your notice, or otherwise learn, of a claim that is covered by this Policy, Our choices include one or more of the following:
      (1) Pay the claim;
      (2) Negotiate a settlement;
      (3) Bring or defend a legal action related to the claim;
      (4) Pay You the amount required by this Policy;
      (5) End the coverage of this Policy for the claim by paying You Your actual loss resulting from the Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
      (6) End the coverage described in Covered Risk 16, 18, 19 or 21 by paying You the amount of Your insurance then in force for the particular Covered Risk, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
      (7) End all coverage of this Policy by paying You the Policy Amount then in force, and those costs, attorneys' fees and expenses incurred up to that time which We are obligated to pay;
      (8) Take other appropriate action.
   b. When We choose the options in Sections 4.a. (5), (6) or (7), all Our obligations for the claim end, including Our obligation to defend, or continue to defend, any legal action.
   c. Even if We do not think that the Policy covers the claim, We may choose one or more of the options above. By doing so, We do not give up any rights.
5. <u>HANDLING A CLAIM OR LEGAL ACTION</u>
   a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.
   b. If You fail or refuse to cooperate with Us, Your coverage will be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.
   c. We are required to repay You only for those settlement costs, attorneys' fees and expenses that We approve in advance.
   d. We have the right to choose the attorney when We bring or defend a legal action on Your behalf. We can appeal any decision to the highest level. We do not have to pay Your claim until the legal action is finally decided.
   e. Whether or not We agree there is coverage, We can bring or defend a legal action, or take other appropriate action under this Policy. By doing so, We do not give up any rights.
6. <u>LIMITATION OF OUR LIABILITY</u>
   a. After subtracting Your Deductible Amount if it applies, We will pay no more than the least of:
      (1) Your actual loss;
      (2) Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk, for claims covered only under Covered Risk 16, 18, 19 or 21; or
      (3) the Policy Amount then in force.

      and any costs, attorneys' fees and expenses that We are obligated to pay under this Policy.
   b. If We pursue Our rights under Sections 4.a.(3) and 5.e. of these Conditions and are unsuccessful in establishing the Title, as insured:
      (1) the Policy Amount then in force will be increased by 10% of the Policy Amount shown in Schedule A, and
      (2) You shall have the right to have the actual loss determined on either the date the claim was made by You or the date it is settled and paid.
   c. (1) If We remove the cause of the claim with reasonable diligence after receiving notice of it, all Our obligations for the claim end, including any obligation for loss You had while We were removing the cause of the claim.
      (2) Regardless of 6.c.(1) above, if You cannot use the Land because of a claim covered by this Policy:
         (a) You may rent a reasonably equivalent substitute residence and We will repay You for the actual rent You pay, until the earlier of:
            (i) the cause of the claim is removed; or
            (ii) We pay You the amount required by this Policy. If Your claim is covered only under Covered Risk 16, 18, 19 or 21, that payment is the amount of Your insurance then in force for the particular Covered Risk.
         (b) We will pay reasonable costs You pay to relocate any personal property You have the right to remove from the Land, including transportation of that personal property for up to twenty-five (25) miles from the Land, and repair of any damage to that personal property because of the relocation. The amount We will pay You under this paragraph is limited to the value of the personal property before You relocate it.
   d. All payments We make under this Policy reduce the Policy Amount then in force, except for costs, attorneys' fees and expenses. All payments We make for claims which are covered only under Covered Risk 16, 18, 19 or

21 also reduce Our Maximum Dollar Limit of Liability for the particular Covered Risk, except for costs, attorneys' fees and expenses.

e. If We issue, or have issued, a Policy to the owner of a Mortgage that is on Your Title and We have not given You any coverage against the Mortgage, then:
   (1) We have the right to pay any amount due You under this Policy to the owner of the Mortgage, and any amount paid shall be treated as a payment to You under this Policy, including under Section 4.a. of these Conditions;
   (2) Any amount paid to the owner of the Mortgage shall be subtracted from the Policy Amount then in force ; and
   (3) If Your claim is covered only under Covered Risk 16, 18, 19 or 21, any amount paid to the owner of the Mortgage shall also be subtracted from Our Maximum Dollar Limit of Liability for the particular Covered Risk.

f. If You do anything to affect any right of recovery You may have against someone else, We can subtract from Our liability the amount by which You reduced the value of that right.

7. TRANSFER OF YOUR RIGHTS TO US
   a. When We settle Your claim, We have all the rights and remedies You have against any person or property related to the claim. You must not do anything to affect these rights and remedies. When We ask, You must execute documents to evidence the transfer to Us of these rights and remedies. You must let Us use Your name in enforcing these rights and remedies.
   b. We will not be liable to You if We do not pursue these rights and remedies or if We do not recover any amount that might be recoverable.
   c. We will pay any money We collect from enforcing these rights and remedies in the following order:
      (1) to Us for the costs, attorneys' fees and expenses We paid to enforce these rights and remedies;
      (2) to You for Your loss that You have not already collected;
      (3) to Us for any money We paid out under this Policy on account of Your claim; and
      (4) to You whatever is left.
   d. If You have rights and remedies under contracts (such as indemnities, guaranties, bonds or other policies of insurance) to recover all or part of Your loss, then We have all of those rights and remedies, even if those contracts provide that those obligated have all of Your rights and remedies under this Policy.

8. THIS POLICY IS THE ENTIRE CONTRACT

This Policy, with any endorsements, is the entire contract between You and Us. To determine the meaning of any part of this Policy, You must read the entire Policy and any endorsements. Any changes to this Policy must be agreed to in writing by Us. Any claim You make against Us must be made under this Policy and is subject to its terms.

9. INCREASED POLICY AMOUNT

The Policy Amount then in force will increase by ten percent (10%) of the Policy Amount shown in Schedule A each year for the first five years following the Policy Date shown in Schedule A, up to one hundred fifty percent (150%) of the Policy Amount shown in Schedule A. The increase each year will happen on the anniversary of the Policy Date shown in Schedule A.

10. SEVERABILITY

If any part of this Policy is held to be legally unenforceable, both You and We can still enforce the rest of this Policy.

11. ARBITRATION
   a. If permitted in the state where the Land is located, You or We may demand arbitration.
   b. The law used in the arbitration is the law of the state where the Land is located.
   c. The arbitration shall be under the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). You can get a copy of the Rules from Us.
   d. Except as provided in the Rules, You cannot join or consolidate Your claim or controversy with claims or controversies of other persons.
   e. The arbitration shall be binding on both You and Us. The arbitration shall decide any matter in dispute between You and Us.
   f. The arbitration award may be entered as a judgment in the proper court.

12. CHOICE OF LAW

The law of the state where the Land is located shall apply to this policy.

HOMEOWNER'S POLICY OF TITLE INSURANCE

For a one-to-four family residence

Issued By

BLANK TITLE INSURANCE COMPANY

SCHEDULE A

Name and Address of Title Insurance Company:

Policy No.: [Premium: $_______________] Policy Amount: $ Policy Date [and Time]:

Deductible Amounts and Maximum Dollar Limits of Liability
For Covered Risk 16, 18, 19 and 21:

	Your Deductible Amount	Our Maximum Dollar Limit of Liability
Covered Risk 16:	% of Policy Amount Shown in Schedule A or $ (whichever is less)	$
Covered Risk 18:	% of Policy Amount Shown in Schedule A or $ (whichever is less)	$
Covered Risk 19:	% of Policy Amount Shown in Schedule A or $ (whichever is less)	$
Covered Risk 21:	% of Policy Amount Shown in Schedule A or $ (whichever is less)	$

Street Address of the Land:

1. Name of Insured:

2. Your interest in the Land covered by this Policy is:

3. The Land referred to in this Policy is described as:

SCHEDULE B

EXCEPTIONS

In addition to the Exclusions, You are not insured against loss, costs, attorneys' fees, and expenses resulting from:

2006 ALTA Owner's Policy

OWNER'S POLICY OF TITLE INSURANCE
Issued by
Blank Title Insurance Company

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

9. Title being vested other than as stated in Schedule A or being defective

   (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

   (b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
   (i) to be timely, or
   1. (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By________________________________
President

By________________________________
Secretary

2006 ALTA Owner's Policy

EXCLUSIONS FROM COVERAGE

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

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

    (i) the occupancy, use, or enjoyment of the Land;

    (ii) the character, dimensions, or location of any improvement erected on the Land;

    (iii) the subdivision of land; or

    (iv) environmental protection;

    or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

    (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims, or other matters

    (a) created, suffered, assumed, or agreed to by the Insured Claimant;

    (b) not 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 Claimant prior to the date the Insured Claimant became an Insured under this policy;

    (c) resulting in no loss or damage to the Insured Claimant;

    (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or

    (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is

    (a) a fraudulent conveyance or fraudulent transfer; or

    (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.

5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

SCHEDULE A

Name and Address of Title Insurance Company:

[File No.:] Policy No.:
Address Reference:
Amount of Insurance: $ [Premium: $]
Date of Policy: [at a.m./p.m.]

1. Name of Insured:

2. The estate or interest in the Land that is insured by this policy is:

3. Title is vested in:

4. The Land referred to in this policy is described as follows:

2.

SCHEDULE B

[File No.] Policy No.

EXCEPTIONS FROM COVERAGE

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

1. [Policy may include regional exceptions if so desired by the issuing
2. Company.]
3. [Variable exceptions such as taxes, easements, CC&R's, etc., shown here]
4.

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 11 and 12 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Insured": The Insured named in Schedule A.

(i) the term "Insured" also includes

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured,

(3) if the grantee 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) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) with regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": An Insured claiming loss or damage.

(f) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "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 Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) "Title": The estate or interest described in Schedule A.

(k) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

(ii) Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE

The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

16. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at [fill in].

NOTE: Bracketed [ ] material optional

1970 ALTA Loan Policy

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, BLANK TITLE INSURANCE COMPANY, a blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;

2. Any defect in or lien or encumbrance on such title;

3. Lack of a right of access to and from the land;

4. Unmarketability of such title;

5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out of the transaction evidenced by the insured mortgage and is based upon

   a. usury, or
   b. any consumer credit protection or truth in lending law;

6. The priority of any lien or encumbrance over the lien of the insured mortgage;

7. Any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of the insured mortgage, except any such lien arising from an improvement on the land contracted for and commenced subsequent to Date of Policy not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance; or

8. The invalidity or unenforceability of any assignment, shown in Schedule A, of the insured mortgage or the failure of said assignment to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

IN WITNESS WHEREOF, Blank Title Insurance Company has caused this policy to be signed and sealed by its duly authorized officers as of Date of Policy shown in Schedule A.

BLANK TITLE INSURANCE COMPANY

By__________________________________
President

By__________________________________
Secretary

1970 ALTA Loan Policy

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.

2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy or acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy (except to the extent insurance is afforded herein as to any statutory lien for labor or material);

4. Unenforceability of the lien of the insured mortgage because of failure of the insured at Date of Policy or of any subsequent owner of the indebtedness to comply with applicable "doing business" laws of the state in which the land is situated.

SCHEDULE A

Date of Policy: Amount of Insurance: $

1. Name of Insured:

2. The estate or interest in the land described in this Schedule and which is encumbered by the insured mortgage is:

3. The estate or interest referred to herein is at Date of Policy vested in:

4. The mortgage, herein referred to as the insured mortgage, and the assignments thereof, if any, are described as follows:

5. The land referred to in this policy is described as follows:

SCHEDULE B
PART I

This policy does not insure against loss or damage by reason of the following:

PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any shown, but the Company insures that such matters are subordinate to the lien or charge of the insured mortgage upon said estate or interest:

1970 ALTA Loan Policy

CONDITIONS AND STIPULATIONS

1. Definition of Terms

The following terms when used in this policy mean:

(a) "insured": The insured named in Schedule A. The term "insured" also includes (i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of such indebtedness (reserving, however, all rights and defenses as to any such successor who acquires the indebtedness by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next to kin or corporate or fiduciary successors that the Company would have had against the successor's transferor), and further includes (ii) any governmental agency or instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing said indebtedness, or any part thereof, whether named as an insured herein or not, and (iii) the parties designated in paragraph 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law impart constructive notice of matters relating to said land.

2. (a) Continuation of Insurance after Acquisition of Title

This policy shall continue in force as of Date of Policy in favor of an insured who acquires all or any part of the estate or interest in the land described in Schedele A by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage, and if the insured is a corporation, its transferee of the estate or interest so acquired, provided the transferee is the parent or wholly owned subsidiary of the insured; and in favor of any governmental agency or instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage; provided that the amount of insurance hereunder after such acquisition, exclusive of costs, attorneys' fees and expenses which the Company may become obligated to pay, shall not exceed the least of:

(i) the amount of insurance stated in Schedule A;

(ii) the amount of the unpaid principal of the indebtedness as defined in paragraph 8 hereof, plus interest thereon, expenses of foreclosure and amounts advanced to protect the lien of the insured mortgage and secured by said insured mortgage at the time of acquisition of such estate or interest in the land; or

(iii) the amount paid by any governmental agency or instrumentality, if such agency or instrumentality is the insured claimant, in the acquisition of such estate or interest in satisfaction of its insurance contract or guaranty.

(b) Continuation of Insurance after Conveyance of Title

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such state or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

3. Defense and Prosecution of Actions - Notice of Claim to be given by an Insured Claimant

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or defenses, restraining orders injunctions interposed against a foreclosure of the insured mortgage or a defense interposed against an insured in an action to enforce a contract for a sale of the indebtedness secured by the insured mortgage, or a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense or restraining order or injunction is interposed as set forth in (a) above, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest which is adverse to the title of the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If such prompt notice shall not be given to the Company, then as to such insured all liability of the insured shall cease and terminate in regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provisions of this policy.

(d) Whenever the Company shall have brought any action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for that purpose. Whenever bequested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

4. Notice of Loss - Limitation of Action

In addition to the notices required under paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

5. Options to Pay or Otherwise Settle Claims

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment by the insured claimant under this policy by an insured, the Company shall have the further option to purchase such indebtedness for the amount owing thereon together with all costs, attorneys' fees and expenses which the Company is obligated hereunder to pay. If the Company offers to purchase said indebtedness as herein provided, the owner of such indebtedness shall transfer and assign said indebtedness and the mortgage and any collateral securing the same to the Company upon payment therefor as herein provided.

6. Determination and Payment of Loss

(a) The liability of the Company under this policy shall in no case exceed the least of:

(i) the actual loss of the insured claimant; or

(ii) the amount of insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in paragraph 2(a) hereof; or

(iii) the amount of the indebtedness secured by the insured mortgage as determined under paragraph 8 hereof, at the time the loss or damage insured against hereunder occurs, together with interest thereon.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

7. Limitation of Liability

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, or the lien of the insured mortgage, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

8. Reduction of Liability

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto; provided, however, such payments, prior to the acquisition of title to said estate or interest as provided in paragraph 2(a) of these Conditions and Stipulations, shall not reduce pro tanto the amount of the insurance afforded hereunder except to the extent that such payments reduce the amount of the indebtedness secured by the insured mortgage.

Payment in full by any person or voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in paragraph 2(a) hereof.

(b) The liability of the Company shall not be increased by additional principal indebtedness created subsequent to Date of Policy, except as to amounts advanced to protect the lien of the insured mortgage and secured thereby.

No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

9. Liability Noncumulative

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

10. Subrogation Upon Payment or Settlement

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant, except that the owner of the indebtedness secured by the insured mortgage may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness, provided such act occurs prior to receipt by the insured of notice of any claim of title or interest adverse to the title to the estate or interest or the priority of the lien of the insured mortgage and does not result in any loss of priority of the lien of the insured mortgage. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss, but such subrogation shall be in subordination to the insured mortgage. If loss or priority should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

11. Liability Limited to this Policy

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy. No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

12. Notices, Where Sent

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at ________________________.

1992 ALTA Loan Policy

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land;

5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;

6. The priority of any lien or encumbrance over the lien of the insured mortgage;

7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:

   (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or

   (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;

8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:______________________________
PRESIDENT

BY:______________________________
SECRETARY

1992 ALTA Loan Policy

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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.

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.

3. Defects, liens, encumbrances, adverse claims or other matters:

   (a) created, suffered, assumed or agreed to by the insured claimant;

   (b) not 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 claimant prior to the date the insured claimant became an insured under this policy;

   (c) resulting in no loss or damage to the insured claimant;

   (d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or

   (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated.

5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any statutory lien for services, labor or materials (or the claim of priority of any statutory lien for services, labor or materials over the lien of the insured mortgage) arising from an improvement or work related to the land which is contracted for and commenced subsequent to Date of Policy and is not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance.

7. 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:

(a) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or

(b) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or

(c) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:

(i) to timely record the instrument of transfer; or

(ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

1992 ALTA Loan Policy

SCHEDULE A

[File No.]
Policy No.

Amount of Insurance $
[Premium $]

Date of Policy__________ [at a.m. p.m.]

1. Name of Insured:

2. The estate or interest in the land which is encumbered by the insured mortgage is:

3. Title to the estate or interest in the land is vested in:

4. The insured mortgage and assignments thereof, if any, are described as follows:

[5. The land referred to in this policy is described as follows:]

If Paragraph 5 is omitted, a Schedule C, captioned the same as Paragraph 5, must be used.

SCHEDULE B

[File No.   ]   Policy No.

EXCEPTIONS FROM COVERAGE

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

PART I

1.

[POLICY MAY INCLUDE REGIONAL EXCEPTIONS IF SO

2. DESIRED BY ISSUING COMPANY]

[VARIABLE EXCEPTIONS SUCH AS TAXES, EASEMENTS, CC & Rs, ETC.]

3.

4.

Note: If there are matters which affect the title to the estate or interest in the land described in Schedule [A][C], but which are subordinate to the lien of the insured mortgage, Part II of Schedule B must be added, or Part I of Schedule B must contain the following statement:

"Matters which affect the title to the estate or interest, but which are subordinate to the lien of the insured mortgage"

PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule [A][C] is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

1992 ALTA Loan Policy

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A. The term "insured" also includes

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage.

(c) "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 matters affecting the land.

(d) "land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "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.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) the amount paid by any governmental agency or governmental instrumentality, if the agency or instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage, together with any collateral security, to the Company upon payment therefor.

Upon the exercise by the Company of either of the options provided for in paragraphs a(i) or (ii), all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the

Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. <u>REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY</u>.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto. However, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of the insurance afforded under this policy except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

10. <u>LIABILITY NONCUMULATIVE</u>.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

11. <u>PAYMENT OF LOSS</u>.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. <u>SUBROGATION UPON PAYMENT OR SETTLEMENT</u>.

(a) <u>The Company's Right of Subrogation.</u>

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.

(b) <u>The Insured's Rights and Limitations</u>.

Notwithstanding the foregoing, the owner of the indebtedness secured by the insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of the insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of the insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. SEVERABILITY.

In the event any provision of this policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at (fill in).

NOTE: Bracketed [ ] material optional

2006 ALTA Loan Policy

LOAN POLICY OF TITLE INSURANCE
Issued by
Blank Title Insurance Company

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured

Mortgage

(a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;

(b) failure of any person or Entity to have authorized a transfer or conveyance;

(c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;

(d) failure to perform those acts necessary to create a document by electronic means authorized by law;

(e) a document executed under a falsified, expired, or otherwise invalid power of attorney;

(f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or

(g) a defective judicial or administrative proceeding.

10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.

11. The lack of priority of the lien of the Insured Mortgage upon the Title

(a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either

(i) contracted for or commenced on or before Date of Policy; or

(ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and

(b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.

12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.

13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title

(a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

(b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records

(i) to be timely, or

(ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By________________________________
President

By________________________________
Secretary

EXCLUSIONS FROM COVERAGE

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

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to

(i) the occupancy, use, or enjoyment of the Land;

(ii) the character, dimensions, or location of any improvement erected on the Land;

(iii) the subdivision of land; or

(iv) environmental protection;

or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

(b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims, or other matters

(a) created, suffered, assumed, or agreed to by the Insured Claimant;

(b) not 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 Claimant prior to the date the Insured Claimant became an Insured under this policy;

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.

4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.

5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.

6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is

(a) a fraudulent conveyance or fraudulent transfer, or

(b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.

7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

2006 ALTA Loan Policy

SCHEDULE A

Name and Address of Title Insurance Company:

[File No.:] Policy No.:
Loan No.:
Address Reference:
Amount of Insurance: $ [Premium: $]
Date of Policy: [at a.m./p.m.]

1. Name of Insured:

2. The estate or interest in the Land that is encumbered by the Insured Mortgage is:

3. Title is vested in:

4. The Insured Mortgage and its assignments, if any, are described as follows:

5. The Land referred to in this policy is described as follows:

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

4-06	(Condominium)
4.1-06	
5-06	(Planned Unit Development)
5.1-06	
6-06	(Variable Rate)
6.2-06	(Variable Rate--Negative Amortization)
8.1-06	(Environmental Protection Lien) Paragraph b refers to the following state statute(s):
9-06	(Restrictions, Encroachments, Minerals)
13.1-06	(Leasehold Loan)
14-06	(Future Advance-Priority)
14.1-06	(Future Advance-Knowledge)
14.3-06	(Future Advance-Reverse Mortgage)
22-06	(Location) The type of improvement is a __________________, and the street address is as shown above.]

SCHEDULE B

[File No.   ]   Policy No.

EXCEPTIONS FROM COVERAGE

[Except as provided in Schedule B - Part II,] t[or T]his policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

[PART I

PART II

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

2006 ALTA Loan Policy

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) “Amount of Insurance”: The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.

(b) “Date of Policy”: The date designated as “Date of Policy” in Schedule A.

(c) “Entity”: A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) “Indebtedness”: The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of

(i) the amount of the principal disbursed as of Date of Policy;

(ii) the amount of the principal disbursed subsequent to Date of Policy;

(iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;

(iv) interest on the loan;

(v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;

(vi) the expenses of foreclosure and any other costs of enforcement;

(vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;

(viii) the amounts to pay taxes and insurance; and

(ix) the reasonable amounts expended to prevent deterioration of improvements;

but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.

(e) “Insured”: The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) 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;

(C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(D) successors to an Insured by its conversion to another kind of Entity;

(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) if the grantee wholly owns the named Insured, or

(3) if the grantee 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;

(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;

(ii) With regard to (A), (B), (C), (D), and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the

Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.

(f) "Insured Claimant": An Insured claiming loss or damage.

(g) "Insured Mortgage": The Mortgage described in paragraph 4 of Schedule A.

(h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(j) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(k) "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 Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(l) "Title": The estate or interest described in Schedule A.

(m) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title or the lien of the Insured Mortgage, as insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness,

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy, or

(iv) if a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

(d) In addition to the extent of liability under (a), (b), and (c), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

(a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the Indebtedness.

(b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) The Company's Right to Recover

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Insured's Rights and Limitations

(i) The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

(ii) If the Insured exercises a right provided in (b)(i), but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

(c) The Company's Rights Against Noninsured Obligors

The Company’s right of subrogation includes the Insured’s rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

13. ARBITRATION

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association (“Rules”). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

15. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

16. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

17. NOTICES, WHERE SENT

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at [fill in].

NOTE: Bracketed [ ] material optional

ALTA Short Form Residential Loan Policy

SHORT FORM RESIDENTIAL
LOAN POLICY -- ONE-TO-FOUR FAMILY

Issued by
BLANK TITLE INSURANCE COMPANY

SCHEDULE A

Amount of Insurance: [Premium:]

[File Number:]	Mortgage Amount:	Policy Number:
Loan Number:	Mortgage Date:	Date of Policy: or date of recording of insured mortgage, whichever is later.

Name of Insured:

Name of Borrower(s):

Property Address:

County and State:

The estate or interest in the land identified in this Schedule A and which is encumbered by the insured mortgage is fee simple and is at Date of Policy vested in the borrower(s) shown in the insured mortgage and named above.

The land referred to in this policy is described as set forth in the insured mortgage and is identified as the property address shown above.

This policy consists of [one] page[, including the reverse side hereof,] unless an addendum is attached and indicated below:

__ Addendum attached __ No addendum attached

[Subject to the conditions stated in the endorsement list below, the following ALTA endorsements are incorporated herein:

ENDORSEMENTS 4 and 4.1 (Condominium), if the land or estate or interest is referred to in the insured mortgage as a condominium.
ENDORSEMENTS 5 and 5.1 (Planned Unit Development).
ENDORSEMENT 6 (Variable Rate), if the insured mortgage contains provisions which provide for an adjustable interest rate.
ENDORSEMENT 6.2 (Variable Rate B Negative Amortization), if the insured mortgage contains provisions which provide for both an adjustable interest rate and negative amortization.
ENDORSEMENT 7 (Manufactured Housing Unit), if a manufactured housing unit is located on the land at Date of Policy.
ENDORSEMENT 8.1 (Environmental Protection Lien), referring to the following state statutes: __________________ .
ENDORSEMENT 9 (Restrictions, Encroachments, Minerals).]

[The ALTA endorsements indicated below are incorporated herein:

__ ENDORSEMENT 4 (Condominium) or __ ENDORSEMENT 4.1
__ ENDORSEMENT 5 (Planned Unit Development) or __ ENDORSEMENT 5.1
__ ENDORSEMENT 6 (Variable Rate)
__ ENDORSEMENT 6.2 (Variable Rate--Negative Amortization)
__ ENDORSEMENT 7 (Manufactured Housing Unit)
__ ENDORSEMENT 8.1 (Environmental Protection Lien) referring to the following state statute(s): ____
__ ENDORSEMENT 9 (Restrictions, Encroachments, Minerals)

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY
BY:________________________________
PRESIDENT
BY:________________________________
SECRETARY

SUBJECT TO THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B BELOW, AND ANY ADDENDUM ATTACHED HERETO, BLANK TITLE INSURANCE COMPANY, A ____ CORPORATION, HEREIN CALLED THE "COMPANY," HEREBY INSURES THE INSURED IN ACCORDANCE WITH AND SUBJECT TO THE TERMS, EXCLUSIONS, CONDITIONS AND STIPULATIONS SET FORTH IN THE AMERICAN LAND TITLE ASSOCIATION LOAN POLICY (10-17-92), ALL OF WHICH ARE INCORPORATED HEREIN. ALL REFERENCES TO SCHEDULES A AND B SHALL REFER TO SCHEDULES A AND B OF THIS POLICY.

SCHEDULE B

EXCEPTIONS FROM COVERAGE AND
AFFIRMATIVE INSURANCE

Except to the extent of the affirmative insurance set forth below, this policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Those taxes and special assessments which become due and payable subsequent to Date of Policy.

2. Covenants, conditions and restrictions, if any, appearing in the public records; however, this policy insures against loss or damage arising from:

   a. the violation of any covenants, conditions and restrictions on or prior to Date of Policy, except that this affirmative insurance does not extend to covenants, conditions and restrictions relating to environmental protection, unless a notice of a violation thereof has been recorded or filed in the public records and is not referenced in an addendum attached to this policy;
   b. a forfeiture or reversion of title from a future violation of any covenants, conditions and restrictions appearing in the public records, including any relating to environmental protection; and
   c. any provisions in any covenants, conditions and restrictions under which the lien of the insured mortgage can be extinguished, subordinated or impaired.

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

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

5. This policy insures against loss or damage by reason of any violation, variation, encroachment or adverse circumstance affecting the title that would have been disclosed by an accurate survey. The term "encroachment" includes encroachments of existing improvements located on the land onto adjoining land, and encroachments onto the land of existing improvements located on adjoining land.

ADDENDUM TO SHORT FORM
RESIDENTIAL LOAN POLICY

[File Number:] Addendum to Policy Number:

SCHEDULE B (Continued)

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

ALTA Residential Limited Coverage Junior Loan Policy

RESIDENTIAL LIMITED COVERAGE JUNIOR LOAN POLICY
Issued By
BLANK TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 15 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS AND THE CONDITIONS, and provided that the Land is a one-to-four family residence or condominium unit, Blank Title Insurance Company, a ______ corporation, the Company, insures, as of Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Grantee not being the named grantee on the last document purporting to vest the Title recorded in the Public Records.

2. The description of the Land in Schedule A not being the same as that contained in the last document purporting to vest the Title recorded in the Public Records.

3. A Monetary Lien recorded in the Public Records.

4. Any ad valorem taxes or assessments of any governmental taxing authority that constitute a lien on the Title and that on Date of Policy appear in the official ad valorem tax records where the Land is located.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:___________________________________PRESIDENT

BY:___________________________________ SECRETARY

SCHEDULE A

Name and Address of Title Insurance Company:

Policy No. [Premium: $________.]

Amount of Insurance: $ Date of Policy:

Name of Insured:

Grantee:

The Land referred to in this policy is described as follows:

EXCEPTIONS

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

[<u>TAX INFORMATION</u>]

ALTA Residential Limited Coverage Junior Loan Policy

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. Any invalidity, unenforceability or ineffectiveness of the Insured's Mortgage.

2. Defects, liens, encumbrances, adverse claims or other matters:

a. created, suffered, assumed or agreed to by the Insured Claimant;

b. known to the Insured Claimant whether or not disclosed in the Public Records;

c. resulting in no loss or damage to the Insured Claimant; or

d. recorded or filed in the Public Records subsequent to Date of Policy.

CONDITIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) “Amount of Insurance”: The amount stated in Schedule A.
(b) “Date of Policy”: The date designated as “Date of Policy” in Schedule A.
(c) “Entity”: A corporation, partnership, trust, limited liability company, or other similar legal entity.
(d) “Grantee”: The Grantee designated in Schedule A.
(e) “Indebtedness”: The obligation if secured by the Insured’s Mortgage. Including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of:
  (i) the amount of the principal disbursed if secured by the Insured’s Mortgage;
  (ii) interest on the loan;
  (iii) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;
  (iv) the expenses of foreclosure and any other costs of enforcement;

but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.

(f) “Insured”: The Insured named in Schedule A if it is the owner of the Indebtedness and each successor in ownership of the Indebtedness, except a successor who is an obligor, reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.
(g) "Insured Claimant": An Insured claiming loss or damage.
(h) “Insured’s Mortgage”: The Mortgage described in JR1.
(i) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.
(j) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land” does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways.
(k) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.
(l) "Monetary Lien": Any Mortgage, deed of trust, judgment lien or other lien affecting the Title securing the obligation to pay money, but not including any lien created in any easement, covenant, condition, restriction, or declaration of condominium or planned unit development, except to the extent that a separate notice of enforcement of a specific delinquent charge or assessment affecting the Title has been recorded in the Public Records.
(m) "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.
(n) “Title”: The estate or interest described in Schedule A.

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured through foreclosure of the lien of the Insured's Mortgage or deed in lieu of foreclosure.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5 of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim that might cause loss or damage for which the Company may be liable by virtue of this policy. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 6 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 6 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

7. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness, or

(iii) the difference between the value of the Title without the matter insured against and the value of the Title subject to the matter insured against by this policy.

(b) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions then the extent of liability of the Company shall continue as set forth in Section 7(a) of these Conditions.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions. If the loss is caused by a lien insured against by this policy, the difference between the value of the estate or interest in the land encumbered by the insured's mortgage without the lien insured against and the value of that estate or interest subject to the lien insured against by this policy.

8. LIMITATION OF LIABILITY

(a) If the Company removes an alleged matter insured against by this policy in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations and shall not be liable for any loss or damage with respect to that matter.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Insured with respect to matters insured against by this policy.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

9. REDUCTION OF INSURANCE; TERMINATION OF LIABILITY

(a) All payments under this policy, except payment made for costs, attorneys' fees and expenses, shall reduce the Amount of Insurance by the amount of the payment.

(b) The voluntary satisfaction or release of the Insured's Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

10. PAYMENT OF LOSS

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

11. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT

(a) The Company's Right to Recover

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to all rights and remedies of the Insured Claimant in respect to the claim that the Insured Claimant has against any person or property to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's Rights Against Noninsured Obligors

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under this policy.

12. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage relating to the Covered Risks or any other matter shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

13. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, and all other provisions shall remain in full force and effect.

14. CHOICE OF LAW; FORUM

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefore in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims insured against by this policy and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

15. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company, Attention: Claims Department.

[16. ARBITRATION

Unless prohibited by applicable law, either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.]

ALTA United States of America Policy (Revised 2012)

UNITED STATES OF AMERICA
POLICY OF TITLE INSURANCE
Issued by
BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land;

5. In instances where the insured acquires title to the land by condemnation, failure of the commitment for title insurance, as updated to the date of the filing of the lis pendens notice or the Declaration of Taking, to disclose the parties having an interest in the land as disclosed by the public records.

6. Title to the estate or interest described in Schedule A being vested other than as stated therein or being defective:

(a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the land occurring prior to the transaction vesting title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

(b) because the instrument of transfer vesting title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the public records

(i) to be timely, or

(ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY: __________________________________ PRESIDENT

BY: __________________________________ SECRETARY

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

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 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.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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.

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.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the insured claimant;

(b) not 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 claimant prior to the date the insured claimant became an insured under the policy;

(c) resulting in no loss or damage to the insured claimant; or

(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under insuring provision 6).

4. This policy does not insure against the invalidity or insufficiency of any condemnation proceeding instituted by the United States of America, except to the extent set forth in insuring provision 5.

5. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the title as shown in Schedule A is:

(a) a fraudulent conveyance or fraudulent transfer; or

(b) a preferential transfer for any reason not stated in insuring provision 6.

ALTA United States of America Policy

SCHEDULE A

Name and Address of Title Insurance Company:

[File No.]   Policy No.

Amount of Insurance $
[Premium $]

Date of Policy   [at a.m./ p.m.]

1. Name of Insured:

2. The estate or interest in the land which is covered by this policy is:

3. Title to the estate or interest in the land is vested in:

[4. The land referred to in this policy is described as follows:]

If Paragraph 4 is omitted, a Schedule C, captioned the same as Paragraph 4, must be used.

SCHEDULE B

[File No.]   Policy No.

EXCEPTIONS FROM COVERAGE

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

1.

[POLICY MAY INCLUDE REGIONAL EXCEPTIONS IF SO DESIRED BY ISSUING COMPANY]

[VARIABLE EXCEPTIONS SUCH AS TAXES, EASEMENTS, CC & Rs, ETC.]

3.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.
The following terms when used in this policy mean:

(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 of 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.

(b) "insured claimant": an insured claiming loss or damage.

(c) "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 matters affecting the land.

(d) "land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "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.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(e) Notwithstanding Conditions and Stipulations Section 4(a-d), the Attorney General of the United States shall have the sole right to authorize or to undertake the defense of any matter which would constitute a claim under the policy, and the Company may not represent the insured without authorization. If the Attorney General elects to defend at the Government's expense, the Company shall, upon request, cooperate and render all reasonable assistance in the prosecution or defense of the proceeding and in prosecuting any related appeals. If the Attorney General shall fail to authorize and permit the Company to defend, all liability of the Company with respect to that claim shall terminate; provided, however, that if the Attorney General shall give the Company timely notice of all proceedings and an opportunity to suggest defenses and actions as it shall recommend should be taken, and the Attorney General shall present the defenses and take the actions of which the Company shall advise the Attorney General in writing, the liability of the Company shall continue and, in any event, the Company shall cooperate and render all reasonable assistance in the prosecution or defense of the claim and any related appeals.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Unless prohibited by law or governmental regulation, failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) Subject to the prior written approval of the Attorney General, to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs 6(b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation. Failure of the Attorney General to give the approval called for in 6(b)(i) shall not prejudice the rights of the insured unless the Company is prejudiced thereby, and then only to the extent of the prejudice.

7. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT.

If the land described in Schedule [A][C] consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. LIABILITY NONCUMULATIVE.

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy or an accurate facsimile for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

(c) No Subrogation to the Rights of the United States.

Notwithstanding the provisions of Conditions and Stipulations Section 13(a) and (b), whenever the Company shall have settled and paid a claim under this policy, the Company shall not be subrogated to the rights of the United States. The Attorney General may elect to pursue any additional remedies which may exist, and the Company may be consulted. If the Company agrees in writing to reimburse the United States for all costs, attorneys' fees and expenses, to the extent that funds are recovered they shall be applied first to reimbursing the Company for the amount paid to satisfy the claim, and then to the United States.

14. ARBITRATION ONLY BY AGREEMENT.

Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters shall be arbitrated only when agreed to by both the Company and the Insured.

The law of the United States, or if there be no applicable federal law, the law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. SEVERABILITY.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at (fill in).

NOTE: Bracketed [] material optional

ALTA 13-06 Leasehold Owner's Endorsement (adopted April 2, 2012)

ENDORSEMENT

Attached to Policy No. ______

Issued by

Blank Title Insurance Company

1. As used in this endorsement, the following terms shall mean:

   a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.

   b. "Lease": the lease described in Schedule A.

   c. "Leasehold Estate": the right of possession granted in the Lease for the Lease Term.

   d. "Lease Term": the duration of the Leasehold Estate, as set forth in the Lease, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.

   e. "Personal Property": property, in which and to the extent the Insured has rights, located on or affixed to the Land on or after Date of Policy that by law does not constitute real property because (i) of its character and manner of attachment to the Land and (ii) the property can be severed from the Land without causing material damage to the property or to the Land.

   f. "Remaining Lease Term": the portion of the Lease Term remaining after the Insured has been Evicted.

   g. "Tenant Leasehold Improvements": Those improvements, in which and to the extent the Insured has rights, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Insured's expense or in which the Insured has an interest greater than the right to possession during the Lease Term.

2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title, or any portion of it, as the result of an Eviction of the Insured, then, as to that portion of the Land from which the Insured is Evicted, that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements affected by a defect insured against by the policy valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining

Lease Term.

3. Additional items of loss covered by this endorsement:

If the Insured is Evicted, the following items of loss, if applicable to that portion of the Land from which the Insured is Evicted shall be included, without duplication, in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title determined pursuant to Section 2 of this endorsement, any other endorsement to the policy, or Section 8(a)(ii) of the Conditions:

a. The reasonable cost of (i) removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, (ii) transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, (iii) repairing the Personal Property damaged by reason of the removal and relocation, and (iv) restoring the Land to the extent damaged as a result of the removal and relocation of the Personal Property and required of the Insured solely because of the Eviction.

b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

c. The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.

d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

e. Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

f. The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate.

g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping.

4. This endorsement does not insure against loss, damage or costs of remediation (and the Company will not pay costs, attorneys' fees or expenses) resulting from environmental damage or contamination.

ALTA 13 Leasehold Owner's Endorsement

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

Date of Endorsement: ________________________

[Witness clause optional]

Date:
By: __Blank Title Insurance Company____________

Authorized Signatory

ALTA 13.1-06 Leasehold Loan Endorsement (adopted April 2, 2012)

ENDORSEMENT

Attached to Policy No. ______

Issued By

Blank Title Insurance Company

1. As used in this endorsement, the following terms shall mean:

a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.

b. "Lease": the lease described in Schedule A.

c. "Leasehold Estate": the right of possession granted in the Lease for the Lease Term.

d. "Lease Term": the duration of the Leasehold Estate, as set forth in the Lease, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.

e. "Personal Property": property, in which and to the extent the Insured has rights, located on or affixed to the Land on or after Date of Policy that by law does not constitute real property because (i) of its character and manner of attachment to the Land and (ii) the property can be severed from the Land without causing material damage to the property or to the Land.

f. "Remaining Lease Term": the portion of the Lease Term remaining after the Tenant has been Evicted.

g. "Tenant": the tenant under the Lease and, after acquisition of all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of the policy, the Insured Claimant.

h. "Tenant Leasehold Improvements": Those improvements, in which and to the extent the Insured has rights, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Tenant's expense or in which the Tenant has an interest greater than the right to possession during the Lease Term.

2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title, or any portion of it, as the result of an Eviction of the Tenant, then, as to that portion of the Land from which the Tenant is Evicted, that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements affected by a defect insured against by the policy valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.

3. Additional items of loss covered by this endorsement:

If the Insured acquires all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of this policy and thereafter is Evicted, the following items of loss, if applicable to that portion of the Land from which the Insured is Evicted shall be included, without duplication, in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title determined pursuant to Section 2 of this endorsement, any other endorsement to the policy, or Section 8(a)(iii) of the Conditions:

a. The reasonable cost of (i) removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, (ii) transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, (iii) repairing the Personal Property damaged by reason of the removal and relocation, and (iv) restoring the Land to the extent damaged as a result of the removal and relocation of the Personal Property and required of the Insured solely because of the Eviction.

b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

c. The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.

d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease permitted by the Lease and made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

e. Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease permitted by the Lease and made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.

f. The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate.

g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping.

4. This endorsement does not insure against loss, damage or costs of remediation (and the Company will not pay costs, attorneys' fees or expenses) resulting from environmental damage or

contamination.

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

Date of Endorsement: ________________________

[Witness clause optional]

Date: __________________________
Blank Title Insurance Company

By: ____

Authorized Signatory

1990 California Land Title Ass'n Standard Coverage Owner's Policy

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California Land Title Association

POLICY OF TITLE INSURANCE

Issued by

BLANK TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation, herein called the company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;

2. Any defect in or lien or encumbrance on the title;

3. Unmarketability of the title;

4. Lack of a right of access to and from the land;

and in addition, as to an insured lender only:

5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;

6. The priority of any lien or encumbrance over the lien of the insured mortgage, said mortgage being shown in Schedule B in the order of its priority;

7. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule B, or the failure of the assignment shown in Schedule B to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY:___________________________
PRESIDENT

BY:___________________________
SECRETARY

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building or 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 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.

(b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or 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.

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.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;

(b) not 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 claimant prior to the date the insured claimant became an insured under this policy;

(c) resulting in no loss or damage to the insured claimant;

(d) attaching or created subsequent to Date of Policy; or

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.

4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with the applicable doing business laws of the state in which the land is situated.

5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy or the transaction creating the interest of the insured lender, by reason of the operation of federal bankruptcy, state insolvency or similar creditors' rights laws.

1990 CLTA Owner's Policy

SCHEDULE A

(File No.) Policy No.
Amount of Insurance $
Premium $

Date of Policy __________________________ (at a.m./p.m.)

1. Name of Insured:

2. The estate or interest in the land which is covered by this policy is:

3. Title to the estate or interest in the land is vested in:

[4. The land referred to in this policy is described as follows:]

If Paragraph 4 is omitted, a Schedule C, captioned the same as Paragraph 4, must be used.

SCHEDULE B

(File No.) Policy No.

EXCEPTIONS FROM COVERAGE

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

PART I

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

2. Any facts, rights, interests or claims which are. not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession thereof.

3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b) or (c) are shown by the public records.

PART II

CONDITIONS AND STIPULATIONS

1. Definition of Terms.

The following terms when used in this policy mean:

(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 of 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. The term "insured" also includes:

(i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12(c) of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);

(ii) any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;

(iii) the parties designated in Section 2(a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage.

(c) "insured lender": the owner of an insured mortgage.

(d) "insured mortgage": a mortgage shown in Schedule B, the owner of which is named as an insured in Schedule A.

(e) "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 matters affecting the land.

(f) "land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(g) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(h) "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.

(i) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. Continuation of Insurance.

(a) After Acquisition of Title by Insured Lender. If this policy insures the owner of the indebtedness secured by the insured. mortgage, the coverage of this policy shall continue in force as of Date of Policy in favor of (i) such insured lender who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

(b) After Conveyance of Title by an Insured. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from an insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to an insured.

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance by an insured lender shall in neither event exceed the least of:

(i) The amount of insurance stated in Schedule A;

(ii) The amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured hereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or

(iii) The amount paid by any governmental agency or governmental instrumentality, if the agency or the instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.

3. Notice of Claim To Be Given By Insured Claimant..

An insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company then as to that insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. Defense and Prosecution of Actions; Duty of Insured Claimant to Cooperate.

(a) Upon written request by an insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of such insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of such insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by an insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to an insured. The Company may take any' appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, an insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for this purpose. Whenever requested by the Company, an insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured. If the Company is prejudiced by the failure of an insured to furnish the required cooperation, the Company's obligations to such insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation with regard to the matter or matters requiring such cooperation.

5. Proof of Loss or Damage.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by each insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of an insured claimant to provide the required proof of loss or damage, the Company's obligations to such insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, an insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by an insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of an insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that insured for that claim.

6. <u>Options to Pay or Otherwise Settle Claims; Termination of Liability.</u>

In case of a claim under this policy, the Company shall have the following additional options:

(a) <u>To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.</u>

(i) to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or

(ii) in case loss or damage is claimed under this policy by the owner of the indebtedness secured by the insured mortgage, to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage, together with any collateral security, to the Company upon payment therefor.

Upon the exercise by the Company of the option provided for in paragraph a(i), all liability and obligations to the insured under this policy, other than to make the payment required in that paragraph, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

Upon the exercise by the Company of the option provided for in paragraph a(ii) the Company's obligation to an insured Lender under this policy for the claimed loss or damage, other than the payment required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

(b) <u>To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant</u>.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b(i) or b(ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. <u>Determination and Extent of Liability</u>.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy to an insured lender shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2 (c) of these Conditions and Stipulations;

(ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or

(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the insured lender has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

(c) The liability of the Company under this policy to an insured described in Schedule A shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or,

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(d) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. Limitation of Liability.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, or, if applicable to the lien of the insured mortgage, as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

(d) The Company shall not be liable to an insured lender for: (i) any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or (ii) construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. Reduction of Insurance; Reduction or Termination of Liability.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of insurance pro tanto. However, as to an insured lender, any payments made prior to the acquisition of title to the estate or interest as provided in Section 2(a) of these Conditions and Stipulations shall not reduce pro tanto the amount of insurance afforded under this policy as to any such insured, except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

(b) Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company to an insured lender except as provided in Section 2(a) of these Conditions and Stipulations.

10. Liability Noncumulative.

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

The provisions of this Section shall not apply to an insured lender, unless such insured acquires title to said estate or interest in satisfaction of the indebtedness secured by an insured mortgage.

11. Payment of Loss.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

12. Subrogation Upon Payment or Settlement

(a) The Company's Right of Subrogation

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated (i) as to an insured owner, to all rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss ; and (ii) as to an insured lender, to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest and costs of collection.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by an insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected , may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of an insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of an insured mortgage by an obligor (except an obligor described in Section 1(a)(ii) of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1(a)(i) of these Conditions and Stipulations.

13. <u>Arbitration</u>.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable: matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. <u>Liability Limited to This Policy; Policy Entire Contract</u>.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. Severability.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. Notices, Where Sent.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at [fill in].

Texas T-7 Commitment for Title Insurance

Title insurance insures you against loss resulting from certain risks to your title. The commitment for Title Insurance is the title insurance company's promise to issue the title insurance policy. The commitment is a legal document. You should review it carefully to completely understand it before your closing date.	El seguro de título le asegura en relación a perdidas resultantes de ciertos riesgos que pueden afectar el título de su propriedad. El Compromiso para Seguro de Título es la promesa de la compañía aseguradora de títulos de emitir la póliza de seguro de título. El Compromiso es un documento legal. Usted debe leerlo cuidadosamente y endenterlo complemente antes de la fecha para finalizar su transacción.

Your Commitment of Title insurance is a legal contract between you and us. The Commitment is not an opinion or report of your title. It is a contract to issue you a policy subject to the Commitment's terms and requirements.

Before issuing a Commitment for Title insurance (the Commitment) or a Title Insurance Policy (the Policy), the title insurance Company (the Company) determines whether the title is insurable. This determination has already been made. Part of that determination involves the Company's decision to insure the title except for certain risks that will not be covered by the Policy. Some of these risks are listed in Schedule B of the attached Commitment as Exceptions. Other risks are stated in the Policy as Exclusions. These risks will not be covered by the Policy. The Policy is not an abstract of title nor does a Company have an obligation to determine the ownership of any mineral interest.

--MINERALS AND MINERAL RIGHTS may not be covered by the Policy. The Company may be unwilling to insure title unless there is an exclusion or an exception as to Minerals and Mineral Rights in the Policy. Optional endorsements insuring certain risks involving minerals, and the use of improvements (excluding lawns, shrubbery and trees) and permanent buildings may be available for purchase. If the title insurer issues the title policy with an exclusion or exception to the minerals and mineral rights, neither this Policy, nor the optional endorsements, ensure that the purchaser has title to the mineral rights related to the surface estate.

Another part of the determination involves whether the promise to insure is conditioned upon certain requirements being met. Schedule C of the Commitment lists these requirements that must be satisfied or the Company will refuse to cover them. You may want to discuss any matters shown in Schedules B and C of the Commitment with an attorney. These matters will affect your title and your use of the land.

When your policy is issued, the covererage will be limited by the Policy's Exceptions, Exclusions and Conditions, defined below.

--EXCEPTIONS are title risks that a Policy generally covers but does not cover in a particular instance. Exceptions are shown on Schedule B or discussed in Schedule C of the Commitment. They can also be added if you do not comply with the Conditions section of the Commitment. When the policy is issued, all Exceptions will be on Schedule B of the Policy.

--EXCLUSIONS are title risks that a Policy generally does not cover. Exclusions are contained in the Policy but not shown or discussed in the Commitment.

--CONDITIONS are additional provisions that qualify or limit you coverage. Conditions include your responsibilities and those of the Company. They are contained in the Policy but not shown or discussed in the Commitment. The Policy Conditions are not the same as the Commitment Conditions.

You can get a copy of the policy form approved by the Texas Department of Insurance by calling the Title Insurance Company at 1-800-_______ or by calling the title insurance agent that issued the Commitment. The Texas Department of Insurance may revise the policy form from time to time.

You can also get a brochure that explains the policy from the Texas Department of Insurance by calling 1-800-252-3439.

Texas T-7 Commitment

Before the Policy is issued, you may request changes in the Policy. Some of the changes to consider are:

--Request amendment of the "area and boundary" exception (Schedule B, paragraph 2). To get this amendment, you must furnish a survey and comply with other requirements of the Company. On the Owner Policy, you must pay an additional premium for the amendment. If the survey is acceptable to the Company and if the Company's other requirements are met, your Policy will insure you against loss because of discrepancies or conflicts in boundary lines, encroachments or protrusions, or overlapping of improvements. The Company may then decide not to insure against specific boundary or survey problems by making special exceptions in the Policy. Whether or not you request amendment of the "area and boundary" exception, you should determine whether you want to purchase and review a survey if a survey is not being provided to you.

--Allow the Company to add an exception to "rights of parties in possession." If you refuse this exception, the Company or the title insurance agent may inspect the property. The Company may except to and not insure you against the rights of specific persons, such as renters, adverse owners or easement holders who occupy the land. The Company may charge you for the inspection. If you want to make your own inspection, you must sign a Waiver of Inspection form and allow the Company to add this exception to your Policy.

The entire premium for a Policy must be paid when the Policy is issued. You will not owe any additional premiums unless you want to increase your coverage at a later date and the Company agrees to add an Increased Value Endorsement.

DELETION OF ARBITRATION PROVISIONS

(Not applicable to the Texas Residential Owner Policy)

Arbitration is a common form of alternative dispute resolution. It can be a quicker and cheaper means to settle a dispute with your Title Insurance Company. However, if you agree to arbitrate, you give up your right to take the Title Company to court and your rights to discovery of evidence may be limited in the arbitration process. In addition, you cannot usually appeal an arbitrator's award.

Your policy contains an arbitration provision (shown below). It allows you or the Company to require arbitration if the amount of insurance is $2,000,000 or less. If you want to retain your right to sue the Company in case of a dispute over a claim, you must request deletion of the arbitration provision before the policy is issued. You can do this by signing this form and returning it to the Company at or before the closing of your real estate transaction or by writing to the Company.

The arbitration provision in the Policy is as follows:

> “Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association (“Rules”). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is **$2,000,000** or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of **$2,000,000** shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.”

I request deletion of the Arbitration provision.

____________________________ ____________________

SIGNATURE DATE

THE FOLLOWING COMMITMENT FOR TITLE INSURANCE IS NOT VALID UNLESS YOUR NAME AND THE POLICY AMOUNT ARE SHOWN IN SCHEDULE A, AND OUR AUTHORIZED REPRESENTATIVE HAS COUNTERSIGNED BELOW.

COMMITMENT FOR TITLE INSURANCE

Issued by

We (____________________________) will issue our title insurance policy or policies (the Policy) to You (the proposed insured) upon payment of the premium and other charges due, and compliance with the requirements in Schedule B and Schedule C. Our policy will be in the form approved by the Texas Department of Insurance at the date of issuance, and will insure your interest in the land described in Schedule A. The estimated premium for our Policy and applicable endorsements is shown on Schedule D. There may be additional charges such as recording fees, and expedited delivery expenses.

This Commitment ends ninety (90) days from the effective date, unless the Policy is issued sooner, or failure to issue the Policy is our fault. Our liability and obligations to you are under the express terms of this Commitment and end when this Commitment expires.

____

ATTEST: BY:_________________________________

________________________ Secretary

____
Authorized Signatory

CONDITIONS AND STIPULATIONS

1. If you have actual knowledge of any matter which may affect the title or mortgage covered by this Commitment, that is not shown in Schedule B, you must notify us in writing. If you do not notify us in writing, our liability to you is ended or reduced to the extent that your failure to notify us affects our liability. If you do notify us, or we learn of such matter, we may amend Schedule B, but we will not be relieved of liability already incurred.

2. Our liability is only to you, and others who are included in the definition of Insured in the Policy to be issued. Our liability is only for actual loss incurred in your reliance on this Commitment to comply with its requirements, or to acquire the interest in the land. Our liability is limited to the amount shown in Schedule A of this Commitment and will be subject to the following terms of the Policy: Insuring Provisions, Conditions and Stipulations, and Exclusions.

Texas T-7 Commitment

SCHEDULE A

Effective Date: GF No.

Commitment No. , issued , 19_____, _____m.

1. The policy or policies to be issued are:

(a) OWNER POLICY OF TITLE INSURANCE (Form T-1)
(Not applicable for improved one-to-four family residential real estate)
Policy Amount: $
PROPOSED INSURED:

(b) TEXAS RESIDENTIAL OWNER POLICY OF TITLE INSURANCE - ONE-TO-FOUR FAMILY RESIDENCES (Form T- 1R)
Policy Amount: $
PROPOSED INSURED:

(c) MORTGAGEE POLICY OF TITLE INSURANCE (Form T-2)
Policy Amount: $
PROPOSED INSURED:
Proposed Borrower:

(d) TEXAS SHORT FORM RESIDENTIAL LOAN POLICY OF TITLE INSURANCE (Form T-2R)
Policy Amount: $
PROPOSED INSURED:
Proposed Borrower:

(e) MORTGAGEE TITLE POLICY BINDER OR INTERIM CONSTRUCTION LOAD (Form T-13)
Binder Amount: $
PROPOSED INSURED:
Proposed Borrower:

(f) OTHER
Policy Amount: $
PROPOSED INSURED:

2. The interest is the land covered by this Commitment is:

3. Record title to the land on the Effective Date appears to be vested in:

4. Legal description of the land:

SCHEDULE B

EXCEPTIONS FROM COVERAGE

In addition to the Exclusions and Conditions and Stipulations, your Policy will not cover loss, costs, attorney's fees, and expenses resulting from:

1. The following restrictive covenants of record itemized below (We must either insert specific recording data or delete this exception):

2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.

3. Homestead or community property or survivorship rights, if any of any spouse of any insured. (Applies to the Owner Policy only.)

4. Any titles or rights asserted by anyone, including, but not limited to, persons, the public, corporations, governments or other entities,

   a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
   b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
   c. to filled-in lands, or artificial islands, or
   d. to statutory water rights, including riparian rights, or
   e. to the area extending from the line of mean low tide to the line of vegetation, or the rights of access to that area or easement along and across that area.

   (Applied to the Owner Policy only.)

5. Standby fees, taxes and assessments by any taxing authority for the year ____, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year. (If Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R) is issued, that policy will substitute "which become due and payable subsequent to Date of Policy" in lieu of "for the year ____ and subsequent years.")

6. The terms and conditions of the documents creating your interest in the land.

7. Materials furnished or labor performed in connection with planned construction before signing and delivering the lien document described in Schedule A, if the land is part of the homestead of the owner. (Applies to the Mortgagee Title Policy Binder on Interim Construction Loan only, and may be deleted if satisfactory evidence to us before a binder is issued.)

8. Liens and leases that affect the title to the land, but that are subordinate to the lien of the insured mortgage. (Applies to Mortgagee Policy only.)

9. The Exceptions from Coverage and Express Insurance in Schedule B of the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R). (Applies to Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R) only. Separate exceptions 1 through 8 of this Schedule B do not apply to the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R).

10. The following matters and all terms of the documents creating or offering evidence of the matters (We must insert matters or delete this exception.):

Texas T-7 Commitment

SCHEDULE C

Your Policy will not cover loss, costs, attorneys fees, and expenses resulting from the following requirements that will appear as Exceptions in Schedule B of the Policy, unless you dispose of these matters to our satisfaction, before the date the Policy is issued:

1. Documents creating your title or interest must be approved by us and must be signed, notarized and filed for record.

2. Satisfactory evidence must be provided that:
   - no person occupying the land claims any interest in that land against the persons named in paragraph 3 of Schedule A,
   - all standby fees, taxes, assessments and charges against the property have been paid,
   - all improvements or repairs to the property are completed and accepted by the owner, and that all contractors, subcontractors, laborers and suppliers have been fully paid, and that no mechanic's laborer's or materialmen's liens have attached to the property,
   - there is legal right of access to and from the land,
   - (on a Mortgagee Policy only) restrictions have not been and will not be violated that affect the validity and priority of the insured mortgage.

3. You must pay the seller or borrower the agreed amount for your property or interest.

4. Any defect, lien or other matter than may affect title to the land or interest insured, that arises or is filed after the effective date of this Commitment.

Texas Form T-1 Owner's Policy of Title Insurance (revised 10/29/09)

OWNER POLICY OF TITLE INSURANCE (T-1)

Issued by

BLANK TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the “Company”) insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:
   (a) A defect in the Title caused by:
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding.
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term “encroachment” includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
   (d) Any statutory or constitutional mechanic’s, contractor’s, or materialman’s lien for labor or materials having its inception on or before Date of Policy.
3. Lack of good and indefeasible Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:
   (a) the occupancy, use or enjoyment of the Land;
   (b) the character, dimensions or location of any improvement erected on the Land;
   (c) subdivision of land; or
   (d) environmental protection

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.
9. Title being vested other than as stated in Schedule A or being defective:
   (a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a

transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency or similar creditors' rights laws; or

(b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency or similar creditors' rights laws by reason of the failure of its recording in the Public Records:

(i) to be timely, or

(ii) to impart notice of its existence to a purchaser for value or a judgment or lien creditor.

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

BY: **PRESIDENT**

BY: **SECRETARY**

EXCLUSIONS FROM COVERAGE

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

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions or location of any improvement erected on the Land;
   (iii) subdivision of land; or
   (iv) environmental protection;
   or the effect of any violation of these laws, ordinances or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims or other matters:
   (a) created, suffered, assumed or agreed to by the Insured Claimant;
   (b) not 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 Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is:
   (a) a fraudulent conveyance or fraudulent transfer; or
   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.

5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

6. The refusal of any person to purchase, lease or lend money on the estate or interest covered hereby in the land described in Schedule A because of Unmarketable Title.

Texas T-1 Owner's Policy 2009

SCHEDULE A

Name and Address of Title Insurance Company:

[File No.:] Policy No.:

[Address for Reference only:]

Amount of Insurance: $ [Premium: $]

Date of Policy: [at a.m./p.m.]

1. Name of Insured:

2. The estate or interest in the Land that is insured by this policy is:

3. Title is insured as vested in:

4. The Land referred to in this policy is described as follows:

SCHEDULE B

[File No.] Policy No.

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of the terms and conditions of the leases and easements, if any, shown in Schedule A, and the following matters:

1. The following restrictive covenants of record itemized below (the Company must either insert specific recording data or delete this exception):
2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.
3. Homestead or community property or survivorship rights, if any, of any spouse of any Insured.
4. Any titles or rights asserted by anyone, including but not limited to, persons, the public, corporations, governments or other entities,
    a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
    b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
    c. to filled-in lands, or artificial islands, or
    d. to statutory water rights, including riparian rights, or
    e. to the area extending from the line of mean low tide to the line of vegetation, or the right of access to that area or easement along and across that area.
5. Standby fees, taxes and assessments by any taxing authority for the year ___, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year.
6. The following matters and all terms of the documents creating or offering evidence of the matters (The Company must insert matters or delete this exception).:

CONDITIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) “Amount of Insurance”: the amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

(b) “Date of Policy”: The date designated as “Date of Policy” in Schedule A.

(c) “Entity”: A corporation, partnership, trust, limited liability company or other similar legal entity.

(d) “Insured": the Insured named in Schedule A.

(i) The term "Insured" also includes:

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title;

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) If the grantee wholly owns the named Insured,

(3) If the grantee 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) If the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C) and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": an Insured claiming loss or damage.

(f) "Knowledge" or "Known": actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": the land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land” does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "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 Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) “Title”: the estate or interest described in Schedule A.

(k) "Unmarketable Title”: Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) below, or (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

When, after the Date of the Policy, the Insured notifies the Company as required herein of a lien, encumbrance, adverse claim or other defect in Title insured by this policy that is not excluded or excepted from the coverage of this policy, the

Company shall promptly investigate the charge to determine whether the lien, encumbrance, adverse claim or defect or other matter is valid and not barred by law or statute. The Company shall notify the Insured in writing, within a reasonable time, of its determination as to the validity or invalidity of the Insured's claim or charge under the policy. If the Company concludes that the lien, encumbrance, adverse claim or defect is not covered by this policy, or was otherwise addressed in the closing of the transaction in connection with which this policy was issued, the Company shall specifically advise the Insured of the reasons for its determination. If the Company concludes that the lien, encumbrance, adverse claim or defect is valid, the Company shall take one of the following actions: (i) institute the necessary proceedings to clear the lien, encumbrance, adverse claim or defect from the Title as insured; (ii) indemnify the Insured as provided in this policy; (iii) upon payment of appropriate premium and charges therefor, issue to the Insured Claimant or to a subsequent owner, mortgagee or holder of the estate or interest in the Land insured by this policy, a policy of title insurance without exception for the lien, encumbrance, adverse claim or defect, said policy to be in an amount equal to the current value of the Land or, if a mortgagee policy, the amount of the loan; (iv) indemnify another title insurance company in connection with its issuance of a policy(ies) of title insurance without exception for the lien, encumbrance, adverse claim or defect; (v) secure a release or other document discharging the lien, encumbrance, adverse claim or defect; or (vi) undertake a combination of (i) through (v) herein.

4. PROOF OF LOSS.
In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS.
(a) Upon written request by the Insured, and subject to the options contained in Sections 3 and 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.
(b) The Company shall have the right, in addition to the options contained in Sections 3 and 7, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.
(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction and it expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order. When the Company has reasonable grounds to dispute coverage under this policy, the Company may reserve its rights to pay the claim and the costs of defense and seek reimbursement from the Insured for all amounts paid for which there was no coverage.

6. DUTY OF INSURED CLAIMANT TO COOPERATE.
(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.
(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any

authorized representative of the Company to examine, inspect and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

(c) If the Insured demands that the Company accept a settlement offer that is not greater than the Amount of Insurance or if the Insured expressly agrees that a settlement offer should be accepted, the Company has a right to be reimbursed if it has timely asserted its reservation of rights and notified the Insured that it intends to seek reimbursement if it pays to settle or defend a claim that is not covered by the policy.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay. Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of:

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 3 or 5 and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the Title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the Land, all as insured, or takes action in accordance with Section 3 or 7, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE.
The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS.
When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT.
(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.
If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.
(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION.
Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.
(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim, shall be restricted to this policy.
(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.
(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy or (iv) increase the Amount of Insurance. Each Commitment, endorsement or other form, or provision in the Schedules to this policy that refers to a term defined in Section 1 of the Conditions shall be deemed to refer to the term regardless of whether the term is capitalized in the Commitment, endorsement or other form, or Schedule. Each Commitment, endorsement or other form, or provision in the Schedules that refers to the Conditions and Stipulations shall be deemed to refer to the Conditions of this policy.

16. SEVERABILITY.
In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid and all other provisions shall remain

in full force and effect.

17. CHOICE OF LAW; FORUM.

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured, and in interpreting and enforcing the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of laws principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT.

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at [fill in].

NOTE: Bracketed [ ] material optional

OWNER'S POLICY OF TITLE INSURANCE (Form T-1) 2014

Issued by

BLANK TITLE INSURANCE COMPANY

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at the address shown in Section 18 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

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

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:

   (a) A defect in the Title caused by:

      (i) forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation;

      (ii) failure of any person or Entity to have authorized a transfer or conveyance;

      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized or delivered;

      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;

      (v) a document executed under a falsified, expired or otherwise invalid power of attorney;

      (vi) a document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or

      (vii) a defective judicial or administrative proceeding.

   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.

   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

   (d) Any statutory or constitutional mechanic's, contractor's, or materialman's lien for labor or materials having its inception on or before Date of Policy.

3. Lack of good and indefeasible Title.

4. No right of access to and from the Land.

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:

(a) the occupancy, use or enjoyment of the Land;

(b) the character, dimensions or location of any improvement erected on the Land;

(c) subdivision of land; or

(d) environmental protection

if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

9. Title being vested other than as stated in Schedule A or being defective:

(a) as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency or similar creditors' rights laws; or

(b) because the instrument of transfer vesting Title as shown in Schedule A constitutes a preferential transfer under federal bankruptcy, state insolvency or similar creditors' rights laws by reason of the failure of its recording in the Public Records:

(i) to be timely, or

(ii) to impart notice of its existence to a purchaser for value or a judgment or lien creditor.

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: President ______________________

By: Secretary ______________________

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:

(i) the occupancy, use, or enjoyment of the Land;

(ii) the character, dimensions or location of any improvement erected on the Land;

(iii) subdivision of land; or

(iv) environmental protection;

or the effect of any violation of these laws, ordinances or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

(b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims or other matters:

(a) created, suffered, assumed or agreed to by the Insured Claimant;

(b) not 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 Claimant prior to the date the Insured Claimant became an Insured under this policy;

(c) resulting in no loss or damage to the Insured Claimant;

(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 9 and 10); or

(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.

4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is:

(a) a fraudulent conveyance or fraudulent transfer; or

(b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.

5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

6. The refusal of any person to purchase, lease or lend money on the estate or interest covered hereby in the land described in Schedule A because of Unmarketable Title.

SCHEDULE A

Name and Address of Title Insurance Company:
[File No.:] Policy No.:
[Address for Reference only:]
Amount of Insurance: $
[Premium: $] Date of Policy:
[at a.m./p.m.]

1. Name of Insured:
2. The estate or interest in the Land that is insured by this policy is:
3. Title is insured as vested in:
4. The land referred to in this policy is described as follows:

SCHEDULE B

File No. Policy No.

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of the terms and conditions of the leases and easements, if any, shown in Schedule A, and the following matters:

1. The following restrictive covenants of record itemized below (the Company must either insert specific recording data or delete this exception):
2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.
3. Homestead or community property or survivorship rights, if any, of any spouse of any Insured.
4. Any titles or rights asserted by anyone, including but not limited to, persons, the public, corporations, governments or other entities,
   (a) to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
   (b) to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
   (c) to filled-in lands, or artificial islands, or
   (d) to statutory water rights, including riparian rights, or
   (e) to the area extending from the line of mean low tide to the line of vegetation, or the right of access to that area or easement along and across that area.
5. Standby fees, taxes and assessments by any taxing authority for the year , and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year.

6. The following matters and all terms of the documents creating or offering evidence of the matters (The Company must insert matters or delete this exception).:

CONDITIONS

DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) “Amount of Insurance”: the amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Sections 10 and 11 of these Conditions.

(b) “Date of Policy”: The date designated as “Date of Policy” in Schedule A.

(c) “Entity”: A corporation, partnership, trust, limited liability company or other similar legal entity.

(d) “Insured": the Insured named in Schedule A.

(i) The term "Insured" also includes:

(A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives or next of kin;

(B) successors to an Insured by dissolution, merger, consolidation, distribution or reorganization;

(C) successors to an Insured by its conversion to another kind of Entity;

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title;

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) If the grantee wholly owns the named Insured,

(3) If the grantee 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) If the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

(ii) With regard to (A), (B), (C) and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

(e) "Insured Claimant": an Insured claiming loss or damage.

(f) "Knowledge" or "Known": actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(g) "Land": the land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land” does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(h) "Mortgage": mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(i) "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 Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(j) “Title”: the estate or interest described in Schedule A.

(k) "Unmarketable Title”: Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title to be released from the obligation to purchase, lease or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) below, or (ii) in case Knowledge shall come to an Insured hereunder of any claim of title or interest that is adverse to the Title, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

When, after the Date of the Policy, the Insured notifies the Company as required herein of a lien, encumbrance, adverse claim or other defect in Title insured by this policy that is not excluded or excepted from the coverage of this policy, the Company shall promptly investigate the charge to determine whether the lien, encumbrance, adverse claim or defect or other matter is valid and not barred by law or statute. The Company shall notify the Insured in writing, within a reasonable time, of its determination as to the validity or invalidity of the Insured's claim or charge under the policy. If the Company concludes that the lien, encumbrance, adverse claim or defect is not covered by this policy, or was otherwise addressed in the closing of the transaction in connection with which this policy was issued, the Company shall specifically advise the Insured of the reasons for its determination. If the Company concludes that the lien, encumbrance, adverse claim or defect is valid, the Company shall take one of the following actions: (i) institute the necessary proceedings to clear the lien, encumbrance, adverse claim or defect from the Title as insured; (ii) indemnify the Insured as provided in this policy; (iii) upon payment of appropriate premium and charges therefore, issue to the Insured

Claimant or to a subsequent owner, mortgagee or holder of the estate or interest in the Land insured by this policy, a policy of title insurance without exception for the lien, encumbrance, adverse claim or defect, said policy to be in an amount equal to the current value of the Land or, if a loan policy, the amount of the loan; (iv) indemnify another title insurance company in connection with its issuance of a policy(ies) of title insurance without exception for the lien, encumbrance, adverse claim or defect; (v) secure a release or other document discharging the lien, encumbrance, adverse claim or defect; or (vi) undertake a combination of (i) through (v) herein.

4. PROOF OF LOSS.

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS.

(a) Upon written request by the Insured, and subject to the options contained in Sections 3 and 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Sections 3 and 7, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction and it expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in this subsection, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay. Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the lesser of:

(i) the Amount of Insurance; or

(ii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy.

(b) If the Company pursues its rights under Section 3 or 5 and is unsuccessful in establishing the Title, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In addition to the extent of liability under (a) and (b), the Company will also pay those costs, attorneys' fees and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the Title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the Land, all as insured, or takes action in accordance with Section 3 or 7, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.
All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE.
The Amount of Insurance shall be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject or which is executed by an Insured after Date of Policy and which is a charge or lien on the Title, and the amount so paid shall be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS.
When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

13. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT.

(a) Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Company's right of subrogation includes the rights of the Insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

14. ARBITRATION.

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or by any action asserting such claim, shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy or (iv) increase the Amount of Insurance. Each Commitment, endorsement or other form, or provision in the Schedules to this policy that refers to a term defined in Section 1 of the Conditions shall be deemed to refer to the term regardless of whether the term is capitalized in the Commitment, endorsement or other form, or Schedule.

Each Commitment, endorsement or other form, or provision in the Schedules that refers to the Conditions and Stipulations shall be deemed to refer to the Conditions of this policy.

16. SEVERABILITY.

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid and all other provisions shall remain in full force and effect.

17. CHOICE OF LAW; FORUM.

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title that are adverse to the Insured, and in interpreting and enforcing the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of laws principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

18. NOTICES, WHERE SENT.

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at [fill in].

NOTE: Bracketed [ ] material optional

Texas Form T-1R Owner's Policy--Residential

BLANK TITLE INSURANCE COMPANY

TEXAS RESIDENTIAL OWNER POLICY OF TITLE INSURANCE
ONE-TO-FOUR FAMILY RESIDENCES

OWNER'S INFORMATION SHEET

Your Title Insurance Policy is a legal contract between you and ____________ Title Insurance Company. This policy is not an opinion or report of your title. it is a contract of indemnity, meaning a promise to pay you or to take other action if you have a loss resulting from a covered title risk. It applies only to an improved one-to-four family residential property or condominium unit. If your land is not either of these, contact us immediately.	Su po1iza de Seguro de Titulo es un contrato legal entre usted y ____________ Title Insurance Company. Esta poliza no es una opinion o reports en relacion a su titulo de propiedad. Es un contrato de indemnification, esto es, la promesa de reembolsarle o de tomar cualquier otro tipo de accion si usted sufre una perdida como resultado de cualquier riesgo cubierto por la poliza. Esta forma de poliza ha sido designada para ser utilizada exclusivamente en los casos de propiedades en las cuales hay constuidas viviendas pcaa no mas de cuatro familias o unidades en condominios. Si su propiedad no es ninguna de las anteriores, por favor, notifiquenos immediatamente.

We insure you against certain risks to your land title. We list these risks on page ______. The following limit your coverage:

- Exclusions on page ______.
- Exceptions on Schedule B.
- Conditions on pages ______.

You should keep the policy even if your transfer the title to your land. If you want to make a claim, see Section 3 under Conditions on page ______.

You do not owe any more premiums for the Policy.

This sheet is not your insurance Policy. It is only a brief outline of some of the important Policy features. The Policy explains in detail your rights and obligations and our rights and obligations. The Policy - and not this sheet - is the legal document. **YOU SHOULD READ THE POLICY VERY CAREFULLY.**
THE TOLL-FREE NUMBER OF ___________ TITLE INSURANCE COMPANY IS 1-800-______-___________. YOU MAY CALL THIS NUMBER TO DISCUSS THIS POLICY OR TO MAKE A COMPLAINT. YOU MAY WRITE TO ________ TITLE INSURANCE COMPANY AT THE ADDRESS IN SECTION 3 UNDER CONDITIONS ON PAGE _________.

Texas Form T-1R Owner's Policy--Residential

BLANK TITLE INSURANCE COMPANY

TEXAS RESIDENTIAL OWNER POLICY OF TITLE INSURANCE
ONE-TO-FOUR FAMILY RESIDENCES

TABLE OF CONTENTS

OWNER'S COVERAGE STATEMENT

This Policy insures your title to the land described in Schedule A - if that land is a one-to-four family residential property or condominium unit.

Your insurance, as described in this Coverage Statement, is effective on the Policy Date shown in Schedule A.

This document is title insurance. It is not an opinion or report of your title. it is a contract of indemnity, meaning a promise to pay you or take other action if you have loss resulting from a covered title risk.

Your insurance under this contract is limited by the following:

- Exclusions on page ______.
- Exceptions on Schedule B, page ______.
- Conditions on pages ______.

We insure you against actual loss resulting from:

- Any title risks covered by this Policy - up to the Policy Amount, and

- Any costs, attorneys' fees and expenses we have to pay under this Policy. We must approve the attorney before the attorney begins to work. You have the right to disapprove our choice of attorney for reasonable cause.

COVERED TITLE RISKS

This Policy covers the following title risks subject to the Exceptions (p. ______) and Exclusions (p. ______), if they affect your title to the land on the Policy Date. We do not promise that there are no covered risks. We do insure you if there are covered title risks.

1. Someone else owns an interest in your title.
2. A document is invalid because of improper signature, acknowledgment, delivery, or recording.
3. A document is invalid because of forgery, fraud, duress, incompetency, incapacity or impersonation.
4. Restrictive covenants apply to your title.
5. There is a lien on your title because of:
   - a mortgage or deed of trust,
   - a judgment, tax, or special assessment, or
   - a charge by a homeowner's or condominium association.
6. There are liens on your title for labor and material which have their inception before the policy date. However, we will not cover liens for labor and material that you agreed to pay for.
7. Others have rights in your title arising our of leases, contracts or options.
8. Someone else has an easement on your land.
9. You do not have good and indefeasible title.
10. There are other defects in your title.
11. There are other liens or encumbrances on your title.

This Policy also covers the following title risk:
You do not have any legal right of access to and from the land.

Texas Form T-1R Owner's Policy--Residential

OUR DUTY TO DEFEND AGAINST COURT CASES

We will defend your title in the part or parts of a court case involving a Title Risk covered by this Policy. We will pay the costs, attorneys' fees, and expenses that we incur in that defense. We will not pay for the parts of a case not involving a covered title risk. You may disapprove our choice of attorney for reasonable cause.

We can end this duty to defend your title by exercising any of our options listed in Item 4 of the Conditions, see page ______.

This Policy is not complete without Schedules A and B.

BLANK TITLE INSURANCE COMPANY

BY:____
President

An authorized party also must countersign this Policy.

[Witness clause optional]

____
(Authorized Signature)

BY:____
Secretary

____
(Authorized Signature)

SCHEDULE A

Policy Number: File Number:
Policy Date:
Policy Amount:
Premium:

1. Name of Insured:
2. We insure your interest in the land covered by this Policy is:
3. Legal Description of land:

SCHEDULE B

EXCEPTIONS

We do not cover loss, costs, attorneys' fees and expenses resulting from:

1. The following restrictive covenants of record itemized below (We must either insert specific recording data or delete this exception.):
2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.
3. Homestead or community property or survivorship rights, if any, of any spouse of any insured. (Applies to the Owner Policy only.)
4. Any titles or rights asserted by anyone, including, but not limited to, persons, the public, corporations, governments or other entities,
   a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
   b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
   c. to filled-in lands, or artificial islands, or
   d. to statutory water rights, including riparian rights, or
   e. to the area extending from the line of mean low tide to the line of vegetation, or the rights of access to that area or easement along and across that area.
5. Standby fees, taxes and assessments by any taxing authority for the year 19______ and subsequent year, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership.
6. The following matters and all terms of the documents creating or offering evidence of the matters (We must insert matters or delete this exception.):

Texas Form T-1R Owner's Policy--Residential

EXCLUSIONS

In addition to the Exception in Schedule B, we do not insure you against loss, costs, attorneys' fees, and expenses resulting from these Exclusions:

1. We do not cover loss caused by the exercise of governmental police power or the enforcement or violation of any law or government regulation. This includes building and zoning ordinances and laws and regulations concerning:
   a. Land use
   b. Improvements on the land
   c. Land division
   d. Environmental protection

This exclusion does not apply to notices of violations or notices of enforcement that appear in the public records at Policy Date. However, there may be an Exception in Schedule B.

2. We do no cover the right to take the land by condemning it, unless:
   a. a notice of exercise of the right appears in the public records on the Policy Date, or
   b. the taking happened before the Policy Date and is binding on you if you bought the land without knowing of the taking.

3. We do not cover title risks:
   a. that are created, allowed, or agreed to by you,
   b. that are known to you, but not to us on the Policy Date unless they appeared in the public records,
   c. that result in no loss to you, or
   d. that first affect your title after the Policy Date - this does not limit the labor and material lien coverage in Item 6 of the Covered Title Risks.

4. We do not cover the effect of failure to pay value for your title.

5. We do not cover lack of a right:
   a. to any land outside the area specifically described and referred to in item 3 of Schedule A.
   b. in streets, alleys, or waterways that touch your land.

This exclusion does not limit the access coverage in the Covered Title Risks.

6. We do not cover any claim based upon allegations that your purchase of title (or acquisition of title by gift or otherwise):
   a. was a fraudulent conveyance, fraudulent transfer, voidable distribution, or voidable dividend;
   b. should be subordinated or recharacterized as a result of equitable subordination;
   c. was a preferential transfer unless
      (1) the Company or its issuing agent failed to timely file for record the deed to you after delivery or
      (2) the recordation of the deed to you is not legal record notice.

   (We do cover the two types of claims described in c. (1) and c. (2) above.)

7. We do not cover the refusal of any person to buy, lease or lend money on your land because of unmarketability of the title.

8. We do not cover claims concerning the physical condition of your land or of the access to your land.

CONDITIONS

1. DEFINITIONS
   a. **Actual Loss.** This is the difference between the value of your land without the covered title risk and the value of your land with the covered title risk. These values are the respective values at the time you must furnish proof of your loss.
   b. **Document.** A deed or other conveyance of title to you or a prior owner.
   c. **Easement.** A portion of your land someone else has the right to use for a special purpose.
   d. **Government Regulation.** Any federal, state, or local law, constitutional provision, regulation, ordinance, or guideline.
   e. **Land.** The land or condominium unit described in Schedule A and any improvements on the land that are real property.
   f. **Knowledge or known.** Actual knowledge, not constructive knowledge or notice that may be imputed to an insured by the public records.
   g. **Mortgage.** A type of lien on the land such as a deed of trust or other security instrument.
   h. **Public Records.** Those records required by Texas law and maintained by public officials in the county where the property is located that give legal notice of matters affecting your title.
   i. **Title.** The ownership interest in the land, as shown in Schedule A.
   j. **We, us or our.** The title insurance company. This is ____________________ (insert name of company.)
   k. **You, your.** The insured.

2. CONTINUATION OF COVERAGE

We insure you as long as you:
   a. own your Title,
   b. own a mortgage from anyone who buys your Title, or
   c. are liable for and Title warranties you make.

We insure anyone who receives your title because of your death.
We do not insure your transferee or assignee.

3. YOUR DUTIES IF YOU MAKE A CLAIM.

You must follow this process to make a claim:
   a. You Must give Us Notice Of Your Claim
      If anyone claims a right against your insured title, you must notify us promptly.
      Send the notice to __________________ or call 1-800-_______ ask for a claims attorney. If you initially notify us by phone, we recommend that you also notify us in writing. Please include the Policy number shown in Schedule A, and the county where the land is.

   Our obligation to you is reduced or ended if:
   (1) you fail to give prompt notice, and
   (2) your failure affects our ability to dispose of or to defend you against the claim.

   Our obligation is reduced only the extent that your failure affects our ability to dispose of or to defend you against the claim.
   b. You Must Give Us Proof of Your Loss if We Request It
      You must send to us, if we request, your signed proof of loss within 91 days of our request on a standard form supplied by us. Within 15 days after we receive your notice of claim, we must request a signed proof of loss. If not, we waive our right to require a proof of loss. This waiver will not waive our other rights under the policy. The statement must have the following information to the best of your knowledge:
      (1) the Covered Title Risks which resulted in your loss,
      (2) the dollar amount of your loss, and
      (3) the method you used to compute the amount of your loss.
   c. You Must Provide Papers We Request
      We may require you to show us your records, checks, letters, contracts, and other papers that relate to your claim of loss. We may make copies of these papers.
      If you tell us this information is confidential, we will not disclose it to anyone else unless we reasonably believe the disclosure is necessary to administer the claim.

   d. You Must Answer Questions Under Oath
      We may require you to answer questions under oath.

e. Effect of Failure to Cooperate.
Our obligation to you reduces or ends if you fail or refuse to:
(1) (a) provide a statement of loss,
(b) answer our questions under oath, or
(c) show us the papers we request, and
(2) your failure or refusal effects our ability to dispose of or to defend you against the claim.

4. OUR CHOICES WHEN YOU NOTIFY US OF A CLAIM

a. After we receive your claim notice or in any other way learn of a matter for which we are liable, we can do one or more of the following:
(1) Pay the claim against your title.
(2) Negotiate a settlement.
(3) Prosecute or defend a court case related to the claim.
(4) Pay you the amount required by this Policy.
(5) Take other action under Section 4b.
(6) Cancel this policy by paying the Policy Amount, then in force, and only those costs, attorneys' fees and expenses incurred up to that time that we are obligated to pay.

We can choose which of these to do.

b. If you report to us that a covered title risk exists, we will promptly investigate to determine if that covered title risk is valid and not barred by law or statute. A covered title risk is a title risk that this Policy does not exclude or except.
If we conclude that your claim, or any part of your claim, is covered by the policy, we will take one or more of the following actions to the extent that it is covered:
(1) Institute all necessary legal proceedings to clear the title to the property.
(2) Indemnify you pursuant to the terms of the policy;
(3) Issue a new title policy without making exception to the covered title risk. If another insurer issues the new title policy to your purchaser, lender or other transferee without making exception to the covered title risk, we will indemnify the other insurer.
(4) Secure a release of the covered title risk.

c. If we deny your claim, or any part of your claim, not more than 15 days after we deny the claim, we will:
(1) notify you in writing, and
(2) give you the reasons for denial of your claim in writing.

5. HANDLING A CLAIM OR COURT CASE

You must cooperate with us in handling any claim or court case and give us all relevant information.
We must repay you only for those settlement costs, attorneys' fees and expenses that we approve in advance.
When we defend or sue to clear your title, we have a right to choose the attorney. You have the right to disapprove our choice of attorney for reasonable cause. We can appeal any decision to the highest court. We do not have to pay your claim until your case is finally decided. We do not agree that the matter is a covered title risk by defending.

6. LIMITATIONS OF OUR LIABILITY

Our liability is limited by the following:

a. We will pay up to your actual loss of the Policy Amount in force when the claim is made - whichever is less.

b. If we remove the claim against your title with reasonable diligence or take other action under this policy after receiving notice of it, we will have no further liability for it.

c. All payments we make under this policy - except for costs, attorneys' fees and expenses - will be subtracted from your Policy Amount.

d. If the Covered Title Risk is an easement, we may pay an insured mortgage holder instead of paying you when a written agreement between you and the mortgage holder allows. If the claim involves another Covered Title Risk, we may pay the mortgage holder instead of paying you. The amount paid to the mortgage holder is considered a payment to you under your policy and will be subtracted from your policy amount.

e. If you do anything to affect any right of recovery or defense you may have, we can subtract from our liability the amount by which you reduced the value of that right or defense. But we must add back to our liability any amount by which our expenses are reduced as a result of your action.

7. TRANSFER OF YOUR RIGHTS
When we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must not do anything to affect these rights. You must let us use your name in enforcing these rights.
We will not be liable to you if we do not pursue these rights or if we do not recover any amount that might be recoverable.
With the money we recover from enforcing these rights, we will pay whatever part of your loss we have not paid. We have a right to keep what is left.

8. ARBITRATION
If it is permitted under Texas or federal law, you and we may agree to arbitration when you file a claim. The arbitration may decide any matter in dispute between you and us.
Arbitration is one means of alternative dispute resolution. It may lessen the time and cost of claims settlement. You may wish to consider another form of mediation or use the court system. If you choose arbitration, you may give up some discovery rights and your right to sue.
The arbitration award may:

a. include attorneys' fees if allowed by state law, and/or
b. be entered as a judgment in the proper court.

The arbitration shall be under the Title Insurance Arbitration Rules of the American Arbitration Association. You may choose current Rules or Rules in existence on Policy Date.
The law used in the arbitration is the law of the place where the property is located.
You can get a copy of the Rules from us.

9. ENTIRE CONTRACT PROVISION
This policy and any endorsements we attach are the entire contract between you and us. Any claim you make against us must be under this Policy and is subject to its terms.

10. COMPLAINT NOTICE
Should any dispute arise about your premium or about a claim that you have filed, contact the agent or write to us. OUR TOLL-FREE NUMBER IS __________________. If we do not resolve the problem, you also may write the Texas Department of Insurance, P.O. Box 149091, Austin, TX 78714-9091, FAX No. (512) 475-1771. THE TOLL-FREE NUMBER FOR THE TEXAS DEPARTMENT OF INSURANCE IS 1-800-252-3439.

This notice of complaint procedure is for information only. It does not become a part of condition of this policy.

Texas Form T-2 Mortgagee Policy

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS, BLANK TITLE INSURANCE COMPANY, a Blank corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 11, 13 and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

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

2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:

(a) A defect in the Title caused by:

(i) forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation;

(ii) failure of any person or Entity to have authorized a transfer or conveyance;

(iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized or delivered;

(iv) failure to perform those acts necessary to create a document by electronic means authorized by law;

(v) a document executed under a falsified, expired or otherwise invalid power of attorney;

(vi) a document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or

(vii) a defective judicial or administrative proceeding.

(b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.

(c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

3. Lack of good and indefeasible Title.

4. No right of access to and from the Land.

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to:

(a) the occupancy, use or enjoyment of the Land;

(b) the character, dimensions or location of any improvement erected on the Land;

(c) subdivision of land; or

(d) environmental protection

if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.

7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.

8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage:

(a) forgery, fraud, undue influence, duress, incompetency, incapacity or impersonation;

(b) failure of any person or Entity to have authorized a transfer or conveyance;

(c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized or delivered;

(d) failure to perform those acts necessary to create a document by electronic means authorized by law;

(e) a document executed under a falsified, expired or otherwise invalid power of attorney;

(f) a document not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or

(g) a defective judicial or administrative proceeding.

10. The lack of priority of the lien of the Insured Mortgage over any other lien or encumbrance.

11. The lack of priority of the lien of the Insured Mortgage

(a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory or constitutional mechanic’s, contractor’s, or materialman’s lien for services, labor or material having its inception on or before Date of Policy ; and

(b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.

12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.

13. The invalidity, unenforceability, lack of priority or avoidance of the lien of the Insured Mortgage:

(a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency or similar creditors’ rights laws; or

(b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency or similar creditors’ rights laws by reason of the failure of its recording in the Public Records:

(i) to be timely, or

(ii) to impart notice of its existence to a purchaser for value or a judgment or lien creditor.

14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

BLANK TITLE INSURANCE COMPANY
BY:______________________________
PRESIDENT
BY:______________________________
SECRETARY

Texas Form T-2 Loan Policy

EXCLUSIONS FROM COVERAGE

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

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to: (i) the occupancy, use, or enjoyment of the Land; (ii) the character, dimensions or location of any improvement erected on the Land; (iii) subdivision of land; or (iv) environmental protection; or the effect of any violation of these laws, ordinances or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.

(b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.

2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.

3. Defects, liens, encumbrances, adverse claims or other matters:
(a) created, suffered, assumed or agreed to by the Insured Claimant;
(b) not 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 Claimant prior to the date the Insured Claimant became an Insured under this policy;
(c) resulting in no loss or damage to the Insured Claimant;
(d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13 or 14); or
(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.

4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing business laws of the state where the Land is situated.

5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth in lending law.

6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is:
(a) a fraudulent conveyance or fraudulent transfer; or
(b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.

7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

8. The refusal of any person to purchase, lease or lend money on the estate or interest covered hereby in the land described in Schedule A because of Unmarketable Title.

SCHEDULE A

Name and Address of Title Insurance Company:

[File No.:] Policy No.:

Loan No.:

[Address for Reference only:]

Amount of Insurance: $ [Premium: $]

Date of Policy: [at a.m./p.m.]

1. Name of Insured:

2. The estate or interest in the Land that is encumbered by the Insured Mortgage is:

3. Title is insured as vested in:

4. The Insured Mortgage, and its assignments, if any, are described as follows:

5. The Land referred to in this policy is described as follows:

6. This policy incorporates by reference those endorsements selected below:
o T-5 (Leasehold Mortgagee Policy Endorsement)
o T-17 (Planned Unit Development)
o T-19 (Restrictions, Encroachments, Minerals)
o T-19.2 (Minerals and Surface Damage)
o T-19.3 (Minerals and Surface Damage)
o T-28 (Condominium)
o T-31 (Manufactured Housing) referring to manufactured housing unit serial number _______
o T-31.1 (Supplemental Coverage Manufactured Housing Unit)
o T-33 (Variable Rate)
o T-33.1 (Variable Rate--Negative Amortization)
T-35 (Revolving Credit/Future Advance)
o T-36 (Environmental Protection Lien) Paragraph b refers to the following state statute(s):
o T-39 (Balloon Mortgage)
o T-42 (Equity Loan Mortgage) and subparagraph 2(f) of the Equity Loan Mortgage Endorsement set forth in Procedural Rule P-44.C(2) __ is ___ is not added.
o T-42.1 (Supplemental Coverage Equity Loan Mortgage)
o T-43 (Texas Reverse Mortgage)
o Section 13 of the Conditions of this policy, which relates to Arbitration, is hereby deleted.

[The Company may insert or preprint all or part of paragraph 6 as applicable and may delete boxes or substitute lines for boxes. The Company also may substitute the following at the beginning of paragraph 6: “This policy incorporates by reference those endorsements shown below:”]

Texas Form T-2 Loan Policy

SCHEDULE B
[File No.] . Policy No.
EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of the terms and conditions of leases and easements, if any, shown in Schedule A, and the following matters:

1. The following restrictive covenants of record itemized below, but the Company insures that any such restrictive covenants have not been violated so as to affect, and that future violation thereof will not affect, the validity or priority of the Insured Mortgage (insert specific recording data or delete this exception):

2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.
o Item 2 of Schedule B is hereby amended to read: "shortages in area".

3. Standby fees, taxes and assessments by any taxing authority for the year ___, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year.

[Item 3 of Schedule B is hereby amended to delete: "and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership,"]

[Item 3 of Schedule B is hereby amended to add the following: "Company insures that standby fees, taxes and assessments by any taxing authority for the year ____ are not yet due and payable."]

4. Liens and leases that affect the Title, but that are subordinate to the lien of the Insured Mortgage.

5. (Insert here all other specific exceptions as to superior liens, easements, outstanding mineral and royalty interests, etc.)

CONDITIONS

1. DEFINITION OF TERMS.

(a) "Amount of Insurance": the amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b), or decreased by Section 10 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company or other similar legal entity.

(d) "Indebtedness": The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of:

(i) the amount of the principal disbursed as of Date of Policy;

(ii) the amount of the principal disbursed subsequent to Date of Policy;

(iii) construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;

(iv) interest on the loan;

(v) prepayment premiums, exit fees and other similar fees or penalties allowed by law;

(vi) expenses of foreclosure and any other costs of enforcement;

(vii) amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;

(viii) amounts to pay taxes and insurance; and,

(ix) reasonable amounts expended to prevent deterioration of improvements;

but reduced by the total of all payments and by any amount forgiven by an Insured.

(e) "Insured": the Insured named in Schedule A.

(i) The term "Insured" also includes:

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor

who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) if the Indebtedness is evidenced by a "transferable record," the person or Entity who has "control" of the "transferable record," as these terms are defined by applicable electronic transactions law;

(C) successors to an Insured by dissolution, merger, consolidation, distribution or reorganization;

(D) successors to an Insured by its conversion to another kind of Entity;

(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title:

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) If the grantee wholly owns the named Insured, or

(3) If the grantee 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;

(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;

(ii) With regard to (A), (B), (C), (D) and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance or other matter insured against by this policy.

(f) "Insured Claimant": an Insured claiming loss or damage.

(g) “Insured Mortgage”: the Mortgage described in paragraph 4 of Schedule A.

(h) "Knowledge" or "Known": actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(i) "Land": the land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land” does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(j) "Mortgage": mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(k) "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 Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(l) “Title”: the estate or interest described in Schedule A.

(m) "Unmarketable Title”: Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE.

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) below, or (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

Subject to the provisions of this policy, upon acquisition of all or any part of the Title pursuant to the provisions of Section 2 of these Conditions, when, after the Date of the Policy, the Insured notifies the Company as required herein of a lien, encumbrance, adverse claim or other defect in Title insured by this policy that is not excluded or excepted from the coverage of this policy, the Company shall promptly investigate the charge to determine whether the lien, encumbrance, adverse claim or defect or other matter is valid and not barred by law or statute. The Company shall notify the Insured in writing, within a reasonable time, of its determination as to the validity or invalidity of the Insured's claim or charge under the policy. If the Company concludes that the lien, encumbrance, adverse claim or defect is not covered by this policy, or was otherwise addressed in the closing of the transaction in connection with which this policy was issued, the Company shall specifically advise the Insured of the reasons for its determination. If the Company concludes that the lien, encumbrance, adverse claim or defect is valid, the Company shall take one of the following actions: (i) institute the necessary proceedings to clear the lien, encumbrance, adverse claim or defect from the Title as insured; (ii) indemnify the Insured as provided in this policy; (iii) upon payment of appropriate premium and charges therefor, issue to the Insured Claimant or to a subsequent owner, mortgagee or holder of the estate or interest in the Land insured by this policy, a policy of title insurance without exception for the lien, encumbrance, adverse claim or defect, said policy to be in an amount equal to the current value of the Land or, if a mortgagee policy, the amount of the loan; (iv) indemnify another title insurance company in connection with its issuance of a policy(ies) of title insurance without exception for the lien, encumbrance, adverse claim or defect; (v) secure a release or other document discharging the lien, encumbrance, adverse claim or defect; or (vi) undertake a combination of (i) through (v) herein.

4. PROOF OF LOSS.

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS.

(a) Upon written request by the Insured, and subject to the options contained in Sections 3 and 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Sections 3 and 7, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction and it expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) to pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) to purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

8. DETERMINATION AND EXTENT OF LIABILITY.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of:

(i) the Amount of Insurance;

(ii) the Indebtedness;

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy; or

(iv) if a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.

(b) If the Company pursues its rights under Section 3 or 5 and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

(d) In addition to the extent of liability under (a), (b) and (c), the Company will also pay those costs, attorneys' fees and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the Title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the Land, or establishes the lien of the Insured Mortgage, all as insured, or takes action in accordance with Section 3 or 7, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

(a) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the Indebtedness.

(b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

11. PAYMENT OF LOSS.

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right to Recover.

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

(b) The Insured's Rights and Limitations.

(i) The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

(ii) If the Insured exercises a right provided in (b)(i), but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

(c) The Company's Rights Against Non-insured Obligors.

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights. The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(i)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an Insured under this policy.

13. ARBITRATION.

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is $2,000,000 or less shall be arbitrated at the option of either the Company or the Insured, unless the Insured is an individual person (as distinguished from an Entity). All arbitrable matters when the Amount of Insurance is in excess of $2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim, shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy or (iv) increase the Amount of Insurance. Each Commitment, endorsement or other form, or provision in the Schedules to this policy that refers to a term defined in Section 1 of the Conditions shall be deemed to refer to the term regardless of whether the term is capitalized in the Commitment, endorsement or other form, or Schedule. Each

Commitment, endorsement or other form, or provision in the Schedules that refers to the Conditions and Stipulations shall be deemed to refer to the Conditions of this policy.

15. SEVERABILITY.

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid and all other provisions shall remain in full force and effect.

16. CHOICE OF LAW; FORUM.

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefore in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies or enforcement of policies of title insurance of the jurisdiction where the Land is located.

Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured, and in interpreting and enforcing the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of laws principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

17. NOTICES, WHERE SENT. Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at [fill in].

NOTE: Bracketed [ ] material optional

Texas Form T-13 Loan Policy Binder on Interim Construction Loan

MORTGAGEE TITLE POLICY BINDER ON INTERIM CONSTRUCTION LOAN

The Company commits to issue a Mortgagee Policy of Insurance to the Proposed Insured as of the Date and Time and in the Amount shown on SCHEDULE A hereof and insuring the Lien described in SCHEDULE A hereof, subject to the exceptions shown in SCHEDULE B hereof and pursuant to the requirements herein made and in the form then promulgated by the State Board of Insurance of the State of Texas.

Upon receipt of evidence showing compliance with and satisfaction of the requirements set forth under SCHEDULE C of this Binder, or in the event that said requirements are not complied with that proper exception is taken, and upon payment of the applicable premium therefor, the Company will issue its Mortgagee Policy in the face amount and as of the date and time set forth and covering the lien described in SCHEDULE A hereof.

Nothing herein contained shall be construed as insurance against the effect of zoning ordinances, if any, or the consequences of the exercise and enforcement or attempted enforcement of governmental "Police Power" over the property. No inspection of the premises has been made by this company or its Agent, and this Binder is subject to any state of facts that a physical inspection would show.

This Binder is delivered and accepted upon the understanding that you have no personal knowledge or intimation of any defect, objection, lien or encumbrance affecting said premises other than those shown under SCHEDULE B hereof, and your failure to disclose any such personal information shall render this Binder and any policy issued based thereon, null and void as to such defects, objections, liens and encumbrances.

This Binder shall not be binding until it shall have been countersigned by an Officer or Agent of the Company.

This Binder is preliminary to the issuance of the Mortgagee Policy referred to above, and in no even shall it be effective after one year from the date set forth in SCHEDULE A hereof unless extended in writing for a term or terms prescribed by the regulations of the Texas Department of Insurance and unless the premium of such extension is paid.

The Company's liability hereunder shall be determined by Exclusions from Coverage, and the terms, conditions and stipulations of the Mortgagee Policy referred to above; provided that the Company shall have no liability unless and until payment is made of the applicable premium for the above referred to Mortgagee Policy.

EXECUTED as of the date and hour above shown.

__________________ TITLE INSURANCE COMPANY

BY ____________Authorized Officer or Agent

Texas Form T-13 Loan Policy Binder on Interim Construction Loan

SCHEDULE A

AMOUNT: NUMBER:

Date and Time of Binder ______________________________at ______a.m./p.m.

Proposed Insured:

Proposed Borrower:

Recorded title at the date hereof appears vested in:

DESCRIPTION OF THE LIEN (must have been filed for record):

LEGAL DESCRIPTION of the property referred to in this Binder.

SCHEDULE B - Part 1

Showing defects, objections, liens, exceptions and reservations, to be shown as exceptions under SCHEDULE B of the Policy:

1. The following restrictive covenants of record itemized below, but the Company insures that any such restrictive covenants have not been violated so as to affect, and that a future violation thereof will not affect, the validity or priority of the mortgage hereby insured (insert specific recording data or delete this exception):

2. Any discrepancies, conflicts or shortages in area or boundary lines, or any encroachments, or protrusions, or any overlapping of improvements.

3. Standby fees, taxes and assessments by any taxing authority for the year 19_____ and subsequent years, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership.

4. In the event a Mortgagee Policy is issued prior to the improvements having been completed and accepted by the owner, and before satisfactory evidence that all outstanding bills have been paid or satisfied has been furnished to the Company issuing said Mortgagee Policy, an additional exception will be inserted under Schedule B of said Mortgagee Policy, excepting to "Mechanic's and materialmen's liens," as well as "pending disbursements" (if applicable), the wording of said exception being as promulgated by the Texas Department of Insurance and specifically set out as Rule P8b3 in the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

5. (Insert here all other specific exceptions as to liens, easements, outstanding mineral and royalty interests, etc., which will be shown as exceptions under SCHEDULE B of the Mortgagee Policy.)

SCHEDULE B - Part 2

Showing matters that affect the title to the estate or interest in the land described or referred to in **SCHEDULE A,** but the Company commits to insure the Proposed Insured in the Mortgagee Policy against loss, if any, sustained by said Insured under the Policy if said matters are not subordinate to the lien described in **SCHEDULE A.**

SCHEDULE C

Showing requirements to be complied with; defects and objections to be removed or eliminated, and liens and encumbrances to be satisfied and discharged of record before the policy will be issued without exceptions thereto:

1. Evidence satisfactory to the Company that:

   (a) No materials have been furnished or any labor performed in connection with the construction contemplated here under prior to the execution, acknowledgment and delivery of the lien instrument described under SCHEDULE A hereof, if the land described under SCHEDULE A forms any part of the homestead of the owner. (This item may be deleted if satisfactory evidence is furnished before binder is issued.)

   (b) Improvements have been completed and accepted by the owner.

   (c) All bills for labor and materials have been paid in full and no mechanic's, laborer's or materialmen's liens have attached.

   (d) Restrictions or restrictive covenants have not been violated.

2. Payment of the full consideration to, or for the account of, the grantors or mortgagors.

3. Payment of all standby fees, taxes, charges and assessments levied or assessed against the subject estate or interest, which are currently due and payable.

4. Satisfactory evidence of legal right of access to and from the land.

5. (Here show outstanding liens or other matters which must be disposed of at or before issuance of policy.)

1987 ALTA Closing Protection Letter

BLANK TITLE INSURANCE COMPANY

[Addressee]

Date: ____________

Re: Closing Protection Letter

Dear :

When title insurance of Blank Title Insurance Company (the "Company") is specified for your protection in connection with closings of real estate transactions in which you are to be the lessee or purchaser of an interest in land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by an Issuing Agent (an agent authorized to issue title insurance for the Company) or an Approved Attorney (an attorney upon whose certification of title the Company issues title insurance) and when such loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or

2. Fraud or dishonesty of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with such closings.

If you are a lender protected under the foregoing paragraph, your borrower in connection with a loan secured by a mortgage on a one to four family dwelling shall be protected as if this letter were addressed to your borrower.

<u>Conditions and Exclusions</u>

A. The Company will not be liable to you for loss arising out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in said binder or commitment shall not be deemed to be inconsistent.

2. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.

3. Mechanics' and materialmen's liens in connection with your purchase or lease or construction loan transactions, except to the extent that protection against such liens is afforded by a title insurance binder, commitment or policy of the Company.

B. If the closing is to be conducted by an Issuing Agent or Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Issuing Agent or Approved Attorney.

C. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation.

D. Any liability of the Company for loss incurred by you in connection with closings of real estate transactions by an Issuing Agent or Approved Attorney shall be limited to the protection provided by this letter. However, this letter shall not affect the protection afforded by a title insurance binder, commitment or policy of the Company.

E. Claims shall be made promptly to the Company at its principal office at _____. When the failure to give prompt notice shall prejudice the Company, then liability of the Company hereunder shall be reduced to the extent of such prejudice.

F. The protection herein offered does not extend to real property transactions in the states of Florida, Iowa, New Jersey, Nebraska, Kansas, New Mexico, New York and Texas. Insured closing letters have been regulated under the laws of those states.

G. Notwithstanding your instructions to the Issuing Agent or Approved Attorney, nothing herein shall be construed to impose any liability on the Company on account of any consumer credit protection, truth-in-lending, or similar law, or the provisions of the Flood Disaster Protection Act of 1973.

The protection herein offered will be effective upon receipt by the Company of your acceptance in writing, which may be made on the enclosed copy hereof and will continue until cancelled by written notice from the Company.

Any previous insured closing service letter or similar agreement is hereby cancelled except as to closings of your real estate transactions regarding which you have previously sent or within 30 days hereafter send written closing instructions to the Issuing Agent or Approved Attorney.

BLANK TITLE INSURANCE COMPANY

BY:______________________________

____

(Title)

Accepted: _____________________________, 19______

____

By:___________________________

(Title)

2008 ALTA Closing Protection Letter

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee:
Date:

Name of Issuing Agent or Approved Attorney (hereafter, "Issuing Agent" or "Approved Attorney", as the case may require): *[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Re: Closing Protection Letter

Dear

Blank Title Insurance Company (the "Company") agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with closings of real estate transactions conducted by the Issuing Agent or Approved Attorney, provided:

(A) title insurance of the Company is specified for your protection in connection with the closing; and

(B) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land

and provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or

2. Fraud, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closings to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

<u>Conditions and Exclusions</u>

1. The Company will not be liable to you for loss arising out of:

A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.

B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.

C. Defects, liens, encumbrances or other matters in connection with your purchase, lease or loan transactions except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.

D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.

E. Your settlement or release of any claim without the written consent of the Company.

F. Any matters created, suffered, assumed or agreed to by you or known to you.

2. If the closing is to be conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.

3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation.

4. The Issuing Agent is the Company's agent only for the limited purpose of issuing title insurance policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.

5. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.

6. You must promptly send written notice of a claim under this letter to the Company at its principal office at ________. The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.

7. The protection herein offered extends only to real property transactions in [State].

Any previous closing protection letter or similar agreement is hereby cancelled, except for closings of your real estate transactions for which you have previously sent (or within 30 days hereafter send) written closing instructions to the Issuing Agent or Approved Attorney.

BLANK TITLE INSURANCE COMPANY

By: _________________________________

2008 ALTA Closing Protection Letter--Limitations

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee:

Date:

Name of Issuing Agent or Approved Attorney (hereafter, “Issuing Agent” or “Approved Attorney”, as the case may require): *[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Re: Closing Protection Letter

Dear

_______________ Title Insurance Company (the “Company”) agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with closings of real estate transactions conducted by the Issuing Agent or Approved Attorney, provided:

(A) title insurance of the Company is specified for your protection in connection with the closing; and
(B) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land

and provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or
2. Fraud, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closings to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

<u>Conditions and Exclusions</u>

1. The Company will not be liable to you for loss arising out of:

    A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.
    B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
    C. Defects, liens, encumbrances or other matters in connection with your purchase, lease or loan transactions except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.

D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.
E. Your settlement or release of any claim without the written consent of the Company.
F. Any matters created, suffered, assumed or agreed to by you or known to you.

2. If the closing is to be conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.

3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed; Liability of the Company for reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation.

4. The protection herein offered shall not extend to any transaction in which the funds you transmit to the Issuing Agent or Approved Attorney exceed $_________. The Company shall have no liability of any kind for the actions or omissions of the Issuing Agent or Approved Attorney in that transaction except as may be derived under the Company's commitment for title insurance, policy of title insurance or other express written agreement. Please contact the Company if you desire the protections of this letter to apply to that transaction. This paragraph shall not apply to individual mortgage loan transactions on individual one-to-four-family residential properties (including residential townhouse, condominium and cooperative apartment units).

5. The Issuing Agent or Approved Attorney is the Company’s agent only for the limited purpose of issuing title insurance policies, and is not the Company’s agent for the purpose of providing other closing or settlement services. The Company’s liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company’s liability with respect to its title insurance binders, commitments or policies.

6 Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.

7. You must promptly send written notice of a claim under this letter to the Company at its principal office at ________________________. The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.

8. The protection herein offered extends only to real property transactions in [State].

Any previous closing protection letter or similar agreement is hereby cancelled, except for closings of your real estate transactions for which you have previously sent (or within 30 days hereafter send) written closing instructions to the Issuing Agent or Approved Attorney.

BLANK TITLE INSURANCE COMPANY

By: ___________________________________

2008 ALTA Closing Protection Letter—Single Transaction Limited Liability

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee:
Date:

Name of Issuing Agent or Approved Attorney (hereafter, “Issuing Agent” or “Approved Attorney”, as the case may require): *[Identity of settlement agent and status as either Issuing Agent or Approved Attorney appears here.]*

Transaction (hereafter, “the Real Estate Transaction”):

Re: Closing Protection Letter

Dear

_______________ Title Insurance Company (the “Company”) agrees, subject to the Conditions and Exclusions set forth below, to reimburse you for actual loss incurred by you in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney, provided:

(A) title insurance of the Company is specified for your protection in connection with the closing of the Real Estate Transaction;

(B) you are to be the (i) lender secured by a mortgage (including any other security instrument) of an interest in land, its assignees or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land; and

(C) the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed $_____________

and provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or

2. Fraud, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closing to the extent that fraud, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected under the foregoing paragraph, your borrower, your assignee and your warehouse lender in connection with a loan secured by a mortgage shall be protected as if this letter were addressed to them.

<u>Conditions and Exclusions</u>

1. The Company will not be liable to you for loss arising out of:

   A. Failure of the Issuing Agent or Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in the binder or commitment shall not be deemed to be inconsistent.

B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.

C. Defects, liens, encumbrances or other matters in connection with the Real Estate Transaction if it is a purchase, lease or loan transaction except to the extent that protection against those defects, liens, encumbrances or other matters is afforded by a policy of title insurance not inconsistent with your closing instructions.

D. Fraud, dishonesty or negligence of your employee, agent, attorney or broker.

E. Your settlement or release of any claim without the written consent of the Company.

F. Any matters created, suffered, assumed or agreed to by you or known to you.

2. If the closing is conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.

3. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of this right of subrogation.

4. The Issuing Agent or Approved Attorney is the Company's agent only for the limited purpose of issuing title insurance policies, and is not the Company's agent for the purpose of providing other closing or settlement services. The Company's liability for your losses arising from those other closing or settlement services is strictly limited to the protection expressly provided in this letter. Any liability of the Company for loss does not include liability for loss resulting from the negligence, fraud or bad faith of any party to a real estate transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with a real estate transaction, or the failure of any collateral to adequately secure a loan connected with a real estate transaction. However, this letter does not affect the Company's liability with respect to its title insurance binders, commitments or policies.

5. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000. If you have a policy of title insurance for the applicable transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.

6. You must promptly send written notice of a claim under this letter to the Company at its principal office at __________________________. The Company is not liable for a loss if the written notice is not received within one year from the date of the closing.

Any previous closing protection letter or similar agreement is hereby cancelled with respect to the Real Estate Transaction.

BLANK TITLE INSURANCE COMPANY

2011 ALTA Closing Protection Letter—Single Transaction

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee:
Date:

Name of Issuing Agent or Approved Attorney (“Issuing Agent” or “Approved Attorney”, as the case may require):
[Name of Issuing Agent or Approved Attorney appears here.]

Transaction (“Real Estate Transaction”):

Re: Closing Protection Letter

Dear __________________:

Blank Title Insurance Company (the “Company”), in consideration of your acceptance of this letter, agrees, subject to the Conditions and Exclusions set forth below, to indemnify you for actual loss of settlement funds incurred by you in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the date of this letter, provided:

(A) the Company issues or is contractually obligated to issue title insurance for your protection in connection with the closing of the Real Estate Transaction;
(B) you are to be the (i) lender secured by an Insured Mortgage, as defined in the ALTA Loan Policy (6-17-06), its assignee or a warehouse lender, (ii) purchaser of an interest in land, or (iii) lessee of an interest in land; and
(C) the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed $_____________; and

further provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or
2. Fraud, theft, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closing to the extent that fraud, theft, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected by this letter, your borrower, your assignee and your warehouse lender in connection with an Insured Mortgage shall be protected as if it was addressed to them.

Conditions and Exclusions

1. The Company shall have no liability for loss arising out of:
   A. Failure of the Issuing Agent or Approved Attorney to comply with closing instructions that require title insurance protection inconsistent with that set forth in the Company’s title insurance binder or commitment.
   B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
   C. Defects, liens, encumbrances or other matters in connection with the Real Estate Transaction. This Exclusion does not affect the coverage afforded in the Company’s title insurance policy issued in connection with the Real Estate Transaction.
   D. Fraud, theft, dishonesty or negligence of your employee, agent, attorney or broker.

E. Your settlement or release of any claim without the Company's written consent.
F. Any matters created, suffered, assumed or agreed to by you or known to you.

2. If the closing is conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of the Company's title insurance policy must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.

3. When the Company shall have indemnified you pursuant to this letter, it shall be subrogated to all rights and remedies you have against any person or property had you not been indemnified. The Company's liability for indemnification shall be reduced to the extent that you have impaired the value of this right of subrogation.

4. The Company's liability for loss under this letter shall not exceed the least of:
A. the amount of your settlement funds;
B. the Company's liability under its title insurance policy at the time written notice of a claim is made under this letter; or
C. the value of the lien of the Insured Mortgage, or the interest in the land insured or to be insured under the Company's title insurance policy at the time written notice of a claim is made under this letter.

5. Payment to you or to the owner of the Indebtedness under the Company's title insurance policy or policies or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to Section 10 of the Conditions of the policy.

6. The Issuing Agent is the Company's agent only for the limited purpose of issuing title insurance policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for your losses arising from those closing or settlement services is strictly limited to the protection expressly provided in this letter. The Company shall have no liability for loss resulting from the fraud, theft, dishonesty or negligence of any party to the Real Estate Transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

7. You must promptly send written notice of a claim under this letter to the Company at its principal office at _______________. If the Company is prejudiced by your failure to provide prompt notice, the Company's liability to you under this letter shall be reduced to the extent of the prejudice. In no event shall the Company be liable for a loss if the written notice is not received by the Company within one year from the date of the closing.

8. This letter will cover the Real Estate Transaction if it closes within one year after the date of this letter. The Company may terminate its obligation to cover the Real Estate Transaction if it has not closed by sending written notice to the Addressee.

9. The protection of this letter extends only to real estate in [State].

[10. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a title insurance policy for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000. If you have a policy of title insurance for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.]
No previous letter, endorsement or similar agreement for closing protection applies to the Real Estate Transaction.

BLANK TITLE INSURANCE COMPANY

2011 ALTA Closing Protection Letter—Multiple Transactions

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee:
Date:

Name of Issuing Agent or Approved Attorney ("Issuing Agent" or "Approved Attorney", as the case may require):

[Name of Issuing Agent or Approved Attorney appears here.]

Re: Closing Protection Letter

Dear _________________:

Blank Title Insurance Company (the "Company"), in consideration of your acceptance of this letter, agrees, subject to the Conditions and Exclusions set forth below, to indemnify you for actual loss of settlement funds incurred by you in connection with the closing of any teal estate transaction conducted by the Issuing Agent or Approved Attorney on or after the date of this letter, provided:

(A) the Company issues or is contractually obligated to issue title insurance for your protection in connection with the closing of the Real Estate Transaction;
(B) you are to be the lender secured by an Insured Mortgage, as defined in the ALTA Loan Policy (6-17-06), its assignee or a warehouse lender; and
(C) the aggregate of all funds you transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed $_____________; and

further provided the loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, including the obtaining of documents and the disbursement of funds necessary to establish the status of title or lien, or (b) the obtaining of any other document, specifically required by you, but only to the extent the failure to obtain the other document affects the status of the title to that interest in land or the validity, enforceability and priority of the lien of the mortgage on that interest in land, and not to the extent that your instructions require a determination of the validity, enforceability or the effectiveness of the other document, or
2. Fraud, theft, dishonesty or negligence of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with the closings to the extent that fraud, theft, dishonesty or negligence relates to the status of the title to that interest in land or to the validity, enforceability, and priority of the lien of the mortgage on that interest in land.

If you are a lender protected by this letter, your borrower, your assignee and your warehouse lender in connection with an Insured Mortgage shall be protected as if it was addressed to them.

Conditions and Exclusions

1. The Company shall have no liability for loss arising out of:
   A. Failure of the Issuing Agent or Approved Attorney to comply with closing instructions that require title insurance protection inconsistent with that set forth in the Company's title insurance binder or commitment.
   B. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except as shall result from failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.
   C. Defects, liens, encumbrances or other matters in connection with the Real Estate Transaction. This Exclusion does not affect the coverage afforded in the Company's title insurance policy issued in connection with the Real Estate Transaction.
   D. Fraud, theft, dishonesty or negligence of your employee, agent, attorney or broker.
   E. Your settlement or release of any claim without the Company's written consent.

F. Any matters created, suffered, assumed or agreed to by you or known to you.

2. If the closing is to be conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of the Company's title insurance policy must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.

3. When the Company shall have indemnified you pursuant to this letter, it shall be subrogated to all rights and remedies you have against any person or property had you not been indemnified. The Company's liability for indemnification shall be reduced to the extent that you have impaired the value of this right of subrogation.

4. The Company's liability for loss under this letter shall not exceed the least of:

A. the amount of your settlement funds;

B. the Company's liability under its title insurance policy at the time written notice of a claim is made under this letter; or

C. the value of the lien of the Insured Mortgage, or the interest in the land insured or to be insured under the Company's title insurance policy at the time written notice of a claim is made under this letter.

5. Payment to you or to the owner of the Indebtedness under the Company's title insurance policy or policies or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to Section 10 of the Conditions of the policy.

6. The Issuing Agent is the Company's agent only for the limited purpose of issuing title insurance policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for your losses arising from those closing or settlement services is strictly limited to the protection expressly provided in this letter. The Company shall have no liability for loss resulting from the fraud, theft, dishonesty or negligence of any party to the Real Estate Transaction other than an Issuing Agent or Approved Attorney, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

7. You must promptly send written notice of a claim under this letter to the Company at its principal office at ________________. If the Company is prejudiced by your failure to provide prompt notice, the Company's liability to you under this letter shall be reduced to the extent of the prejudice. In no event shall the Company be liable for a loss if the written notice is not received by the Company within one year from the date of the closing.

8. This letter will cover each real estate transaction that closes within one year after the date of this letter. The Company may terminate its obligation to cover real estate transactions that have not closed by sending written notice to the Addressee.

9. The protection of this letter extends only to real estate in [State].

[10. Either the Company or you may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless you have a title insurance policy for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000. If you have a policy of title insurance for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and you.]

No previous letter, endorsement or similar agreement for closing protection applies to the Real Estate Transaction.

BLANK TITLE INSURANCE COMPANY

2015 ALTA Closing Protection Letter—Single Transaction (Revised December 1, 2015)

BLANK TITLE INSURANCE COMPANY

Addressee:

Date:

"Issuing Agent" or "Approved Attorney," as the case may require:

"Real Estate Transaction":
[Seller:]
[Buyer:]
[Street Address:]
[Loan No.:]

Re: Closing Protection Letter

Dear

In consideration of Your acceptance of this letter, Blank Title Insurance Company (the "Company"), agrees to indemnify You for actual loss of Funds incurred by You in connection with the closing of the Real Estate Transaction conducted by the Issuing Agent or Approved Attorney on or after the Date of this letter, subject to the Requirements and Conditions and Exclusions set forth below:

REQUIREMENTS

1. The Company issues or is contractually obligated to issue a Policy for Your protection in connection with the Real Estate Transaction;
2. You are to be:
    a. a lender secured by the Insured Mortgage on the Title to the Land or
    b. a purchaser or lessee of the Title to the Land;
3. The aggregate of all Funds You transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed $_____________; and
4. Your loss is solely caused by:
    a. any failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:
        i. the disbursement of Funds necessary to establish the status of the Title to the Land; or
        ii. the validity, enforceability, or priority of the lien of the Insured Mortgage; or
        iii. obtaining any document, specifically required by You, but only to the extent that the failure to obtain the document adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land; or
    b. fraud, theft, dishonesty, or misappropriation of the Issuing Agent or Approved Attorney in handling Your Funds or documents in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation adversely affects the status of the Title to the Land or to the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land.

CONDITIONS AND EXCLUSIONS

1. Your transmittal of Funds or documents to the Issuing Agent or Approved Attorney for the Real Estate Transaction constitutes Your acceptance of this letter.

2. For purposes of this letter:

    a. "Commitment" means the Company's written contractual agreement to issue the Policy.

b. “Funds” means the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction.

c. “Policy” means the contract or contracts of title insurance, each in a form adopted by the American Land Title Association, issued or to be issued by the Company in connection with the closing of the Real Estate Transaction.

d. “You” or “Your” means:

(i) the Addressee of this letter;

(ii) the borrower, if the Land is improved solely by a one-to-four family residence; and

(iii) subject to all rights and defenses relating to a claim under this letter that the Company would have against the Addressee,

(A) the assignee of the Insured Mortgage, provided such assignment was for value and the assignee was, at the time of the assignment, without Knowledge of facts that reveal a claim under this letter; and

(B) the warehouse lender in connection with the Insured Mortgage.

e. “Indebtedness,” “Insured Mortgage,” “Knowledge” or “Known,” “Land,” and “Title” have the same meaning given them in the American Land Title Association Loan Policy (06-17-06).

3. The Company shall have no liability under this letter for any loss arising from any:

a. failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions that require title insurance protection in connection with the Real Estate Transaction inconsistent with that set forth in the Commitment. Your written closing instructions received and accepted by the Issuing Agent or Approved Attorney after issuing the Commitment that require the removal, where allowed by state law, rule, or regulation, of specific Schedule B Exceptions from Coverage or compliance with the requirements contained in the Commitment shall not be deemed to require inconsistent title insurance protection;

b. loss or impairment of Funds in the course of collection or while on deposit with a bank due to bank failure, insolvency, or suspension, except loss or impairment resulting from failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions to deposit Your Funds in a bank that You designated by name;

c. constitutional or statutory lien or claim of lien that arises from services, labor, materials, or equipment, if any Funds are to be used for the purpose of construction, alteration, or renovation. This Section 3.(c) does not affect the coverage, if any, as to any lien for services, labor, materials, or equipment afforded in the Policy;

d. defect, lien, encumbrance, or other matter in connection with the Real Estate Transaction. This Section 3.(d) does not affect the coverage afforded in the Policy;

e. fraud, theft, misappropriation, dishonesty, or negligence by You or by Your employee, agent, attorney, or broker;

f. settlement or release of any claim by You without the Company’s written consent;

g. matters created, suffered, assumed, agreed to, or Known by You;

h. failure of the Issuing Agent or Approved Attorney to determine the validity, enforceability, or the effectiveness of a document required by Your closing instructions. This Section 3.(h) does not affect the coverage afforded in the Policy;

i. Federal consumer financial law, as defined in 12 U.S.C. § 5481(14), actions under 12 U.S.C. § 5531, or other federal or state laws relating to truth-in-lending, a borrower’s ability to repay a loan, qualified mortgages, consumer protection, or predatory lending, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;

j. federal or state laws establishing the standards or requirements for asset-backed securitization including, but not limited to, exemption from credit risk retention, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;

k. periodic disbursement of Funds to pay for construction, alteration, or renovation on the Land; or

l. Issuing Agent or Approved Attorney acting in the capacity of a qualified intermediary or facilitator for tax deferred exchange transactions as provided in Section 1031 of the Internal Revenue Code.

4. If the closing is to be conducted by an Approved Attorney, a Commitment in connection with the Real Estate Transaction must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney.

5. When the Company shall have indemnified You pursuant to this letter, it shall be subrogated to all rights and remedies You have against any person or property had You not been indemnified. The Company's liability for indemnification shall be reduced to the extent that You have impaired the value of this right of subrogation.

6. The Company's liability for loss under this letter shall not exceed the least of:

a. the amount of Your Funds;

b. the Company's liability under the Policy at the time written notice of a claim is made under this letter;

c. the value of the lien of the Insured Mortgage;

d. the value of the Title to the Land insured or to be insured under the Policy at the time written notice of a claim is made under this letter; or

e. the amount stated in Section 3 of the Requirements.

7. The Company will be liable only to the holder of the Indebtedness at the time that payment is made. This Section 7 does not apply to a purchaser, borrower, or lessee.

8. Payment to You or to the owner of the Indebtedness under either the Policy or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to the Conditions of the Policy.

9. The Issuing Agent is the Company's agent only for the limited purpose of issuing policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for Your loss arising from closing or settlement services is strictly limited to the contractual protection expressly provided in this letter. Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

10. In no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within one year from the date of the transmittal of Funds. The condition that the Company must be provided with written notice under this Section 10 shall not be excused by lack of prejudice to the Company.

11. You must promptly send written notice of a claim under this letter to the Company at its principal office at ____________________________________. If the Company is prejudiced by Your failure to provide prompt notice, the Company's liability to You under this letter shall be reduced to the extent of the prejudice.

12. Whenever requested by the Company, You, at the Company's expense, shall:

(a) give the Company all reasonable aid in

(i) securing evidence, obtaining witnesses, prosecuting or defending any action or proceeding, or effecting any settlement, and

(ii) any other lawful act that in the opinion of the Company may be necessary to enable the Company's investigation and determination of its liability under this letter;

(b) deliver to the Company any records, in whatever medium maintained, that pertain to the Real Estate Transaction or any claim under this letter; and

(c) submit to an examination under oath by any authorized representative of the Company with respect to any such records, the Real Estate Transaction, any claim under this letter or any other matter reasonably deemed relevant by the Company.

13. The Company shall have no liability under this letter if:

(a) the Real Estate Transaction has not closed within one year from the date of this letter; or

(b) at any time after the date of this letter, but before the Real Estate Transaction closes, the Company provides written notice of termination of this letter to the Addressee at the address set forth above.

14. The protection of this letter extends only to real estate in [State], and any court or arbitrator shall apply the law of the jurisdiction where the Land is located to interpret and enforce the terms of this letter. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law. Any litigation or other proceeding under this letter must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

[15. Either the Company or You may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless You have a Policy for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000. There shall be no right for any claim under this letter to be arbitrated or litigated on a class action basis. If You have a Policy for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and You. If the Real Estate Transaction solely involves a one-to-four family residence and You are the purchaser or borrower, the Company will pay the costs of arbitration.]

This letter supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction and may not be modified by the Issuing Agent or Approved Attorney.

BLANK TITLE INSURANCE COMPANY

By: ____

Authorized Signatory

(The name of a particular issuing agent or approved attorney may be inserted in lieu of reference to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent.)

2015 ALTA Closing Protection Letter—Multiple Transactions (Revised December 1, 2015)

BLANK TITLE INSURANCE COMPANY

"Addressee":

"Date":

"Issuing Agent" or "Approved Attorney," as the case may require:

Re: Closing Protection Letter

Dear

In consideration of Your acceptance of this letter, Blank Title Insurance Company (the "Company"), agrees to indemnify You for actual loss of Funds incurred by You in connection with the closing of any real estate transaction (the "Real Estate Transaction") conducted by the Issuing Agent or Approved Attorney on or after the Date of this letter, subject to the Requirements and Conditions and Exclusions set forth below:

REQUIREMENTS

(C) The Company issues or is contractually obligated to issue a Policy for Your protection in connection with the Real Estate Transaction;

(D) You are to be a lender secured by the Insured Mortgage on the Title to the Land;

(E) The aggregate of all Funds You transmit to the Issuing Agent or Approved Attorney for the Real Estate Transaction does not exceed $_____________; and

(F) Your loss is solely caused by:

- (a) any failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions that relate to:
  - (i) (A) the disbursement of Funds necessary to establish the status of the Title to the Land; or
    - (B) the validity, enforceability, or priority of the lien of the Insured Mortgage; or
  - (ii) obtaining any document, specifically required by You, but only to the extent that the failure to obtain the document adversely affects the status of the Title to the Land or the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land; or
- (b) fraud, theft, dishonesty, or misappropriation of the Issuing Agent or Approved Attorney in handling Your Funds or documents in connection with the closing, but only to the extent that the fraud, theft, dishonesty, or misappropriation adversely affects the status of the Title to the Land or to the validity, enforceability, or priority of the lien of the Insured Mortgage on the Title to the Land.

CONDITIONS AND EXCLUSIONS

1. Your transmittal of Funds or documents to the Issuing Agent or Approved Attorney for the Real Estate Transaction constitutes Your acceptance of this letter.
2. For purposes of this letter:
   - e. "Commitment" means the Company's written contractual agreement to issue the Policy.
   - f. "Funds" means the money received by the Issuing Agent or Approved Attorney for the Real Estate Transaction.
   - g. "Policy" means the contract or contracts of title insurance, each in a form adopted by the American Land Title Association, issued or to be issued by the Company in connection with the closing of the Real Estate Transaction.
   - h. "You" or "Your" means:
     - (i) the Addressee of this letter;
     - (ii) the borrower, if the Land is improved solely by a one-to-four family residence; and
     - (iii) subject to all rights and defenses relating to a claim under this letter that the Company would

have against the Addressee,

(A) the assignee of the Insured Mortgage, provided such assignment was for value and the assignee was, at the time of the assignment, without Knowledge of facts that reveal a claim under this letter; and

(B) the warehouse lender in connection with the Insured Mortgage.

(e) "Indebtedness," "Insured Mortgage," "Knowledge" or "Known," "Land," and "Title" have the same meaning given them in the American Land Title Association Loan Policy (06-17-06).

3. The Company shall have no liability under this letter for any loss arising from any:

m. failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions that require title insurance protection in connection with the Real Estate Transaction inconsistent with that set forth in the Commitment. Your written closing instructions received and accepted by the Issuing Agent or Approved Attorney after issuing the Commitment that require the removal, where allowed by state law, rule, or regulation, of specific Schedule B Exceptions from Coverage or compliance with the requirements contained in the Commitment shall not be deemed to require inconsistent title insurance protection;

n. loss or impairment of Funds in the course of collection or while on deposit with a bank due to bank failure, insolvency, or suspension, except loss or impairment resulting from failure of the Issuing Agent or Approved Attorney to comply with Your written closing instructions to deposit Your Funds in a bank that You designated by name;

o. constitutional or statutory lien or claim of lien that arises from services, labor, materials, or equipment, if any Funds are to be used for the purpose of construction, alteration, or renovation. This Section 3.(c) does not affect the coverage, if any, as to any lien for services, labor, materials, or equipment afforded in the Policy;

p. defect, lien, encumbrance, or other matter in connection with the Real Estate Transaction. This Section 3.(d) does not affect the coverage afforded in the Policy;

q. fraud, theft, misappropriation, dishonesty, or negligence by You or by Your employee, agent, attorney, or broker;

r. settlement or release of any claim by You without the Company's written consent;

s. matters created, suffered, assumed, agreed to, or Known by You;

t. failure of the Issuing Agent or Approved Attorney to determine the validity, enforceability, or the effectiveness of a document required by Your closing instructions. This Section 3.(h) does not affect the coverage afforded in the Policy;

u. Federal consumer financial law, as defined in 12 U.S.C. § 5481(14), actions under 12 U.S.C. § 5531, or other federal or state laws relating to truth-in-lending, a borrower's ability to repay a loan, qualified mortgages, consumer protection, or predatory lending, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;

v. federal or state laws establishing the standards or requirements for asset-backed securitization including, but not limited to, exemption from credit risk retention, including any failure of the Issuing Agent or Approved Attorney to comply with Your closing instructions relating to those laws;

w. periodic disbursement of Funds to pay for construction, alteration, or renovation on the Land; or

x. Issuing Agent or Approved Attorney acting in the capacity of a qualified intermediary or facilitator for tax deferred exchange transactions as provided in Section 1031 of the Internal Revenue Code.

4. If the closing is to be conducted by an Approved Attorney, a Commitment in connection with the Real Estate Transaction must have been received by You prior to the transmittal of Your final closing instructions to the Approved Attorney.

5. When the Company shall have indemnified You pursuant to this letter, it shall be subrogated to all rights and remedies You have against any person or property had You not been indemnified. The Company's liability for indemnification shall be reduced to the extent that You have impaired the value of this right of subrogation.

6. The Company's liability for loss under this letter shall not exceed the least of:

f. the amount of Your Funds;

g. the Company's liability under the Policy at the time written notice of a claim is made under this letter;

h. the value of the lien of the Insured Mortgage;

i. the value of the Title to the Land insured or to be insured under the Policy at the time written notice of a claim is made under this letter; or

j. the amount stated in Section 3 of the Requirements.

7. The Company will be liable only to the holder of the Indebtedness at the time that payment is made. This

Section 7 does not apply to a purchaser, borrower, or lessee.

8. Payment to You or to the owner of the Indebtedness under either the Policy or from any other source shall reduce liability under this letter by the same amount. Payment in accordance with the terms of this letter shall constitute a payment pursuant to the Conditions of the Policy.

9. The Issuing Agent is the Company's agent only for the limited purpose of issuing policies. Neither the Issuing Agent nor the Approved Attorney is the Company's agent for the purpose of providing closing or settlement services. The Company's liability for Your loss arising from closing or settlement services is strictly limited to the contractual protection expressly provided in this letter. Other than as expressly provided in this letter, the Company shall have no liability for loss resulting from the fraud, theft, dishonesty, misappropriation, or negligence of any party to the Real Estate Transaction, the lack of creditworthiness of any borrower connected with the Real Estate Transaction, or the failure of any collateral to adequately secure a loan connected with the Real Estate Transaction.

10. In no event shall the Company be liable for a loss if the written notice of a claim is not received by the Company within one year from the date of the transmittal of Funds. The condition that the Company must be provided with written notice under this Section 10 shall not be excused by lack of prejudice to the Company.

11. You must promptly send written notice of a claim under this letter to the Company at its principal office at ___________________________________. If the Company is prejudiced by Your failure to provide prompt notice, the Company's liability to You under this letter shall be reduced to the extent of the prejudice.

12. Whenever requested by the Company, You, at the Company's expense, shall:

   (a) give the Company all reasonable aid in

      (i) securing evidence, obtaining witnesses, prosecuting or defending any action or proceeding, or effecting any settlement, and

      (ii) any other lawful act that in the opinion of the Company may be necessary to enable the Company's investigation and determination of its liability under this letter;

   (b) deliver to the Company any records, in whatever medium maintained, that pertain to the Real Estate Transaction or any claim under this letter; and

   (c) submit to an examination under oath by any authorized representative of the Company with respect to any such records, the Real Estate Transaction, any claim under this letter or any other matter reasonably deemed relevant by the Company.

13. The Company shall have no liability under this letter if:

   (a) the Real Estate Transaction has not closed within one year from the date of this letter; or

   (b) at any time after the date of this letter, but before the Real Estate Transaction closes, the Company provides written notice of termination of this letter to the Addressee at the address set forth above.

14. The protection of this letter extends only to real estate in [State], and any court or arbitrator shall apply the law of the jurisdiction where the Land is located to interpret and enforce the terms of this letter. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law. Any litigation or other proceeding under this letter must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

[15. Either the Company or You may demand that any claim arising under this letter be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association, unless You have a Policy for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000. There shall be no right for any claim under this letter to be arbitrated or litigated on a class action basis. If You have a Policy for the Real Estate Transaction with an Amount of Insurance greater than $2,000,000, a claim arising under this letter may be submitted to arbitration only when agreed to by both the Company and You. If the Real Estate Transaction solely involves a one-to-four family residence and You are the purchaser or borrower, the Company will pay the costs of arbitration.]

This letter supersedes and cancels any previous letter or similar agreement for closing protection that applies to the Real Estate Transaction and may not be modified by the Issuing Agent or Approved Attorney.

BLANK TITLE INSURANCE COMPANY

By: ___________________________________

Authorized Signatory

(The name of a particular issuing agent or approved attorney may be inserted in lieu of reference to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent.)

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