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Mr. Patrick F. Stone
Chairman and Chief Executive Officer
WFG National Title Insurance Company
12909 SW 68th Parkway, Suite 350
Portland, Oregon 97223

Joseph V. McCabe, Esq.
General Counsel
WFG National Title Insurance Company
12909 SW 68th Parkway, Suite 350
Portland, OR 97223

Dear Messrs. Stone and McCabe:

Re: Athas Capital Group Claim 1004538/WNT 15-0403

At your request, I have evaluated WFG National Title's handling of the above-referenced claim by comparison to the customs and practices of other title insurers. I offer my opinions based on my experience as a claim administrator and supervisor and the industry practices described in my book, *Title and Escrow Claims Guide*, published by American Land Title Association (hereafter, "Nielsen"). I enclose my resume, which describes my work experience in title insurance claims and my other credentials as a scholar on that subject.

It is my opinion that WFG National Title followed standard industry customs in the handling of this title insurance policy claim. It is also my opinion that the company resolved the claim within a reasonable amount of time, and that the delays in resolving the claim were due to the actions of others (particularly Gloria Montano and her lawyers) and not WFG National Title.

Tender and Acceptance of Defense of Bank of New York Mellon Claim

Athas Capital Group, Inc. ("Athas") submitted a notice of claim to WFG National Title dated October 21, 2015, seeking a defense in the action filed by the Bank of New York Mellon action against Gloria Montano, Case No. 15CV03371, Santa Barbara County Superior Court (the "Bank of New York Action"). Athas had been named a defendant in the Bank of New York Action by an amendment to the complaint filed on October 6, 2015.

WFG National Title acknowledged receipt of the Athas claim on November 10, 2015. On November 25, 2015, Bill Sempertegui, WFG National Title's Claims Officer, issued a coverage determination letter, accepting Athas' defense and reserving the right to continue its investigation and to raise coverage defenses at a later time.

Gloria Montano filed a Chapter 11 bankruptcy petition. Athas filed an adversary proceeding in the Montano bankruptcy. I reviewed the pleadings in the Montano bankruptcy adversary proceeding filed by Athas, Adv. No. 0:16-ap-01041-DS (the "Adversary Proceeding"), particularly the answer filed by Bank of New York Mellon in which it asserted that it held a lien on the Montano property despite the fact that its deed of trust had not been recorded. I also reviewed the pleadings in the adversary proceeding filed by Bank of New York Mellon, which was filed on January 15, 2016 (the "Bank of New York Adversary").

WFG National Title defended Athas against the claims made by Bank of New York Mellon in the Adversary Proceeding. When Athas demanded Cumis counsel, WFG National Title withdrew its reservation of rights. Attorney David Bartelstone, the counsel appointed by WFG National Title to defend against the Bank of New York Mellon claims in the Bank of New York Action, provided a limited representation of Athas in the Bank of New York Adversary.

It is my opinion that WFG National Title accepted and undertook Athas' defense in good faith. Bank of New York Mellon did not have a recorded deed of trust on the property. Its deed of trust was not recorded as of the Athas policy date, and at least arguably was not a lien or encumbrance against title on the policy date. The bank asked the court to impose an equitable lien on the property, which lien would not come into existence unless and until the court so ordered.

I have seen title insurers deny a duty to defend an insured lender under similar circumstances, on the premise that any such equitable lien would not exist until ordered by the court. The title insurance policy excludes from coverage any lien or encumbrance that first attaches after the date of policy, under Exclusion 3(d). The WFG National Title coverage determination letter recited the Covered Risks policy provision, which states that the company insures against the lack of priority of the Insured Mortgage subject to the Exclusions, and only "as of Date of Policy." Despite these coverage limitations, however, WFG National Title accepted Athas' tender of defense under Covered Risk 10. I consider WFG National Title's acceptance of the defense of the Bank of New York Action to be a very good faith act, given those facts.

Athas asked WFG National Title to pay for all of its attorneys' fees in the Montano bankruptcy case. It is standard practice for a title insurer not to pay for the general representation of an insured lender in its borrower's bankruptcy case. The lender, as a secured creditor, is required to assert its rights in various ways in a bankruptcy, most or all of which have nothing to do with policy coverage or defending the lender's position as a secured creditor. For example, Athas asked WFG National Title to appoint counsel to attend the 341 hearing. I have never seen a claim in which a title insurer paid for counsel to attend a creditor hearing, file a claim, seek the lifting of the automatic stay or similar actions that do not invoke a covered risk under the policy.

Athas also asked WFG National Title to pay for the Adversary Proceeding. However, Athas filed the Adversary Proceeding, to obtain a lift of the automatic stay and authority from the bankruptcy court to proceed with a trustee's sale. A title insurer does not pay to prosecute an action filed by the insured, which is not "the defense of an Insured in litigation in which any third party asserts a claim" covered by the policy.[1] Specifically, a title insurer is not required to indemnify the insured when the insured's motion to lift the automatic stay is contested.[2]

WFG National Title did pay attorney David Bartelstone to protect Athas against the Bank of New York Adversary, to the extent that that bank made the same claims in that action as it had in the Bank of New York Action. It is my opinion that WFG National Title correctly asserted that its defense duty did not extend to non-title issues, such as the bank's request for an order of nondischargeability of Montano for the debt owed to Bank of New York Mellon.

For all of the above reasons, it is my opinion that WFG National Title followed standard industry customs in defending Athas against those claims by Bank of New York Mellon that invoked or might have invoked Covered Risk 10, and did so in good faith.

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[1] The quoted language is found in Condition 5(a) of the policy. See *Nielsen*, § 4.4, *Scope Of Duty To Defend*, pp. 4-8 and 4-9 (enclosed).

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

Settlement of the Adversary Proceeding

It is also my opinion that WFG National Title diligently defended Athas' deed of trust from attack by Bank of New York Mellon, and that it acted in good faith in assisting in the settlement of the dispute.

Montano, Bank of New York Mellon and Athas began discussing various options for settling the dispute in March of 2016. Montano retained new counsel at about the same time. By May of 2016, that new lawyer understood the facts well enough to begin discussing a mediation. WFG National Title agreed to pay Athas' share of the cost of the mediation. By June of 2016, the mediation had been scheduled with the mediator. Discovery cutoff in the Adversary Proceeding was set for October 28, 2016.

On August 29, 2016, Mr. Sempertegui sent a letter to Athas' counsel informing her that no loss would be payable to Athas unless and until Athas had taken title to the property and had established that it would not recover its debt in full from the property. Nonetheless, on September 1, Mr. Sempertegui agreed to contribute up to $25,000 to resolve the dispute with Bank of New York Mellon and Montano.

Montano, Bank of New York Mellon and Athas actively negotiated toward a settlement between August of 2016 and July of 2017. During that time, numerous different proposals were made. The parties were very close to signing a settlement agreement on several occasions. The two primary settlement plans involved a sale of the property and a refinance that would pay off both lenders.

In March of 2017, Athas announced that it would not waive its prepayment penalty on a payoff of its loan. In April, Montano had switched to a plan to sell the property. She received an offer for $700,000 and attempted to get court approval for a sale in that amount, which would not have been enough to pay both lenders in full. Martin Phillips, Athas' bankruptcy counsel, objected to the sale and the court did not approve it.

On May 18, 2017, WFG National Title confirmed that it would pay the offered $25,000 toward a payoff if the property was sold. Later the same date, WFG National Title agreed to increase its contribution to $35,000, based on counsel's assessment that the court would approve a sale of the property for $800,000 and the $35,000 would be needed for both lenders to be paid in full.

Montano received an offer for $800,000. The sale was supposedly set to close escrow on June 2, 2017. On June 1, WFG National Title wired the $35,000 to the escrow company. The sale did not close on June 2. The buyer's lawyer wanted a signed settlement agreement before escrow would close. The parties worked on redrafting an agreement, but it appears no agreement was signed. The court approved the sale, and escrow closed on July 21. Mr. Sempertegui received a copy of the closing disclosure to confirm that the sale had closed escrow. The Adversary Proceeding was dismissed.

Mr. Sempertegui paid all fees of the counsel it had retained, attorney Bartelstone.

The fundamental issue in the settlement talks was that the parties, including Athas, believed that Montano's property was worth $1,000,000, more than the combined debts that she owed to both lenders. Further, Athas held the only recorded deed of trust, and Mr. Bartelstone quickly obtained the trustee's agreement that Athas would be paid first from the proceeds if Montaro sold the property.[3] For these reasons, it is my opinion that WFG National Title accurately determined that it had little or no likelihood of owing a loss payment to Athas even if Bank of New York Mellon were granted an equitable lien, and that lien was determined to be prior to Athas' own deed of trust, which possibility I believe was remote in any event.

In such circumstances, a title insurer will offer no more than its cost of defense toward any settlement between the parties. It appears that WFG National Title offered the upper limits of its cost of defense in agreeing to pay $25,000. By the time it offered and paid $35,000, it is my opinion that WFG National Title was paying more than cost of defense, particularly given the fact that it had incurred and paid attorney fees to Mr. Bartelstone in the preceding months. When I make a cost-of-defense settlement offer to an insured, I do so with the understanding that the settlement amount will be *reduced*, not increased, as the insurer actually spends money to defend the insured. By contrast, WFG National Title *increased* the amount it paid despite having paid defense fees in the intervening months.

Based on all of the above, it is my opinion that WFG National Title made a generous contribution toward the settlement that ultimately caused Athas to be repaid its debt amount in full. That settlement protected Athas from the Bank of New York Mellon threat that invoked policy coverage. It is thus my opinion that WFG National Title fully indemnified Athas,

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[3] The facts that I recite in this section of my report are gleaned in part from WFG National Title's six page log of claim notes.

despite the fact that Athas never came into title to the property, which is a condition to payment of a loss to a lender insured.

The Settlement was Effected Within a Reasonable Time

It is my opinion that Bank of New York Mellon's threat to the priority of the Athas deed of trust was resolved within a reasonable time.

The policy does not create any standard as to the length of time the insurer is allotted in defending the insured in litigation. WFG National Title was acting under Condition 5(a) of the policy, which creates the duty to defend the insured in litigation. Condition 5(b) of the policy gives the insurer the right to take action to clear title. WFG National Title did not exercise that right. Condition 5(b) makes the statement that the insurer that elects to clear title "must do so diligently." Courts have repeatedly interpreted that "diligence" statement. My book discusses those decisions. I make the following statements about those cases:

> ...[D]iligence is not measured by a uniform time period. The insurer's diligence in the clearing of title is measured only by its own conduct; the slow pace of the court system may not be counted against the insurer. [4]

I also note in that passage that the insurer cannot control the actions of the insured or other parties in the dispute, and discuss the court decisions that have found that the insurer diligently defended the insured's title even when the title litigation took between three and seven years to complete. Thus, it is my opinion that, even if the "diligence" statement from Condition 5(b) applied to this claim, WFG National Title would be considered to have fulfilled that covenant.

In my review of the chronology of events leading to the settlement, I saw no instance in which the other parties were waiting for WFG National Title to make a decision or take some action. Montano held up the settlement a number of times. Athas also made demands

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[4] *Nielsen*, § 3.4.1, *Reasonable Diligence In The Clearing Of Title*, pp. 3-84 and 3-85 (footnotes and citations omitted) (enclosed). In the footnotes for that passage, I quote *Nebo v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 222, 98 Cal.Rptr. 237 (1971), in which 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.

that slowed down the settlement. I thus conclude that WFG National Title acted in good faith in effecting the settlement, and did nothing to delay it.

I also note that, in the end, Athas was paid in full. It received approximately $100,000 in interest, late charges and other charges. Some of those interest charges and fees were incurred by the borrower during the time the parties were talking about settlement. Thus, to the extent that the settlement was delayed by any of the parties, Athas was paid accordingly, and WFG National Title's payment effectively paid some of those fees on Montano's behalf.

WFG National Title's Statement That No Loss is Payable Unless and Until the Lender Insured Comes Into Title

It is my opinion that WFG National Title accurately recited California law, and title insurance industry custom, in informing Athas that no duty to indemnify Athas would exist unless and until it came into title to the property and proved that it could not recover the full amount of its debt from a sale of the property.

On August 29, 2016, Mr. Sempertegui sent a letter to Athas' counsel informing her that no loss would be payable to Athas unless and until Athas had taken title to the property and had established that it would not recover its debt in full from the property.

The principles recited by Mr. Sempertegui are all stated in my book.[5] I recently presented those same principles about loan policy loss to the Corporate Counsel Committee of the American College of Mortgage Attorneys.[6]

I note that most title insurers will not make a cost-of-defense contribution toward settlement when there is little to no possibility that they will pay any loss to the insured. Thus, it is my opinion that WFG National Title not only accurately informed Athas of the limits of its duty to indemnify the insured, but paid money that it did not owe to assist in resolving the matter.

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[5] See *Nielsen*, § 3.2.4, *Determining Amount Of Loss On A Loan Policy*, and § 3.2.4.1, *Loan Policy Loss Equation* (enclosed).

[6] I enclose my outline, entitled *How Loan Title Insurance Policy Claims Are Resolved*, which I presented to the ACMA committee at its annual meeting in Asheville, North Carolina on September 14, 2017.

Conclusion

For all of the above reasons, it is my opinion that WFG National Title followed standard industry customs in the handling of this title insurance policy claim, and that it resolved the claim within a reasonable amount of time.

Sincerely yours,

J. Bushnell Nielsen

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Enclosures

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SUMMARY OF CREDENTIALS AND RESUME

I have 36 years of work experience in and related to the land title insurance industry. I was employed by two national title insurers for a total of 16 years. I held five positions with those companies.

As a title officer, I searched and examined title and issued title insurance commitments and policies.

I served as chief underwriting counsel in Michigan and Wisconsin, and managed other attorneys who served as underwriting counsel. I wrote underwriting manuals and bulletins, and set underwriting standards for my employers.

I was a claims counsel and administrator for 14 years. I handled about 1,500 title insurance and closing claims personally. In addition, I supervised other claims handlers in offices located in four states who administered claims in nine states.

I was also the manager of agency operations for Ticor Title Insurance Company in the State of Michigan. I was responsible for signing new title agents and auditing and terminating existing agents. I vetted, signed and cancelled dozens of title companies, and negotiated agency contracts.

I also worked in and managed a National Business Unit commercial title insurance operation located in Detroit, with responsibility for multi-site and multi-state transactions in all 50 states.

I served as the closer or escrow officer on hundreds of real estate transactions, for every type of property, including residences, office buildings, factories, a steel mill and a baseball stadium. Those closings concerning property located in many states and in every region of the country. I have trained hundreds of escrow officers and closers on various aspects of the closing process and the duties of escrow officers and closers.

I have also spent 20 years in private practice, engaged almost exclusively on matters involving title insurance, real estate titles and closing liability issues. I was a member of the title insurance team at the law firm of Hinshaw & Culbertson, in its Chicago and Milwaukee offices, for three years before rejoining the industry in 1993. I am a shareholder at the law firm of

Reinhart Boerner Van Deuren s.c., a 200-lawyer firm with offices in Wisconsin, Illinois, Colorado and Arizona. I have been with that firm since 2000.

I have suggested, drafted and testified on a number of laws that have improved and simplified real estate records and issues related to title and title insurance, including Wisconsin's closing funds law, a law permitting the correction of deeds by affidavit, a law setting the boundary of Lake Michigan at Milwaukee and a law that permits the release of liens for debts discharged in bankruptcy.

I have served as counsel in many lawsuits about the title to real estate. I have served as *amicus curiae* counsel in cases presenting important issues, and have argued four cases before the Wisconsin Supreme Court, and a number of other cases before appellate courts.

I have conducted more than 200 training seminars in at least a dozen states. I have given extensive training to claim administrators on industry customs. I have also trained title examiners, closers, surveyors, registers of deeds, GIS mapping and property records custodians, attorneys, loan officers, real estate brokers and other real estate-related professional groups.

I have conducted many title searches and examinations while in private practice, and continue to search, examine and opine on the title to parcels of real estate. I have testified at trial concerning my findings as a title searcher and examiner.

I wrote the textbook *Title and Escrow Claims Guide*, first published in 1996 and updated annually since then. That 1,500-page treatise is national in scope and is published by American Land Title Association. It distills the custom and practice employed by title insurers and escrow companies, is used by employees of every major title insurer, and has been cited as a learned treatise by appellate courts.

Since 1998, I have been the Editor of *The Title Insurance Law Newsletter*, a publication of the American Land Title Association. The *Newsletter* is a paid-subscription monthly report, national in scope and audience, on recent case law, regulations and claims issues involving title insurance policies, closing and escrow issues, closing protection letters, RESPA liability and conveyancing law.

I have written over 2,000 articles about real estate titles and title insurance, most of which have been published in *The Title Insurance Law Newsletter*. I have also written a number of other scholarly articles and two book chapters, as listed in my *curriculum vitae*.

I served as the elected president of both the Michigan Land Title Association and later the Wisconsin Land Title Association, a dual honor given to only a few people in the history of the title insurance business. I am a member by invitation of the American College of Real Estate Lawyers. I have received numerous awards and professional accolades, as further described in my *curriculum vitae*, which is appended.

J. Bushnell Nielsen

Education/ License

Ripon College, attended from 1974 to 1976.
B.S. *cum laude*, U.Wisconsin--Stevens Point, 1978.
J.D., Marquette University Law School, 1981. *Law Review*.

Licensed to practice law in Wisconsin. Bar number 1014758.
Wisconsin Title Insurance Intermediary License No. 2328060 [1993 to 2007].

Work History

June, 2000 to present: Shareholder, Reinhart Boerner Van Deuren s.c., Waukesha, Wisconsin. Title-related and escrow litigation, title insurance coverage opinions, expert witness assignments, real estate transactions, claim investigation and settlement, advice concerning RESPA compliance and affiliated business arrangements and tax-deferred exchanges.

May, 1993 through May, 2000: Chicago Title Insurance Company, Waukesha, Wisconsin. Associate Area Counsel, State of Wisconsin, January, 1996 to 2000. Assistant Regional Counsel, August, 1993 to December, 1995.

August, 1990 to May, 1993: Hinshaw & Culbertson, Milwaukee, Wisconsin. Title industry litigation and coverage practice.

July, 1981 to July, 1990: Ticor Title Insurance Company. Midwest Region Claims Counsel, Home Office staff, 1988 and 1990. Michigan State Manager, 1987 and 1988. Michigan State Counsel, 1984 through 1986. Milwaukee County Counsel, 1981 through 1983.

Recognition

Named a Wisconsin Super Lawyer in the category of real estate by *Law & Politics* and *Milwaukee Magazine* from 2006 through 2017.

Named in *The Best Lawyers in America*® from 2009 through 2016 in the category of Litigation--Real Estate.

Named in the Milwaukee *Business Journal* list of *Top Lawyers* for 2009 through 2017.

Named in the M Magazine/AVVO *Leading Lawyers in Milwaukee* list for 2012.

AV-rated by Lexis-Nexis Martindale-Hubbell.

Recipient of Service Award, Wisconsin Land Title Association, October, 2005.

Recipient of Member of the Year Award, Wisconsin Land Title Association, September, 2002.

Commendation by Wisconsin Governor Scott McCallum for service to the land title industry, September 12, 2002.

Recipient of President's Award for Outstanding Service, Wisconsin Land Title Association, May, 2000.

Recipient of President's Award for Outstanding Service, Wisconsin Land Title Association, April, 1996.

Recipient of Bob Jay Outstanding Leadership Award, Michigan Land Title Association, July, 1991.

Professional Associations

Member (by invitation), American College of Real Estate Lawyers. Member, Title Insurance Committee and Title Insurance Coverage Subcommittee.

Wisconsin Land Title Association:
President, 2003-2004. Director-At-Large, 1999 to 2003. Member, Legislative Committee, 1990 to present; Vice Chair, 1996 to 2000.

American Land Title Association:
Member, 1990 to present. Member, Title Counsel Committee.

Michigan Land Title Association:
President, 1989-1990. Treasurer, 1986-1988. Director, 1985-1986. Chairman, Underwriting Committee, 1987-1990. Good Funds Committee: Chairman, 1989-90; member, Education Committee, 1984-1989.

American Bar Association:
Member, Real Property Section, 1988 to present. Member, Title Insurance Litigation Committee, Tort Trial and Insurance Practice Section, 1992 to present.

Member, State Bar of Wisconsin.

State Bar of Michigan:
Member (special certificate), 1984 to 1990. Member, Water Law Committee, Real Property Section, 1987 to 1990.

Publications

Editor from 1998 to present of The Title Insurance Law Newsletter, a monthly national report of recent legal decisions and other matters affecting the land title industry and conveyancing law. More than 2,000 articles written to date on title insurance coverage, conveyancing, closing duties,

agent-underwriter disputes, escrows and RESPA. Published by American Land Title Association.

Author of Title and Escrow Claims Guide, a national research treatise on title insurance, escrows and conveyancing. Published in 1996 and updated annually. Published by American Land Title Association and available on Westlaw.

Commercial Real Estate Transactions in Wisconsin, Chapter 7, *Title Insurance and Closing Protection Letters*, with Rebecca Leair, State Bar of Wisconsin, 2010, revised 2013.

Methods of Practice (4th Edition), Wisconsin Practice Series, Chapter 9, *Title Insurance*, West Publishing Group, 2004, revised 2012.

Quoted in Wisconsin Passes Bill that Eases Curing of Simple Conveyance Mistakes, ALTA Title News, August 26, 2010.

HUD Adopts New RESPA Regulations, with Robert W. Habich, *The Real Estate Finance Journal*, Spring 2009, page 73.

No More Marina Condos, *Wisconsin Lawyer*, Volume 82, No. 3 (March, 2009), page 36.

Title Policy Blanket Restrictive Covenants Exception Enforceable, 26 ACREL News No. 2 (May, 2008), page 5.

Keeping Up With Law & Regulation column, published monthly in Settlement Services Today magazine, July, 1999 to November, 2000.

Case Briefs column, published monthly in Condell Private Letter, April, 1997 to March, 1998.

Chicago Title Insurance Company Wisconsin Examining Manual, Chief Editor, 1995 to 2000.

Escrowee's Duties in the Handling of Funds, Chicago Title and Trust Family of Insurers Underwriting Journal, April, 1998.

Mortgage Payoff and Assignment Issues, Chicago Title and Trust Family of Insurers Underwriting Journal, June, 1997.

Statements and Representations by Closers, Chicago Title and Trust Family of Insurers Underwriting Journal, November, 1997.

Escrowee's Duties Regarding Recording of Documents, Chicago Title and

Trust Family of Insurers Underwriting Journal, March, 1997.

Contributing Editor, The Title Insurance Law Newsletter, April, 1992 to May, 1993.

Insuring Title to Riparian or Littoral Property, Michigan Real Property Review, Volume 17, No. 1, p. 11 (Spring 1990).

National Underwriting Manual, Ticor Title Insurance Company, Chapter Author, 1988.

Michigan Underwriting Manual, Ticor Title Insurance Company, Chief Editor, 1984 to 1988.

Determining and Surveying Water Boundary Lines in Michigan, *Michigan Bar Journal*, September, 1987, p. 874.

Significant Appellate Decisions

Ash Park, LLC v. Alexander & Bishop, LTD., Appeal No. 2013AP1532. Presented argument on March 4, 2015 to the Wisconsin Supreme Court as counsel for subsequent purchaser-intervenor in petition concerning real estate broker commission and broker lien.

Kimble v. Land Concepts, Inc., 2014 WI 21, 353 Wis.2d 377, 845 N.W.2d 395 (2014). Counsel for First American Title in petition before the Wisconsin Supreme Court in which the court reversed a punitive damage award against the insurer as being an unconstitutional taking of property. Argued on December 19, 2013.

Geiger v. Chicago Title Ins. Co., 2011 WI App 136, 337 Wis.2d 429, 805 N.W.2d 734 (Wis.App.). Counsel for Chicago Title in case holding that the insurer did not have a duty to defend or pay the insured on a claim concerning a boundary dispute.

Johnson 1988 Trust v. Bayfield County, 649 F.3d 799 (7th Cir. 2011), earlier decision 520 F.3d 822 (7th Cir. 2008). Counsel for *amicus curiae* Wisconsin Land Title Association in landmark case affirming private owners' title obtained from railroads after ICC abandonment of rail lines and limiting use of federal rails-to-trails legislation, as discussed in William T. Stuart and Thomas M. Hruz, *Switching Tracks: How the Seventh Circuit Restored Certain Landowners' Rights to Abandoned Railroad Rights-of-Way*, American Land Title Association *Title News*, Volume 90, Number 10 (October 2011), p. 23.

Solowicz, et al. v. Forward Geneva National, Appeal No. 2008AP10, 2010 WI 10, 323 Wis.2d 556, 780 N.W.2d 111 (2010). Counsel for *amicus curiae* Wisconsin REALTORS(r) Association in significant Wisconsin

Supreme Court decision adopting the concept of master planned communities in Wisconsin; participated in oral argument.

Residential Funding Company, LLC v. Saurman, 292 Mich.App. 321, 807 N.W.2d 412 (2011) (Michigan Court of Appeals #290248), reversed by 805 N.W.2d 183, 490 Mich. 909 (2011). Counsel for *amicus curiae* American Land Title Association in precedent-setting case holding that Mortgage Electronic Registrations System, Inc. is qualified to conduct foreclosures by advertisement in Michigan.

Anderson v. Quinn, 2007 WI App 260, ¶ 30, 306 Wis.2d 686, 743 N.W.2d 492. Significant decision concerning bona fide purchaser and inquiry notice, and Statute of Frauds.

Spencer v. Kosir, 301 Wis.2d 521, 733 N.W.2d 921 (Ct. App. 2007). Landmark decision holding that an easement may not be abandoned if never used.

Smiljanic v. Niedermeyer, 2007 Wis. App. 182, 304 Wis.2d 197, 737 N.W.2d 436 (Ct.App. 2007). Decision holds that an easement may not be appended to a deed by an affidavit of correction signed by the broker in the transaction rather than the grantor.

AKG Real Estate, LLC v. Kosterman, 2006 WI 106, 296 Wis.2d 1, 717 N.W.2d 835 (2006). Counsel for easement holder whose rights were affirmed by Wisconsin Supreme Court in a decision rejecting a proposed change concerning the right to unilaterally terminate or move easements.

First American Title Ins. Co. v. Dahlmann, 2006 WI 65, 291 Wis.2d 156, 715 N.W.2d 609 (2006). Counsel for First American Title Insurance Company. Wisconsin Supreme Court ruled that title insurance policy coverage is triggered by the encroachment of improvements into a neighboring street, if that encroachment is substantial, when the insurer has removed the so-called "survey" exceptions from the policy.

Megal Development Corp. v. Shadof, 2005 WI 151, 286 Wis.2d 105, 705 N.W.2d 645 (2005). Counsel for *amicus curiae* Wisconsin Land Title Association. Wisconsin Supreme Court reversed trial court and declared that a judgment lien may be satisfied after discharge of the judgment debt in bankruptcy, adopting reasoning of WLTA.

Evans v. Samuels, 119 Nev. 378, 75 P.3d 361, 119 Nev. Adv. Rep. 42 (Nev. 2003). Counsel for amicus curiae Nevada Land Title Association. Decision clarified the law on duration of judgment liens and effect of attempted renewal of such liens after expiration of six-year lien period.

Houston v. Bank of America Federal Savings Bank, 78 P.3d 71 (Nev. 2003). Counsel for amicus curiae Nevada Land Title Association. The court adopted the Restatement (Third) of Property view of equitable subrogation, which is favorable to lenders and their title insurers.

ABKA Limited Partnership v. Wisconsin Department of Natural Resources, 2002 WI 106, 255 Wis.2d 486, 648 N.W.2d 854 (2002). Counsel for amicus curiae Wisconsin Land Title Association in case concerning public trust doctrine and marina condominiums.

Greenberg v. Stewart Title Guar. Co., 171 Wis.2d 485, 492 N.W.2d 147 (Wis. 1992). Counsel for *amicus curiae* Wisconsin Land Title Association. Wisconsin Supreme Court rejected abstractor liability on title insurance policy, adopting position of WLTA.

Jalowitz v. Ticor Title Ins. Co., 165 Wis.2d 392, 478 N.W.2d 67 (Table), 1991 WL 271040 (Wis.App.) (unpublished). Counsel for Ticor Title in decision establishing that loss on an owner's policy is measured based on the value of the property on the date of the discovery of the title defect or encumbrance.

Significant Legislative and Regulatory Activities

Testified in opposition to Wisconsin Senate Bills 314 and 344, and Assembly bill 465, which would effectively bar the accrual of title by adverse possession in the State of Wisconsin prospectively. Testimony given on November 18, 2015 and December 10, 2015 on behalf of Wisconsin Land Title Association.

Testified in favor of, and served as advisor to the author and co-sponsors of, Wisconsin Statute 30.2038, adopted in March of 2014, which declares the waterward boundary of two and one half miles of shoreline along Lake Michigan at downtown Milwaukee.

Assisted in drafting of proposed law or regulation for the mandatory issuance of closing protection letters in the State of Wisconsin and the State of Michigan, 2011-2015.

Member of committee that obtained adoption of Uniform Residential Mortgage Satisfaction Act in Wisconsin, 2012-2013.

Lead drafter of bill to enable affidavits of correction in Wisconsin and to modify commercial broker lien and *lis pendens* laws, in joint taskforce of Wisconsin Land Title Association, Wisconsin Registers of Deeds Association, Wisconsin Real Property Listers Association and State Bar of Wisconsin, 2008-2010. Testified in support of on Senate Bill 587 before Senate committee.

Senate Committee on Veterans and Military Affairs, Biotechnology and Financial Institutions on March 10, 2010. Testified on Assembly Bill 821 before Committee on State Affairs and Homeland Security on March 25, 2010. Law adopted in 2010.

ALTA representative to joint drafting committee on uniform loan closing instructions sponsored by ALTA, Mortgage Bankers Association of America and American Escrow Association, 2008-2009.

Presentation of proposed rewrite of ALTA owner's title insurance policy to ALTA Forms Committee, February, 2009.

Drafted law grandfathering marina condominiums in Wisconsin. Wis.Stats. § 30.1335, adopted in July, 2007.

Drafted and testified in favor of change to Wisconsin statutes clarifying that a person discharged of a judgment debt in bankruptcy may obtain a court order satisfying the lien of the judgment. Wis.Stats. § 806.19(4).

Drafted and testified in favor of Wisconsin's law requiring mortgage lenders to deliver good funds to closing. Wis.Stats. § 708.10.

Significant Speeches and Seminars

Important Recent Title Insurance Decisions, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 3, 2017.

The New 2016 ALTA Title Insurance Commitment Form, with Fran Iverson, Vice President and Manager, Chicago Title Insurance Company, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 2, 2017.

The New 2016 ALTA Title Insurance Commitment Form, Wisconsin Land Title Association annual convention, Milwaukee, Wisconsin, October 19, 2017.

Mechanic Lien Coverage and B & B Syndication Services, Inc. v. First American Title Insurance Company, telephone "debate" with Albert Rush to Association of Title Insurance Committees of American College of Real Estate Lawyers, American College of Mortgage Attorneys and American Bar Association Title Insurance Committee, October 3, 2017.

How Loan Title Insurance Policy Claims Are Resolved, Corporate Counsel Committee of the American College of Mortgage Attorneys, Asheville, North Carolina, September 14, 2017.

How to Draft Exceptions and Affirmative Coverages, agents of Old Republic National Title Insurance Company, Chippewa Falls, Wisconsin, September 7, 2017.

Important Recent Title Insurance Decisions and Claims on Special Title Policy Coverages, Fidelity National Title Jacksonville, Florida Claims Center, June 6, 2017.

How to Draft Exceptions and Affirmative Coverages, agents of Old Republic National Title Insurance Company, Madison, Wisconsin, April 20, 2017.

Knowledge and Disclosure in Relation to Exclusions 3(a) and 3(b) of the American Land Title Association Title Insurance Policies, telephone "debate" with Albert Rush, to Association of Title Insurance Committees of American College of Real Estate Lawyers, American College of Mortgage Attorneys and American Bar Association Title Insurance Committee, March 8, 2017.

Important Recent Title Insurance Decisions, First American Title Warrenville, Illinois Claims Center, November 18, 2016.

Important 2016 Cases on Title Insurance Policy Coverage and Claims on Special Title Policy Coverages, Including Forced Removal, Zoning and Encroachments, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 3 and 4, 2016.

Important Recent Title Insurance and Closing Protection Letter Cases and Changes, Fidelity National Title Omaha Claims Center, April 27, 2016.

Closing Protection Letter Claim Issues, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, October 23, 2015.

Explaining Title Insurance to Your Customer and Protecting Your Title Agency When a Claim is Made, Wisconsin Land Title Association Annual Convention, Milwaukee, WI, September 18, 2015.

Title Insurance Policy Coverage and Claims in Depth, Minnesota State Bar Continuing Legal Education, Minneapolis, MN, August 12, 2015.

Explaining Title Insurance to Your Customer and Protecting Your Title Agency When a Claim is Made, Minnesota Land Title Association, Minneapolis, MN, August 7, 2015.

Closing Protection Letters informational videotapes posted to Reinhart Boerner Van Deuren s.c. website, August, 2015.

Hot Coverage Issues, American Bar Association TIPS Title Insurance Litigation Committee Spring Meeting, Hilton Head Island, South Carolina, May 15, 2015.

Claims on Loan Title Insurance Policies, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 14, 2014.

Important Recent Title Insurance Decisions, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 13, 2014.

Title Insurance Policy Coverage, guest lecturer, Real Estate Transactions 1 course at University of Wisconsin Law School, October 14, 2014.

Closing Protection Letter Legislative Proposal, panel discussion, Wisconsin Land Title Association convention, September 17, 2014.

Interesting New Title Insurance Decisions, Fidelity National Title Omaha Claims Center, May 20, 2014.

Duties of a Title Company in Closings and Escrows, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 15, 2013.

Title Insurance Case Law Update, Minnesota State Bar Annual Real Estate Institute, St. Paul, MN, November 14, 2013.

Claim Avoidance Strategies, Wisconsin Land Title Association graduate course, member of seminar panel, Madison, WI, November 6, 2013.

Closing Protection Letters, Indiana Land Title Association Super Seminar, Carmel, IN, July 10, 2013.

How to Measure Loss Under a Title Insurance Policy, Wisconsin State Bar 30th Business and Real Estate Institute, Madison, June 13, 2013.

How Endorsements are Written and Construed, customers of Chicago Title Insurance Company, Milwaukee and Waukesha, Wisconsin, May 1 and 2, 2013.

How to Measure Loss Under a Title Insurance Policy, Minnesota State Bar 30th Annual Real Estate Institute, St. Paul, MN, November 9, 2012.

Title Insurance Policy Coverage, guest lecturer, Real Estate Transactions 1 course at University of Wisconsin Law School, October 17, 2012.

Exception Drafting Workshop, for employees of Commercial Partners Title, LLC, Minneapolis, MN, September 12, 2012.

Important Recent Title Insurance Coverage Cases, seminar for claim administrators of Fidelity National family of insurers, Omaha, Nebraska, September 5, 2012.

Drafting Exceptions and Endorsements, seminar for employees of Commercial Partners Title, LLC, Minneapolis, MN, July 10, 2012.

Title Insurance Policy Coverage in Depth, Minnesota State Bar Association Continuing Legal Education, Minneapolis, MN, July 9, 2012.

Closing Protection Letters, Wisconsin Land Title Association, panel discussion with Nick Hacker, American Land Title Association, Doug Smith, Stewart Title Guaranty Company and Donald Schenker, First American Title Insurance Company, Madison, WI, April 21, 2012.

E & O Coverage and Important Title Insurance Cases, Old Republic National Title's annual Wisconsin agent seminar, Wisconsin Dells, WI, April 17, 2012.

Closing Protection Letters, webinar for Fidelity National Title Group agents, with Lisa Petersen, underwriting counsel for Fidelity National Title Group, Milwaukee, WI, April 11, 2012.

Important Recent Title Insurance Coverage Cases, Minnesota Land Title Association, St. Cloud, MN, April 5, 2012.

Commercial Real Estate Transactions: Title Insurance, State Bar of Wisconsin webinar, Madison, Wisconsin, March 7, 2012.

Title Insurance: Important Recent Coverage Cases, Minnesota State Bar 29th Annual Real Estate Institute, St. Paul, MN, November 4, 2011.

Title Insurance Policy Coverage, guest lecturer, Real Estate Transactions 1 course at University of Wisconsin Law School, October 19, 2011.

Title Insurance: Important Recent Coverage Cases, American Land Title Association convention, Charleston, South Carolina, October 13, 2011.

Unauthorized Practice of Law Issues Relating to the Land Title Industry and Settlement Table Shenanigans, Indiana Land Title Association convention, Fort Wayne, September 21, 2011.

Limiting Your Title Company's Risks in an Uncertain World, Keynote Address at 100th Annual Convention of Ohio Land Title Association, Columbus, OH, September 14, 2010.

Closing Problems, Avoidable Title Claims, E&O Coverage and Agency Contract Liability Issues, Indiana Land Title Association five-hour continuing education seminar, Indianapolis, IN, August 24, 2010.

Curing Title Using the New Affidavit of Correction Law and Other Techniques, live webcast for State Bar of Wisconsin, Madison, Wisconsin, July 28, 2010.

How to Calculate Loss Under a Title Insurance Policy, Minnesota State Bar 27th Annual Real Estate Institute, St. Paul, MN, November, 2009.

Training of about 300 title insurance claim administrators in 26 full-day training sessions conducted in three locations between June, 2009 and December, 2010.

Title Insurer v. Lender Amidst the Foreclosure Crisis, American Bar Association teleconference, with Benjamin M. Kahrl, April 14, 2009.

Surveying of Boundaries on Water, Northeast Wisconsin Society of Land Surveyors, Green Bay, Wisconsin, March, 2009.

A View from the Trenches: Title Claims by Region in 2009, ABA Tort, Trial and Insurance Practice Title Insurance Litigation Committee seminar, Seattle, Washington, March, 2009.

Title Insurance and Closing Case Law Update 2008, Minnesota State Bar 26th Annual Real Estate Institute, St. Paul, MN, November, 2008.

Current Trends in Mortgage Fraud, clients of Holland + Knight, LLP, Chicago, November, 2008.

Construction Disbursing in Depth, Wisconsin Land Title Association graduate course, various locations and dates, 2004, 2005, 2006 and 2008.

The Real Estate Roots of the Global Financial Crisis, televised press conference and business seminars sponsored by Global Leadership, Youth Against Corruption and Forum of Young Ukrainian Leaders, Kyiv, Ukraine, October, 2008.

Title Insurance Policy Coverage and Closing Duties, Pennsylvania Land Title Institute, Pittsburgh and Philadelphia, October, 2008.

Title Agent Closing Duties and RESPA Compliance, Chicago Title agent meeting, Bay Harbor, Michigan, September, 2008.

Commercial Real Estate, State Bar of Wisconsin, Madison, Wisconsin, June 4, 2008.

Current Views on Title Agent and Escrow Duties, Ohio Land Title Association keynote address, Columbus, Ohio, May 3, 2008.

Mortgage Fraud, Equity Skimming and Their Effect on the Subprime Mortgage Crisis, Waukesha County Bar Association, October 19, 2007.

Closings and Payoffs: The Right and Wrong Way, agents and offices of Chicago Title Insurance Company in Illinois, Indiana, Michigan, Wisconsin and Minnesota, September 12 and 20, 2007.

Closing Errors You Can Avoid, Wisconsin Land Title Association, Racine, Wisconsin, August 24, 2007.

Twelve Simple Steps in Avoiding Stupid Risks, Minnesota Land Title Association, Rochester, Minnesota, August 10, 2007.

The Measure of Loss Under the Title Insurance Policy, national teleseminar for Old Republic National Title Insurance Company claim administrators, April 5, 2007.

Anatomy of a Residential Real Estate Transaction, State Bar of Wisconsin, February 7, 2007.

Recent Title Insurance Coverage Decisions That Matter, Minnesota State Bar 24th Annual Real Estate Institute, St. Paul, MN, November, 2006.

Reverse Exchanges, for customers of Dane County Title Company, Madison, Wisconsin, July, 2006.

Commercial Title Insurance, Lorman Education, Milwaukee, Wisconsin, June, 2006.

Current Title, Escrow and Class Action Law and Issues, Chicago Title Insurance Company Chicago Metro Agents Meeting, Chicago, Illinois, May, 2006.

Current Issues in Title and Escrow Law, Wisconsin Land Title Association Spring Meeting, Wisconsin Dells, Wisconsin, May, 2006.

The Duty to Defend in Michigan, Ohio, Minnesota, Illinois and Wisconsin, Chicago Title Insurance Company Midwest Regional Claims Center, Chicago, Illinois, February, 2006.

Fascinating Current Title Insurance Coverage Issues, Milwaukee Bar Association, February, 2006.

Late Recording of Mortgages, Current Payoff Issues and Closing Problems Caused by Desperate People, Chicago Title Insurance Company agent

telephone and internet seminar, October, 2005.

What the Title Insurance Policy Really Covers, Illinois Land Title Association, Lake Geneva, Wisconsin, July, 2005.

Hard Questions (and Some Answers) on 1031 Exchanges, Wisconsin State Bar Third Annual Commercial Real Estate Law seminar, Brookfield, June, 2005.

Real Estate Issues for Estate Planners, Wisconsin State Bar Convention, Milwaukee, May, 2005.

What the Title Insurance Policy Really Covers, Iowa Land Title Association, Dubuque, Iowa, May, 2005.

For The Record (document recording issues in Wisconsin), Wisconsin Mortgage Bankers Association, November, 2004 and March, 2005.

Ten Things Never To Say In A Closing, Wisconsin Mortgage Bankers Association Real Estate Conference, April, 2004 and March, 2005.

Closing Do's and Don'ts in 2003, Pennsylvania Land Title Association, Philadelphia, December, 2003.

What the Title Insurance Policy Really Covers—2003, Minnesota State Bar 21st Annual Real Estate Institute, St. Paul, MN, November, 2003.

RESPA Issues in 2003, presented to Fidelity National family Roundtable of Agents, November, 2003.

Mortgage Foreclosures in Wisconsin, Lorman Education, Milwaukee, November, 2003.

Like Kind Real Estate Exchanges in Wisconsin, Lorman Education, Milwaukee, September, 2003.

Tricky Title Issues, presented to agents of Chicago Title Insurance Company, September, 2003.

Mastering Real Estate Titles and Title Insurance in Wisconsin, National Business Institute, Milwaukee, February, 2003.

Escrow Duties, presented to agents of Chicago Title Insurance Company, December 10, 2002.

Boundary Law in Wisconsin, National Business Institute, Madison and

Milwaukee, October 17 and 18, 2002.

Title to Riparian Property, Michigan Land Title Association, Mt. Pleasant, Michigan, April 17, 2002.

What the Title Insurance Policy Really Covers and Closing Do's and Don'ts, presented to: Indiana Land Title Association, August, 2000; North Dakota Land Title Association, January, 2001; Minnesota Land Title Association, March, 2001; Pennsylvania Land Title Association, March, 2001; Illinois Land Title Association, July, 2001; Arkansas Land Title Association, August, 2001; Minnesota State Bar 19th Annual Real Estate Institute, November, 2001; Louisiana Land Title Association, December, 2001; Chicago Title Insurance Company Indiana, February, 2003; Metropolitan Title Company, Indiana, October, 2003.

Real Estate Issues for Estate Planners, Milwaukee Bar Association, March, 2002.

Mastering Real Estate Titles and Title Insurance in Wisconsin, National Business Institute, Milwaukee, January, 2002.

Understanding the Title Insurance Policy, University of Wisconsin Law School guest lecturer, October 2000 and 2001.

Issues in Real Estate Titles 2001, Wisconsin Real Property Listers Association, Mineral Point, Wisconsin, September, 2001.

Boundary Law in Wisconsin, National Business Institute, Madison and Milwaukee, September 11 and 12, 2001.

"Insuring Over": Perspectives on Solving Your Title Problems, Milwaukee Bar Association, February, 2001.

Mastering Real Estate Titles and Title Insurance in Wisconsin, National Business Institute, Milwaukee, December, 2000.

Title Issues for Real Property Listers—Part II, Wisconsin Real Property Listers Association, Ashland, Wisconsin, September, 2000.

Title Insurance Issues: Leasehold Policies, Title in Mergers and Acquisitions, and Current Title Coverage Cases, Wisconsin State Bar Real Property, Probate & Trust Law Section Meeting, 2000 Annual Convention, June, 2000.

Title Insurance and Survey Issues, Residential Real Estate Conveyancing seminar, State Bar of Wisconsin, Milwaukee, Wisconsin, May, 2000.

Ownership of Public Records, American Land Title Association Tech Show, Las Vegas, February, 2000.

Title Issues for Real Property Listers, Wisconsin Real Property Listers Association, Marinette, Wisconsin, September, 1999.

Insuring Over Mortgages With Indemnities, General Counsel's Conference, Chicago Title Insurance Company, San Diego, California, June, 1999.

Wisconsin's New Child Support Lien Law, Milwaukee Bar Association, Milwaukee, April, 1999.

Recent Title Insurance Policy Coverage Cases and Hot Issues in Title Insurance Underwriting, State Bar of Wisconsin, Madison and Milwaukee, October, 1998.

Wisconsin's New Commercial Broker Lien Law, Milwaukee Bar Association Real Property Section, Milwaukee, October 8, 1998.

Advanced Principles of Title Insurance, National Business Institute, Inc., Milwaukee, June 5, 1998.

Proposed Revision of Construction Lien Law, American Subcontractors Association, Milwaukee, Wisconsin, February, 1998.

Riparian Rights in Michigan, Michigan Land Title Association, Mt. Pleasant, Michigan, April 15, 1997.

Adverse Possession and Riparian Rights, 48th Annual Surveyors' Institute, Wisconsin Society of Land Surveyors, Stevens Point, Wisconsin, January 12 and 13, 1997.

Title Insurance Claims and Coverages, State Bar of Wisconsin, Madison and Milwaukee, November 14 and 15, 1996.

Advanced Principles of Title Insurance, National Business Institute, Inc., Milwaukee, July 11, 1996.

Escrows and Escrow Liability, Milwaukee Bar Association, Milwaukee, June, 1996.

Ways To Solve A Title Problem and Save A Closing, Milwaukee Bar Association and Chicago Title Insurance Co., Milwaukee, November 12, 1993.

Title Insurance Claims--Selected Issues, Milwaukee Bar Association,

Milwaukee, October 18, 1993.

Michigan Title Insurance Law, Professional Education Systems, Inc., Detroit, Lansing, Grand Rapids, Michigan, June, 1990.

Title and Escrow Claims Guide

2017 Edition

J. Bushnell Nielsen

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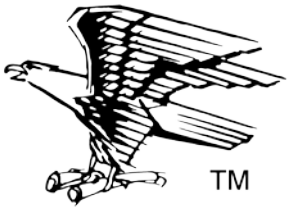

Title and Escrow Claims Guide

This book is intended to provide accurate information. However, it is not intended to render legal advice, for which the reader should seek a competent attorney.

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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. However, one court said that the diligence covenant is separate from the policy's indemnity provisions, justifying an award to the insured of market value decline between the date the claim was submitted and the date on which the insurer began to clear title.[261]

The second prong of the "reasonable diligence" covenant is the insurer's actions in pursuing title clearance after its decides to resolve the claim in that manner.[262] The amount of time it takes to clear title depends on a variety of factors, and each situation is different. Thus, diligence is not measured by a uniform time period.[263] The insurer's diligence in the clearing of title is measured only

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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, saying: "Plaintiff [bank] argues that it suffered damages in the form of the decline in market value of the property. Plaintiff contends that such damages are proper, but cites no California case law that supports its contention that a lender's title insurance policy insures against diminution in value of property caused by market decline. Defendant cites California case law that presents analogous scenarios, which this Court finds persuasive. In both cases cited by Defendant, decline in market value was not considered a compensable damage." However, that decision was vacated by the Ninth Circuit, which found that the complaint survived the motion to dismiss. The appeals court said that the bank had 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." The court said that the policy "does not bar all liability claims simply because litigation did not result in an adverse judgment…, [which] would produce an absurd result by absolving the insurer of any liability, despite a lack of diligence, whenever litigation was initiated but a claim was subsequently resolved short of final judgment, notably by settlement." However, the court also said "We do not reach the validity of any of the other damages theories asserted by the Bank." Thus, the appeals court made it clear that it did not address the insured's contention that market value decline may be a covered element of loss. 2011 WL 6396533 (C.A.9 (Cal.)) (unpublished).

[261] *Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Fla., Inc.*, 2011 WL 2313206 (S.D.Tex.) (unpublished).

[262] 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.

[263] 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

by its own conduct; the slow pace of the court system may not be counted against the insurer.[264] Delays imposed by the insured's own failure to cooperate in the clearing of title must be offset in the insurer's favor. 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. 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.[265]

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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." See also, 9 Appleman, *Insurance Law and Practice*, §§5213-5214.

[264] 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."

[265] 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.*

3.2.4 Determining Amount Of Loss On A Loan Policy

While an owner's policy insures the owner's title to the land, 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. 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,[151] 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.[152]

> Defining and measuring actual loss under a title insurance policy is not the same for 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.[153]

> [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,

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[151] *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).

[152] *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.

[153] *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).

> ... 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.[154]
>
> [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.[155]

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."[156]

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[154] *CMEI, Inc. v. American Title Ins. Co.*, 447 So.2d 427, 428 (Fla.App. 1984).

[155] *American Title Ins. Co. v. East West Financial*, 16 F.3d 449, 456 (1st Cir. 1994).

[156] *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

The loan 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."[157] 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.[158]

As stated above, the second condition to loss on a loan policy is proof that the borrower has defaulted and will not pay the debt. This is typically accepted as proven when the lender has obtained a foreclosure judgment.[159] If the borrower has defaulted but the lender has elected not to foreclose the mortgage, it must show that the borrower has been sued under the note and has not paid the money judgment.[160]

The third condition to payment of loss is that the lender's security position in the real estate be sufficiently impaired or reduced by the covered matter to cause the lender to be undersecured for the loan, when all of its collateral is considered.[161] If the value of the property subject to the covered matter is still sufficient to fully secure the lender even with the existence of 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

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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.

[157] *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."

[158] *Gerrold v. Penn Title Ins. Co.*, 637 A.2d 1293 (N.J.Super.A.D. 1994).

[159] *Goode v. Federal Title Ins. Co.*, 162 So.2d 269 (Fla.App. 1964).

[160] *Falmouth National Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058 (1st Cir. 1990).

[161] 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.

> 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.[162]

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.*,[163] 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.

The principle limiting a lender's loss to the extent its security is impaired is consonant with the full credit bid or one-recovery rule adopted in some states. That rule prohibits the lender from attempting to collect the debt from either the borrower or third parties after the lender makes a credit bid of the full amount of the debt at the foreclosure or trustee's sale it conducts:

> 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.[164]

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, because the bid is the lender's agreement that the property it received at sale is equal in value to the bid it made.[165] The full credit bid rule corresponds

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[162] *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.

[163] 60 Ga.App. 114, 3 S.E.2d 127 (1939); aff'd 64 Ga.App. 38, 12 S.E.2d 147 (1940).

[164] *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).

[165] 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 cases 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

to the 1992 ALTA Loan policy term stating that payment of the debt in full by any person extinguishes the policy. Not all courts have agreed that a full credit bid should be deemed a payment of the debt that reduces the policy amount, and the 2006 ALTA Loan policy does not contain the same provision.[166] Nonetheless, it should not be necessary to establish a direct link between the policy's terms and the full credit bid rule in order for that doctrine to preclude a policy claim. The premise of the rule is that a lender owed a debt is deemed to have accepted title to the property in

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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 *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 181292 (D.Ariz.) (unpublished), a federal court sitting in 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." *Wright* was rejected, however, in *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D.Ariz.) (unpublished), which applied the rule and found that the policy amount was reduced to zero by the bid. The Ninth Circuit Court of Appeals accepted an appeal of that decision, and certified to the Arizona Supreme Court the question of whether or not an insured lender extinguishes its claim of loss under a title insurance policy by making a full credit bid at its trustee's sale. 828 F.3d 1040 (9th Cir. (Ariz.) 2016). The Arizona high court had not issued a decision as of the date of this edition. 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.

[166] In *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 181292 (D.Ariz.) (unpublished), a federal court sitting in 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.

lieu of that debt by making a full credit bid. Having released the borrower from the debt, and having taken title to the property, the lender has no basis on which to assert that the title insurer should pay it additional money.

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.[167] 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.[168]

The policy does not protect the lender against expenses which flow from the breach of its warranties or representations to others as to the state of title, when those expenses are separate from any impairment of the lender's security in the property. For example, in *National Title Ins. Co. v. Safeco Title Ins. Co.*,[169] an insurer failed to disclose a junior mortgage given to finance the buyer's equity. By borrowing the equity funds, the owner breached the terms of the loan agreement and private mortgage insurance contract. Later, the junior mortgage was paid off and the lien satisfied. After that, the insured mortgage loan went into default. The mortgage insurance company declared its policy void for failure to disclose the second mortgage. 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 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.[170]

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[167] 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.

[168] 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.

[169] 661 So.2d 1234 (Fla.App. 3 Dist. 1995).

[170] Id. at 1236.

3.2.4.1 Loan Policy Loss Equation

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.[171] The value of all of the collateral held by the lender as 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.[172] 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.[173] 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.[174] 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

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[171] *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."

[172] 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.

[173] See Conditions & Stipulations 7(a)(ii), 1992 ALTA Loan Policy; Conditions 8(a)(ii), 2006 ALTA Loan Policy.

[174] 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."

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.[175] Also, the insured lender is 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.[176]

A lender that has paid a lien but is unable to show that its security was impaired by it has not proven a loss.[177] In *Green v. Evesham Corp.*,[178] 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.

If 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,

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[175] *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 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 (Bkrtcy.S.D.Miss. 2013).

[176] 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.

[177] 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.

[178] 430 A.2d 944 (N.J. Super. Ct. A.D. 1981).

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.[179] However, when the insured would have had partial security in the property but the 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.[180]

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.[181] 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.[182]

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

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[179] 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 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.

[180] *Focus Investment Associates, Inc. v. American Title Ins. Co.*, 992 F.2d 1231 (1st Cir. 1993).

[181] *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).

[182] 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.

priority issue and the amount of loss, if any, is typically not calculable until the insured takes title or is foreclosed out.[183] See §3.1 regarding watchful waiting.

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,[184] 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.[185]

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.[186]

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[183] *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).

[184] *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.

[185] *Chrysler First Financial Services Corp. of America v. Chicago Title Ins. Co*., 595 N.Y.S.2d 302, 307 (Sup. Ct. 1993).

[186] 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 Conditions 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 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

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.[187] 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 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

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policy, saying simply that it was unfair to reduce the policy amount dollar-for-dollar based on the credit bid amount. However, the *Doss* and *Preservation Capital* analysis of Conditions 9(b) was flatly rejected in *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D.Ariz.) (unpublished). That court held that a lender's credit bid in the policy amount reduced the policy amount to zero by virtue of Conditions 9(b), and thus negated any claim under the policy. The *pro tanto* provision does not appear in the 2006 ALTA Loan policy. However, the *CMEI* decision was issued *before* Conditions 9(b) was added to the 1992 policy. Thus, the principle should still stand that the insured lender cannot suffer a loss if it has received cash or property equal to the full amount of the indebtedness.

[187] 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.

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.[188] 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.[189]

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[188] *Narbeth Building & Loan Ass'n v. Bryn Mawr Trust Co.*, 126 Pa.Super. 74, 190 A. 149 (1937).

[189] *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. 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.

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 is invoked if there would be a potential for coverage if the adverse claimant were to prove its allegations.[26]

However, if there is no such potential for coverage, the insurer does not owe a defense.[27] 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.[28]

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.[29] The policies also do not obligate the insurer to prosecute lawsuits or claims against third parties on behalf of its insured.[30]

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.[31] The duty to defend may only be triggered by the allegations in the

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[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] *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 100 Md.App. 606, 642 A.2d 285 (Md.App. 1993).

[27] 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.

[28] *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).

[29] *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)).

[30] *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).

[31] *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

complaint, not allegations that might be made if the complaint were amended.[32] 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.[33]

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.[34]

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

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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.

[32] *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).

[33] *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).

[34] *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."

HOW LOAN TITLE INSURANCE POLICY CLAIMS ARE RESOLVED

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I. NINE OPTIONS FOR RESOLVING A COVERED CLAIM

A. The American Land Title Association loan title insurance policy permits the insurer to resolve a covered claim in nine ways. Not all permitted options apply in every claim situation. Those options are:

1. Defend the insured's title. Condition 5(a), 2006 ALTA Loan policy.[1]

2. Prosecute a lawsuit on the insured's behalf to remove the defect in title or to reduce the loss payable to the insured due to the title defect until there has been a final determination in the action. Conditions 5(b) and 9(a).

3. Remove the title defect without litigation. Conditions 5(b) and 7(b)(i).

4. Buy rights for the insured. Conditions 5(b) and 7(b)(i).

5. To conduct what the industry terms watchful waiting or meaningful monitoring as to the claim. This right is not explicitly stated in the policy.

6. Pay a loss to the insured. Condition 7(b)(ii).

7. Pay policy limits to the insured. Condition 7(a).

8. Buy the Indebtedness from the insured lender. Condition 7(a)(ii), 2006 ALTA Loan policy; "Indebtedness" is defined in Condition 1(d).

9. Tender title to the insured lender. Inferred from Condition 7(b)(ii), 2006 ALTA Loan policy.

II. LOAN POLICY CONDITIONS TO LOSS

A. Although the loss measurement provisions of the ALTA loan policy are largely the same as those found in the owner's policy, there is a different set of rules for measuring loan policy loss established by case law. The three principal differences are found in the conditions precedent to payment of a claim, the date on which loss is measured, and the way in which loss is calculated. In addition, the insurer has two additional options for resolving a covered claim under a loan policy: purchase of the Indebtedness, and tender of the property's title to the lender.

B. Under an owner's policy, the insured need only establish that there is a title defect in order to invoke coverage. Under a loan policy, however, the insurer is not required to take action unless three events have occurred: (1) a defect in title exists, (2) the loan is in default and (3) the lender has suffered a diminution in its security in the real estate due to the title defect.

> 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.

[1] All subsequent references to the policy forms will be to the 2006 ALTA Loan policy form, unless otherwise stated.

Green v. Evesham Corp., 179 N.J.Super. 105, 109, 430 A.2d 944, 946 (1981); adopted in: Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis.2d 68, 423 N.W.2d 521 (1988); Focus Investment Associates, Inc. v. American Title Ins. Co., 992 F.2d 1231 (1st Cir. 1993); Hodas v. First American Title Ins. Co., 696 A.2d 1095 (Maine 1997).

C. Because of the above principle, when a lender submits a claim notice to the insurer before the lender has come into title, and the claim concerns anything other than a prior lien that may extinguish the insured mortgage, it is typical for the title insurer to respond to such claim by stating that it will conduct watchful waiting, as discussed further below.

D. A lender is not entitled to a loss payment if the loan collateral fully secures the loan, even subject to the discovered title defect. The lender is "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." Karl v. Commonwealth Land Title Ins. Co., 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (1993). See also Title Ins. Co. of Richmond v. Industrial Bank of Richmond, Inc., 156 Va. 322, 157 S.E. 710 (1931); Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis.2d 68, 423 N.W.2d 521 (1988).

E. However, after a lender takes title, it need only establish that there is a defect in title in order to present a viable policy claim.

F. **Not Value Insurance.** A loan title insurance policy does not insure the value of the land or that the lender's lien attaches to any equity in the property. See Bank of Miami Beach v. Fidelity & Casualty Co. of New York, 239 So.2d 97 (Fla. 1970). As an Illinois court put it:

> 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 Guaranty Fund Inc., 61 Ill. App.3d 911, 378 N.E. 2d 355 (1978).

III. LOAN POLICY CLAIM PROCEDURES

A. A lender insured should submit a claim to the insurer if it discovers that title is subject to a superior lien or an encumbrance or title defect not excepted in the policy. If a senior lien is threatening to extinguish the insured lien, or a party claims that the insured lien is invalid or unenforceable, demand that the insurer take action to protect the insured lien. If the title defect is something that does not threaten to extinguish the insured lien, expect the insurer to respond that it will

conduct watchful waiting or meaningful monitoring. Tender a renewed claim if a threat to the insured lien becomes imminent.

B. If a senior lien holder threatens to extinguish the insured lien, supply the insurer with any basis on which to claim priority over the other lien. Submit a claim notice or tender of defense before priority is adjudicated. If a sheriff's sale or nonjudicial sale is scheduled, demand that the insurer bid at sale or obtain an adjournment of the sale until the lien priority issue is determined.

C. An insured lender should not pay off a senior lien and expect the insurer to reimburse the lender afterward. Condition 9(c) states: "[t]he 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." Further, courts have repeatedly found that a lender may not pay off a lien and expect reimbursement from the insurer. Grunberger v. Iseson, 75 App.Div.2d 329, 429 N.Y.S.2d 209 (1980); Karl v. Commonwealth Land Title Ins. Co., 20 Cal.App. 4th 972, 24 Cal.Rptr.2d 912 (1993).

D. Further, the insurer is not required to remove a senior lien that is not being foreclosed. See Wedgewood Square Center Ltd. Ptnshp. v. Lincoln Land Title Co., Inc., 217 S.W.3d 308 (Mo.App. S.D. 2007), finding an action against the insurer to be premature because the insured lender had not yet suffered a loss due to an unexcepted senior lien that was not yet in foreclosure.

IV. WATCHFUL WAITING

A. 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. 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.

B. 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 the insured that it will conduct watchful waiting until the other party takes action to force the removal of the structure. See Trinder v. Connecticut Attorneys Title Ins. Co., 2011 VT 46, 22 A.3d 493 (Vt. 2011); and Manneck v. Lawyers Title Ins. Corp., 28 Cal.App.4th 1294, 33 Cal.Rptr.2d 771 (1994).

C. Also, 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. 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. 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.

D. Another type of claim in which the insurer will commonly elect to conduct watchful waiting is when the claimed defect in title is purely technical, or will be cured by passage of time under a curative or marketable title law. Members of the land title industry have worked hard for decades to have such laws adopted in order to free title of ancient defects. Some laws bar claims in the manner of statutes of limitation. Others are drafted as marketable title laws, which protect a marketable title from adverse claims, even legitimate property rights, after an unbroken chain of, for example, 40 years' duration. 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." Stewart Title Guar. Co. v. West, 110 Md.App. 114, 676 A.2d 953, 961 (1996) (citing 15A Couch on Insurance § 57:177).

E. 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. 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.

F. 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. 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). 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. 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."

G. 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, 912 F.Supp.

28 (N.D.N.Y. 1996), 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.

V. LOAN POLICY MEASURE OF LOSS

A. **Loss is Least of Three Numbers.** When the conditions to payment of a loss to the insured have been met, the loss is measured as the least of the policy amount, the amount of the Indebtedness, or the amount by which the lender's security in the loan collateral is reduced to less than the loan amount by the defect in title.

B. **Loss in Security is Measure.** Loss under a loan policy is not measured by the difference in the value of the insured property with and without the title defect, as under an owner's policy. Instead, loan policy loss is measured as the amount of the loan that is unsecured due to the title defect. If the lender is fully secured even with the title defect, no loss is payable. The lender may be fully secured by the insured real estate, even if it is subject to an unexcepted lien. See Green v. Evesham Corp., 179 N.J.Super 105, 430 A.2d 944 (App.Div. 1981). The lender may also be fully secured if other collateral for the loan makes up for a reduction in the security in the insured property due to a title defect. Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis.2d 68, 423 N.W.2d 521 (1988) (value of other collateral for farm loan included in determining lender's security).

C. **Amount of Indebtedness.** In order to see if the lender is fully secured, the insurer and insured must determine the amount of the debt. The 2006 ALTA Loan policy provides a definition of "Indebtedness," which includes principal disbursed before or after policy date, construction advances after policy date, interest, "prepayment premiums, exit fees, and other similar fees or penalties allowed by law," foreclosure costs, protective advances, tax and insurance payments and "reasonable amounts expended to prevent deterioration of improvements." The 1992 and earlier ALTA policies do not define "indebtedness." They refer only to "unpaid principal indebtedness" and interest, as further limited by Conditions 8 and 9, which state that the debt does not include future advances.

D. **Date of Loss.** The date of loss under a loan policy differs, depending on when, how and if the insured lender takes title to the property.

1. When the insured lien is extinguished by the foreclosure of a senior lien, loss is measured on the date on which the insured lien was extinguished. Karl v. Commonwealth Land Title Ins. Co., 20 Cal.App.4th 972, 24 Cal.Rptr.2d 912 (1993); Chrysler First Financial Services Corp. of

America v. Chicago Title Ins. Co., 156 Misc.2d 814, 595 N.Y.S.2d 302 (Sup. 1993).

2. When the insured takes title to the property by a sheriff's or trustee's sale or a deed in lieu of foreclosure, the majority rule is that loss is measured as of the date on which the insured took title. Old Republic National Title Ins. Co. v. RM Kids, LLC, 337 Ga.App. 638, 788 S.E.2d 542 (Ga.App. 2016); First Am. Bank v. First Am. Transp. Title Ins. Co., 759 F.3d 427 (5th Cir. 2014); Falmouth Nat'l Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir. 1990). Arizona recently said that the loss may be measured on the policy date if the borrower defaulted on the loan because of the title issue, which the court acknowledged was a departure from the majority rule. First American Title Ins. Co. v. Johnson Bank, 239 Ariz. 348, 372 P.3d 292 (Ariz. 2016).

3. When the insured lender has not yet taken title or had its lien extinguished by a senior lien, the claim is premature and the loss cannot yet be fixed. First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp., 282 F.R.D. 423 (N.D.Ill. 2012).

4. The date of loss under a loan policy is not the date on which the insured discovered the title issue, which date is the majority rule for losses payable under an owner's policy. See First Internet Bank of Indiana v. Lawyers Title Ins. Co., 2009 WL 2092782 (S.D.Ind., July 13, 2009) (unpublished) (noting the different considerations about the two types of policies that have led to the two different rules regarding date of loss).

E. The insured's loss is not established based on the amount it obtains from the resale of the property. In Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis.2d 68, 423 N.W.2d 521 (1988), the court explained:

> Once the value of the security interest has been determined by foreclosure or other reasonable means, the insurer should gain no added benefit because of an insured's business acumen regarding later resale for profit of improved land, but neither would its liability be increased if by poor business dealings an insured had lost money on subsequent sale of the property.

(citing Title Ins. Co. v. Industrial Bank of Richmond, Inc., 156 Va. 322, 157 S.E. 710 (1931)).

F. **Examples in Which No Loss is Payable Due to Title Defect.** Not every lien or title defect causes the lender to become undersecured.

1. In Green v. Evesham Corp., 430 A.2d 944 (N.J. Super. A.D. 1981), the insured's loan was for about $15 million. It foreclosed and sold the property for about $19 million. It then demanded payment from the title

insurer for a missed $60,000 lien. The court held that there was no loss payable because the lender was fully secured.

2. In First Commerce Realty Investors v. Peninsular Title Ins. Co., 355 So.2d 510 (Fla.App. 1978), the insured lender held liens on a number of parcels. Its lien on five lots was void. The lender submitted an affidavit admitting that the value of the remaining lots was more than the loan amount. The court held that no loss was payable under the policy.

3. If the insured's lien is junior to another lien excepted in the policy, and there is no security to which the insured's lien could attach because of the amount of that lien, the insured does not suffer a loss due to the existence of a second lien ahead of the insured mortgage. First Tennessee Bank, N.A. v. Lawyers Title Ins. Corp., 282 F.R.D. 423 (N.D.Ill. 2012).

VI. LOSS PAYABLE UNDER JUNIOR LOAN POLICY

A. The measure of loss under a loan policy that excepts a senior lien is the amount of equity in the real estate to which the insured's lien attached as of the date of loss, if any. Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis.2d 68, 423 N.W.2d 521 (1988).

B. A junior mortgagee may not collect under its policy for mechanics' liens it paid off if unless it can prove that the property had a value greater than the excepted first lien, because the mechanics' liens could not cause a loss if the insured junior mortgage did not attach to any equity. The junior lender took title to the property and paid off the first lender, and then resold the property for what it had paid. The court held that the lender had not established that its lien attached to any equity. Twin Cities Metro-Certified Development Co. v. Stewart Title Guar. Co., 868 N.W.2d 713 (Minn.App. 2015).

VII. TENDERING TITLE TO LENDER

A. When the insured mortgage is defective, or the mortgagor is not vested in title, the insurer is entitled to resolve the claim by tendering title to the insured lender by a deed, in full satisfaction of its policy obligations. This is not explicitly stated in the policy, but has been confirmed by case law. JP Morgan Chase Bank, N.A. v. First American Title Ins. Co., 725 F.Supp.2d 619 (E.D.Mich. 2010); In re Evans, 2011 WL 6258881 (Bkrtcy.S.D.Miss.) (not yet released for publication); Bar-K, Inc. v. Security Title Corp., 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished); First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co., 19 F.3d 528 (10th Cir. 1994).

VIII. MEASURE OF LOSS DUE TO TOTAL FAILURE OF TITLE

A. When there is a total failure of title, the lender's loss is limited to the least of the property value, the Indebtedness or the policy amount. The insurer is entitled to resolve the claim by tendering payment to the lender of the value of the property.

U.S. Bank N.A. v. Ticor Title Ins. Co., 2012 WL 2362456 (Mich.App.) (unpublished).

B. When the property is worth less than the amount of the debt, the insurer is required to pay only the value of the property. Gray v. Commonwealth Land Title Ins. Co., 27 A.3d 852 (N.H. 2011), held that the insured's loss was limited to the fair market value of the property on the date of discovery, which was far less than the price paid by the insureds a short time before. The difference in the actual value versus the purchase price was due both to market decline and the fact that the insureds assumed at time of purchase that the parcel was a buildable lot when it was not.

C. The loss payable to a lender whose mortgage was extinguished by the foreclosure of a prior lien was limited to the value of the property, not the amount of the loan or the policy. U.S. Bank N.A. v. Ticor Title Ins. Co., 2012 WL 2362456 (Mich.App.) (unpublished).

IX. MEASURE OF LOSS DUE TO ENCUMBRANCE, PARTIAL FAILURE OF TITLE OR LACK OF ACCESS

A. **Loss Due to Encumbrance is Measured as Either Cost to Cure or Diminution in Value.** The two primary ways in which loss due to an encumbrance on title or a partial failure of title are the cost to cure the title issue, if possible, or the difference in the value of the property with and without the title defect. When a title defect or encumbrance can be removed by payment of money to a third party, the cost of removing the encumbrance is the measure of loss. When the insurer pays to remove the defect, no loss payable to the insured. If the insured pays to remove the encumbrance, the loss payable to the insured is the reasonable cost of removing the encumbrance. In Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985), the insured's encroachment onto an easement was resolved by payment of $100 fee to release part of the easement. The court rejected the insured's claim that loss should be measured as the diminution in value of the land subject to the released easement, which was a considerably larger sum.

B. **Loss is Lesser of Two Amounts.** Payment to the insured of more than the cost to cure the defect or encumbrance would unjustly enrich the insured, and therefore is not allowed, as stated in Breck v. Moore, 910 P.2d 599 (Alaska 1996):

> [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.

Sinimarly, in Aboussie v. Chicago Title Ins. Co., 949 S.W.2d 207 (Mo.App.E.D. 1997), the court said:

> 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. ... 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.

C. **Difference Value Due to Loss of Part of Land.** When the insured does not own some of the land insured in the policy, 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" under Condition 8(a)(ii) is measured as the difference in value of the property including the lost land versus the insured parcel minus the lost land. Hartman v. Shambaugh, 96 N.M. 359, 630 P.2d 758 (1981).

1. Loss is not measured as the value of the land lost, unless the parcel lost was a separate or divisible parcel. Southwest Title Ins. Co. v. Plemons, 554 S.W.2d 734 (Tex.App. 1977).

2. When the property has risen in value, a partial failure of title can result in a policy limits loss. See Fohn v. Title Ins. Corp. of St. Louis, 529 S.W. 2d 1 (Mo. 1975) (the loss of 5% of the land caused a policy limits loss).

3. In the alternative, loss is measured as the cost to buy the parcel not owned by the insured. However, the insured is not entitled to pay a ransom price and then be reimbursed by the insurer in full. In Hillsboro Cove, Inc. v. Archibald, 322 So.2d 585 (Fla.App. 1975), the insured paid $50,000 to obtain a strip of land worth $6,000. The court awarded the insured as loss the value of property rather than amount spent to acquire title.

4. When the insured purchased a larger parcel than the one insured, the insurer was required to pay only the value of the land insured, because the additional land increased the value of the insured's total land holdings. Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. & Trust Co., 141 Ariz. 363, 687 P.2d 371 (App. 1984).

5. A third method for calculating loss, especially useful on small strips of land, encroachments and minor easements, is to calculate the value of the lost land based on a per-square-foot value. To calculate loss using this method:

   (a) Calculate the total number of square feet in the insured parcel, including the disputed area, and assign a value per square foot based on assessed value or a recent appraisal.

   (b) If the title issue is an easement that does not deprive the insured of the use of the land, divide the value in half.

   (c) Calculate the number of lost or encumbered square feet.

(d) Multiply the number of lost or affected square feet by the per-square-foot value. This number represents the loss payable.

D. **Difference Value Due to Encumbrance.** When title is subject to an encumbrance not excepted by the policy, loss is measured as the difference in value of the property with and without the encumbrance.

1. Different kinds of easements have different effects on the value of the land. Some amount to virtual taking of the encumbered area, while others cause no disruption to the present use of the land by the insured.

2. Loss due to an easement is not equal to the fee simple value of the encumbered area. 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.

3. Loss is limited to the alternative measure of the cost of removing an encumbrance, when it may be removed. Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir. 1985) (encroachment onto easement resolved by payment of $100 fee to release part of easement).

4. Loss due to an easement may be limited by restricting a "blanket" utility easement to the actual path of the utility service, or by rerouting the utility service around the insured parcel. However, when the insurer refused to resolve an easement claim and the insured limited the easement path at his own expense, the insurer was not entitled to have loss measured based on the easement as limited by the insured. Kasco, L.P. v. Chicago Title Ins. Co., 2011 WL 4984741 (Cal.App. 2 Dist.) (unpublished).

5. Loss due to a restriction is based on the objective reduction in value due to the restriction, not the insured's specialized intended use. Some use restrictions increase the value of property.

E. **Difference Value Due to Loss of Access Right.** Some insureds assume that a lack of a right of access renders the property valueless. In fact, however, many parcels have no formal right of access. In United Bank v. Chicago Title Ins. Co., 168 F.3d 37 (1st Cir. (Me.) 1999), the access coverage was not even triggered by the fact that a resort at the end of a 17-mile logging road had no formal permission to use logging roads as access. The insured must establish the amount

of loss, if any, due to the lack of a right of access. See Riffle v. United General Title Ins. Co., 64 Ark.App. 185, 984 S.W.2d 47 (1998), in which the insured hunting property had access via water, but the insured access easement was invalid. The court found that the land, which was suitable for recreational use only, was not valueless without overland access and remanded to the trial court to allow the insured to prove the diminution in value.

X. BUYING THE INSURED'S LOAN

A. The insurer is permitted to resolve a loan policy claim in full by buying the insured's loan. Condition 7(a)(ii) says the company may "purchase the Indebtedness for the amount of the Indebtedness on the date of purchase..."

B. On purchase, the insured is require to assign the debt "together with any collateral security." "Indebtedness" may be more than the policy amount. If so, the insurer must still pay the full amount of the Indebtedness in order to buy the loan.

C. The insurer will insist on receiving the entire original loan file and payment history, and an assignment of the note and mortgage. The insurer becomes the assignee of any mortgage insurance policy, VA or FHA loan guaranty, and all personal guarantees.

XI. PAYING POLICY LIMITS

A. The insurer has the right to pay policy limits in satisfaction of all of its policy duties, including the duty to defend. Condition 7(a)(i). See Batdorf v. Transamerica Title Ins. Co., 41 Wash. App. 254, 702 P.2d 1211 (1985).

B. Payment to the insured of even a partial loss, of less than policy limits, also terminates the duty to defend. See Condition 7(b)(ii). In Toste v. First American Title Ins. Co., 2012 WL 1023360 (Cal.App. 3 Dist.) (unpublished), the insurer's payment of diminution in value due to an easement, during litigation, was held to release it of all policy duties, including any duty to appeal an adverse judgment against the insureds.

C. In almost all cases, the insurer will make a payment to the lender rather than the owner, even when the insurer did not issue a policy to the lender. A payment to the lender reduces the amount of the owner's policy dollar for dollar. Condition 11 of the 2006 ALTA Owner's policy says:

> 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.

XII. DEFENDING THE INSURED'S TITLE

A. **Defense of Title Resolves Claim.** One of the nine options for resolving a covered claim provided under the ALTA loan policy is for the insurer to defend the insured in litigation brought by another, attacking title based on a covered matter.

B. **Written Tender Required.** The insured is required to make a written tender of defense. Condition 5(a). The insurer is not required to pay for the cost of defending the insured before the tender is made.

C. Loss Payable on Final Determination. If the insurer defends the insured's title by succeeding in the litigation, no loss is payable to the insured. Condition 9(a). If the insured does not succeed in the litigation, loss is payable when there has been a final determination in the lawsuit, which includes an appeal on the insured's behalf. Condition 9(b).

XIII. CLEARING TITLE BY PROSECUTING A LAWSUIT

A. **Insurer May Clear Title.** Condition 5(b) of the policy permits the insurer to prosecute a lawsuit in the insured's name to remove the covered title defect or to prevent or reduce the loss payable to the insured due to the title defect:

> The Company shall have the right...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.

B. **Insurer Not Required to Clear Title.** The insurer has the option to clear title, but is not obligated to do so when the insured so requests. Schwartz v. Stewart Title Guar. Co., 134 Ohio App.3d 601, 731 N.E.2d 1159 (Ohio App. 8 Dist. 1999).

C. **Insurer Decides Likelihood of Success.** The insurer has the right to determine, in its sole judgment, if there is a reasonable chance of success in the contemplated action to clear title. 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). If the insured wants the insurer to clear title, it should say so and explain why the insured believes there is a reasonable likelihood of success.

D. **Title Clearance Not Waiver of Policy Defenses.** The insurer does not waive policy coverage defenses by electing to take action to clear title. Condition 5(b) states: "[t]he exercise of these rights shall not be an admission of liability or

waiver of any provision of this policy." The insurer is not required to prosecute a lawsuit on the insured's behalf under a reservation of rights, or to identify any policy defenses before taking action to clear title. The doctrine of reservation of rights does not apply to lawsuits filed in the insured's name and paid for by the insurer.

E. **Policy Covenant to Clear Title Diligently.** Condition 5(b) states that, if the insurer elects to clear title, "it must do so diligently."

1. **Failure to Act Diligently.** The insurer can lose the right to clear title by failing to elect that action within a reasonable time after it completes its investigation of the claim. Ticor Title Ins. Co. v. University Creek, Inc., 767 F.Supp. 1127 (Fla. 1991); Jefferson Federal Savings & Loan Ass'n v. Berks Title Ins. Co., 472 A.2d 893 (D.C.App. 1984). The insurer must also be reasonably diligent in pursuing the title clearance action, once begun. See Bar-K, Inc. v. Security Title Corp., 2010 WL 3333391 (Cal.App. 1 Dist.) (unpublished) (finding the insurer to have been diligent in its efforts).

2. **Insured's Duty to Cooperate.** Concomitantly, the insured has a duty to cooperate with the insurer in the clearing of title, including giving assent to the filing of suit in its name and in giving testimony. See Condition 6(a). The insured was found to have breached its duty to cooperate in the clearing of title in the Bar-K decision.

3. **Expenses Caused by Litigation Delay.** The pace of litigation is not counted against the insurer. Thirty-three months was found not to be an reasonable amount of time to remove a title defect by litigation, and no loss was payable for claimed expenses insurred in the interim, in Lawyers Title Ins. Co. v. Synergism One Corp., 572 So.2d 517 (Fla.App. 1990). A title insurer defended the insured mortgage lien against mechanic's lien in an action that took seven years, in National Loan Investors, L.P. v. Chicago Title Ins. Co., 1999 WL 195819 (Conn.Super.) (unpublished), and the court found the insurer not responsible for back taxes and other expenses incurred during that time.

4. **Insured Deprived of Rent During Litigation.** Two courts have awarded insureds the rent that they were unable to collect during the course of the title clearance litigation. Nebo, Inc. v. Transamerica Title Ins. Co., 21 Cal. App. 3d 222, 98 Cal. Rptr. 237 (Cal. Dist. Ct. App. 1971) (lost rent awarded for time when court order prevented insured from collecting apartment rent because title in dispute); American Legion Ed Brauner Post v. Southwest Title & Ins. Co., 253 La. 608, 218 So.2d 612 (1969) (insured entitled to be paid by insurer for rent insured could have earned from leasing property while insurer sued to extinguish prior lease).

XIV. PAYMENT OF LOSS AND FINAL DETERMINATION PROVISION.

1. **No Loss Payable if Title Cleared or Defended.** As when the insurer successfully defends the insured in litigation, no loss is payable to the insured if the title clearance action is successful in establishing title as insured. Condition 9(a) 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.

2. **Final Determination.** When the insurer is defending the insured in litigation or prosecuting a suit to clear title, the insurer has no duty to pay a loss to the insured until there has been a final order in the lawsuit, including on any appeal. Condition 9(b) 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 appeals, adverse to the Title, as insured."

3. **Payment Within 30 Days.** Once the final determination has been made, loss is payable within 30 days. Condition 12(b) states: "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."

4. **Loss Payment Suit Premature Until Final Determination.** A lawsuit by the insured against the insurer seeking payment of loss is premature if brought before a final determination in the title clearance suit. The leading case is Falmouth Nat'l Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir. 1990). In First Federal Savings Bank v. Stewart Title Guar. Co., 451 S.E.2d 916 (S.C.App. 1994), the court said:

> "Stewart Title had no liability for loss or damage where litigation ensued until a court determined the title was not as [insured]. ... Absent a finding adverse to the title, …no claim arose or loss occurred for which Stewart Title could be held responsible... 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."

XV. MEASURE OF LOSS WHEN TITLE PARTLY CLEARED

A. **Partial Loss Payable.** When the title defect is limited but not eliminated by the title clearance lawsuit, the loss payable is the least of (a) the difference in value

between the title as insured and the title as encumbered by the defect or encumbrance as limited by the lawsuit, (b) the policy limits or (c), on a loan policy, the amount of the Indebtedness. Condition 8(a)(ii) expresses the diminution formula as being "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. **Examples.** When the width of an easement was reduced by the lawsuit, the loss payable was the diminution caused by easement as limited. The insurer did not owe policy limits as punishment for not having entirely eliminated easement, as claimed by the insured. Linder v. Ticor Title Ins. Co. of Calif., 647 N.E.2d 37 (Ind.App. 4 Dist. 1995). Similarly, when a pipeline easement path was limited, the loss was limited to the diminution due to the easement as limited. Bender v. Kansas Secured Title and Abstract Co., Inc., 34 Kan.App.2d 399, 119 P.3d 670 (Kan.App. 2005).

C. **2006 ALTA Policy Terms.** Unlike other title insurance policy forms, the 2006 ALTA Owner's and Loan policies provide that, when title is not cleared by the title litigation prosecuted by the insurer, the insured receives two further benefits. The amount of the policy (not the amount payable as loss) is increased by 10% and the insured is entitled to select from two dates on which loss will be measured. Condition 8(b) says:

> 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.

Neither of the two dates on which loss is to be measured are consistent with the dates of loss established for either owner's policies or loan policies. Also, it is usually impossible to value the insured property as of the date on which the loss payment is made, which is a future date. Thus, that election date is unworkable for either insurer or insured.