ALTA 2021 Title Insurance Forms and Endorsements

By

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Slide 1 and 2

1. Introduction 5 minutes

-Focus here will be on changes between the 2006 and 2021 LP and OP.

-That’s a lot of information. There are 72 slides in this presentation making this about a 2 hour presentation if I talk fast and we have 60 minutes.

-3 things to take away from this presentation if you’re a title agent:

1. LP differences since you’ll have small bank/lender customers asking

you about it.

2. With the exception of the ALTA 34.1, the 2021 endorsement forms are only for use with 2021 policy forms. 2006 endorsements that don’t have 2021 versions will remain in use with the 2021 policies.

Make sure your software is configured accordingly!

3. HO and “Estate Planning Entity”

Slide 3 Overview

1. The Process 5 minutes

Slide 4

1. How do forms get adopted?

-Starts with an idea: sometimes in reaction to changes in the law and sometimes by suggestion by an ALTA member or insureds.

-Goes to the ALTA Forms Committee who writes the forms

-Then to ALTA Board for Approval

-Published for comment

-Comments are rejected or forms are modified

-ALTA Board reviews and approves changes

-Implementation

Slide 5

1. Who decides?

-Forms Committee has over 60 individual members representing over 20 title insurance underwriters

-ALTA Underwriters Section and Executive Section

-GSEs: FHFA, Fannie and Freddie are big drives of LP coverage

-Industry Trade Groups for attorneys and Lenders

Slide 6 and 7

1. Why change? 5 minutes
2. McGirt v. Oklahoma and Applicable Law
3. Legislative./Judicial Action Discriminatory Covenants

-Lots of bills, new laws and case interpretation on discriminatory covenants

-Most deal with either recording a notice that a discriminatory covenant is unenforceable or redacting the discriminatory covenant from restrictions:

-Indiana HB 1413 was passed earlier this year a provides for a notice in a deed or separately that a covenant is unenforceable due to the discriminatory nature;

-CA has a new statute requiring a title insurer or agent to assist a party in getting the covenant redacted/stricken

-May v. Spokane deals with an old, Washington law and redaction of racially discriminatory covenants. Is it enough that a court declares it “stricken” or does it have to be physically removed from a recorded document or does the whole document have to be removed.

1. RON

-We all lived through the last 2 years so we know how important RON and it’s derivatives will become going forward as the industry experiences technological revolution.

Slide 8

1. McGirt

Not a big issue in the tri-state area. KY has a tribe/band recognized by a former governor. Ohio has a group that calls itself the Remnant Band of the Eastern Shawnee that isn’t recognized as an official group by anyone other than themselves, and Indiana has two tribes that own land that was recently acquired.

McGirt deals primarily with OK and maybe other states that have Federal reservations.

Slide 9

1. OP & LP Policy Changes 25 minutes

Slide 10

1. Intro (ALTA 39 Electronic Signature Endorsement goes away)

Slide 11

-Here’s a side by side of what the new intro says

Slide 12

1. Covered Risks

Slide 13

1. Covered Risk 2 (OP/LP)

-Deals with additional coverage for electronic execution/notarization

-Expands Survey Coverage to include boundary line overlaps subject of course to the survey exception “fine print” taking away this coverage.

Slide 14 Side by Side

Slide 15

1. Covered Risks 5-7 (OP/LP)

-Revises coverage for eminent domain and other governmental enforcement actions

-Adds a new defined term of “Enforcement Notice” and describes where in the “Public Records” this notice of governmental action has to be filed to trigger coverage. (Public Records definition has been refined too.)

Slide 16 Side by Side

Slide 17

1. Covered Risk 8 (OP/LP)

-PACA/PASA are covered to the extent of an Enforcement Notice being filed

Slide 18 Side by Side

1. Covered Risk 9 & 10 (LP only)

Slide 19 Covered Risk 9 LP

-Adds examples of electronic execution/notarization issues as being matters covered as an “impairment” to enhance Covered Risk 2

Slide 20 Text of Covered Risk 9 LP

Slide 21 Covered Risk 10

-Pay attention here! There’s additional coverage here for Lenders.

-Covered Risk 10 now makes clear that certain lender “expenses” are covered as part of loss under the policy: principal balance, accrued interest, reasonable cost to foreclose, insurance paid for by the lender, taxes advanced by the lender and HOA/Condo dues paid by the lender.

Slide 22 Text

Slide 23

1. Covered Risks 13 (LP) and 9 (OP)

-OP Covered Risk 9 adds a Creditor’s Rights coverage similar to Covered Risk 13 in the LP.

-Provides coverage for loss caused by an “alternative remedy” under Section 550 a of the Bankruptcy Code (Trustee can recover the property improperly transferred by the debtor or “the value” of the property improperly transferred from the person who got it. In short, you’re covered if the Trustee took other property from you instead of land.)

-Updates the name of the former Fraudulent Transfer Act to its new name.

Slide 24 Text (OP in Green, LP in Yellow)

Slide 25 Exclusions

Slide 26

1. 2 Exclusion Changes

-Most changes to the exclusions were done to square them up with changes to the Covered Risks such as new paragraph numbering and defined terms.

-Changes:

1. Exclusion 1 revises subsection b. to exclude loss or damage resulting from “any governmental forfeiture, police, regulatory, or national security power”
2. Exclusion 3 now excludes loss where the insured did not pay enough consideration to be considered a BFP for value, but does cover an insured when they pay a reasonably equivalent or fair market value. (It’s a pretty fine hair being split here.)

Slide 27 Text Exclusion 1

Slides 28/29 -Creditor’s Rights Exclusions changes

-Read from slide

Slides 30/31 PACA/PASA Trusts are excluded unless there’s an Enforcement Notice filed (Covered Risk 8)

Slides 32/33 Finally, an Exclusion for Acreage/Area

Slide 34/35

1. Schedules A & B
2. Schedule A Transaction Header and Incorporation of Endorsements

Two optional items which your underwriter may decide to file as part of the 2021:

-Identifying info that isn’t part of the policy. Meant as an aid to identify what company office or agent issued the policy. (It’s optional on the commitment too)

-Endorsements may be listed as being incorporated into the policy by typing them out. This doesn’t work with every endorsement since some have blanks you have to fill in.

Slide 36

1. Schedule B
2. Discriminatory Covenants are excepted as if the discriminatory language wasn’t in the document.

Slide 37

1. New Introductory Sentence for all Exceptions

Slide 38 Schedule B Text

Slide 39 Conditions

1. Conditions

Slide 40

1. Paragraph 1 Changes

-We’re going to skip through this quickly, but some quick highlights

-New terms in the definitions, PACA/PSA Trust, Affiliate, Enforcement Notice, Discriminatory Covenant and State.

-Definition of Insured and Public Records have been altered so read those carefully.

Slide 41 Affilliate Paragraph 1 a

Slide 42 Consumer Protection Law is a revised term in Paragraph 1 c

Slide 43 Discriminatory Covenant

Slide 44/45 LP Insured has an expanded definition incorporating an Affiliate of the Named Insured to whom title is transferred after foreclosure or deed in lieu. Also, covers a GSE who gets the property post foreclosure from an Insured.

Slide 46/47 OP Insured now includes a former spouse that gets the property from the named Insured in a divorce or a person who takes title from the named insured by operation of law: “Transfer on Death” statutes.

Slide 48 LP 1 h deals with a definition of Governmental Mortgage Agency (Fannie/Freddie) (see definition of Insured

Slide 49 Obligor definition which is mainly important for Conditions 12 Recovery Rights after a claim is paid.

Slide 50 Public Records has been refined to make clear that certain records which may be “public” for purposes of access and Sunshine Laws are not “Public Records” as we use them in our policies.

Slide 51 State definition

Slide 52

1. Condition 3 (LP)

-When notice of claim must be given and late notice may reduce coverage if it prejudices the Company’s right to defend title.

Slide 53 Condition 8 LP/OP

Clarifies the policy is a contract of indemnity and not an abstract, opinion or a report of title.

Provides procedure for the Insured to select the Date the loss is determined.

Slide 54/55 Pay attention here as LP coverage is enhanced!

1. Paragraph 8 (LP)

-Provides option for determining loss including:

-When Fair Market Value of the property is determined for purposes of calculating a loss: Date of the insured acquires title or the date the insured loses their lien by reason of a matter insured against.

-If the underwriter tries to establish title by lawsuit and fails, the policy amount increases 15% and the Insured gets to pick among certain dates to determine the FMV for determining the loss.

Slides 56/57

1. Paragraph 8 (OP)

-similar increase in Amount of Policy and date of loss provisions to the LP.

1. Paragraphs 10 & 12 (LP)

Slide 58 Conditions Paragraph 10. If the Insured acquires title by foreclosure or deed in lieu, the full policy amount is available to pay a claim and is not reduced by the principal balance.

Slide 59 Conditions 12 deals with the right of the underwriter to recover when it pays a loss and is where the term “Obligor” comes into play.

Slide 60/61

1. Paragraphs 15 (LP) & 16 (OP)

-Deals with law that applies, either state law for the state where the land is located or Federal law. This is as a result of McGirt and the fact the policies are drafted according to the underwriters’ understanding of these laws.

Slide 62

1. Paragraphs 17 (LP) & 18 (OP)

This is a new paragraph which contracts away the insureds’ ability to bring class action lawsuits. You may or may not see this clause in policies approved by different states.

Slide 63/64/65 Optional provision for Arbitration that will be used in any state that doesn’t prohibit an Arbitration Clause. Really the same as the 2006 forms.

Slide 66

1. Other Policy Forms 5 minutes
2. Short Form Commitment

-Personally, I’ve never seen one of these issued, but we had a 2006 version so here’s a 2021.

1. Homeowners

-Big change here is that it can be issued to an entity that is an “estate planning entity” instead of just to individuals and trustees who might be an entity.

“Estate Planning Entity - A legal entity, a trust, or a trustee of a trust, if the entity or trust is established by a Natural Person for estate the purpose of planning the disposition of that person’s estate.

Want to let entities be insured, but keep the slumlords out since they may not do inspections to pick up on some things that were done without permits, etc. Contrast that with a lot of homebuyers who waived their inspections over the last year…

1. Short Form
2. Expanded Coverage Residential LP (Now 2 types)

The one that will be used will depend on how states treat condo and HOA liens.

If your state has condo-liens with super-priority over mortgages filed before a lien, only the current assessments version will be available insuring that HOA/Condo dues are paid current assuming an ALTA 4.1 or 5.1 is issued.

If your state has condo/HOA liens that have priority as of the date they’re filed, like God intended, either one may end up being filed and used depending on your underwriter, but you’ll most likely use the Assessments Priority and issue an ALTA 4 or 5.

Slides 67, 68 and 69

1. Endorsements 5 minutes

Lots of revised versions of existing endorsements.

With the exception of the new ALA 34.1 endorsement (Affirmative coverage), 2021 endorsement versions will replace their 2006 counterparts for use with 2021 policies. All other 2006 endorsements can be issued with 2021 policies. The 2021 versions were necessary due to renumbered paragraphs in the base policies that are referenced in the endorsement.

ALTA 34.1 is a revision and alternative to the 34 and it can be issued with either the 2006 policies or 2021 policies. Modern thinking is not to give affirmative coverages for items in Schedule B, but rather to take the exception and issue a 34 series for the affirmative coverage. Keep the exceptions as just exceptions, right. It’s an affirmative coverage endorsement so you’re going to want to get your underwriter’s approval for it.

Slide 70

“Flex Modification Endorsement”

This is an endorsement that’s still being drafted by the Forms Committee at the request of the GSEs. It’s going to challenge a little bit of our thinking on how we issue mortgage modification endorsements.

The GSEs want a mortgage modification endorsement issued at the same time as the loan policy which covers them for certain modifications that they may make in the future, generally rate and term changes.

This endorsement may not be available in all states. The ALTA 11 series basically insures against loss due to a loss of lien priority due to changes in the modification being considered an entirely new mortgage. In law, this is called a “novation”. The law of novation is incredibly nuanced. Somewhere I have a 200 page motion on novation of a mortgage filed in an Ohio case.

Stay tuned for this endorsement.

Slide 71

1. What Can You Do Now? 5 minutes

-You’re going to have to sit down and spend more than an hour learning about the new forms. If I was an attorney in private practice, I’d do a deep dive on the differences between the LP and OP versions.

If I was a title agent, I’d concentrate on the LPs because local lenders are going to want to know what the differences are. I’d concentrate on making sure that my systems were set up so that 2021 endorsements other than the 34.1 can only be issued with the 2021 policies and that the 2006 versions of the 2021 endorsements can only be issued with 2006 policy jackets.

Why? There’s going to be some overlap where both policy forms are available and the 2006 policy will most likely be with us going into the early parts of 2022. In Ohio, where there’s a Rating Bureau that files forms/rates for all underwriter members, I’d guess that the 2021 policies won’t be available until September/October 2022. Software vendors take a long time to implement and get forms for each underwriter ready.

There are additional resources available on [www.alta.org](http://www.alta.org) for members that provide redline versions of the changes in the 2021 forms. There will be a lot of other seminars on the 2021 forms next year too.

Slide 72

1. Questions 5 minutes

Total Time 60 Minutes