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The New 2006 ALTA Policies: The Industry Listens!

By Dena M. Cruz, Paul L. Hammann, and Scott Rogers

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I. INTRODUCTION

In its continuing efforts to improve the products and value offered by the title insurance industry and to streamline the provision of title services, the American Land Title Association (ALTA) has adopted completely new and updated versions of the currently utilized Owner's and Loan Title Insurance Policies (referred to in this article as the "2006 Policies").[1] The last time the ALTA undertook a comprehensive revision of its standard policies was over 20 years ago,[2] resulting in the forms of Owner's and Loan Policies and known to practitioners as the "1992 ALTA Owner's and Loan Policies" (referred to in this article as the "1992 Policies"). Although the 1992 Policies have worked reasonably well over time, the ALTA Forms Committee's[3] collective experience suggested that numerous improvements could and should be made to the 1992 Policies in order to respond to customer concerns, to address recent industry developments, and to facilitate greater standardization.[4]

The 2006 Policies, formally adopted by the ALTA on June 17, 2006, are the result of extensive discussion among ALTA members as well as customer groups.[5] The 2006 Policies are intended for use in both commercial transactions and certain residential transactions that do not qualify for the expanded coverage form policies specifically tailored for improved one-to-four family residential or condominium property.[6] The ALTA anticipates that the 2006 Policies will eventually e supercede and replace the prior policies and as a result has withdrawn the 1992 policies as official ALTA forms, effective as of June 17, 2007.[7] The delay in withdrawal is designed to allow sufficient time for the 2006 Policies to be submitted and approved in those jurisdictions where state department of insurance approval is necessary and to permit customers sufficient time to learn about and adapt to the 2006 Policies.

This article outlines the changes to the structure of the 2006 Policies and describes the major substantive changes from prior policies. Comprehensive comparison charts delineating the major differences between the policies are available on the "Members Only" page of the CA Real Property Section's website at www.calbar.ca.gov.

II. STRUCTURAL CHANGES TO POLICIES

In a concerted effort to make the policies more understandable and to resolve interpretation issues in earlier forms, the ALTA spent considerable time revising the structure of the Owner's and Loan Policies. The major structural changes (discussed below) include: (i) simplified policy language; (ii) new "Covered Risks" that clarify that coverage is intended for matters formerly impliedly covered within the Exclusions From Coverage language[8]; (iii) new "Covered Risks" that provide specificity to policy coverage previously afforded; (iv) additional information in Schedule A; and (v) language that clarifies that each and every endorsement is a part of the policy and subject to its conditions and stipulations.

A. Simplification of Policy Language

In a continuing effort to make the policies more "user friendly," the ALTA removed much of the legalese and inserted language that is more readily understood. The industry originally made this move towards simplification in the residential-specific policies that evolved into the ALTA Homeowner's Policy adopted in 1998.

B. Notices

Condition 18 in the 2006 Owner's Policy and Condition 17 in the 2006 Loan Policy contain information on how to submit a claim under the policy. The 2006 Policies include a "Notice Provision" across the top of the first page of the policies to help guide the Insured to the notice provision in the Conditions. This should assist the Insured in submitting a claim in compliance with the policy terms.

C. Exclusions to Exclusions

Beginning with the 1984 amendment to the 1970 Policies and continuing through the 1992 Policies, a few of the Exclusions From Coverage contain "Exclusions to Exclusions."[9] Insureds, insurers, and the courts have wrestled with the issue of whether coverage is created when a matter is excluded from an Exclusion From Coverage but not contained within an affirmative "Insuring Clause,"[10] and, whether coverage is created when an endorsement is issued deleting an Exclusion From Coverage without adding an Insuring Clause. Some courts have held that unless coverage is provided within an Insuring Clause, exclusions within Exclusions From Coverage or deletions of Exclusions From Coverage do not provide coverage to the Insured.

The court in *Elysian Investment Group, LLC v. Stewart Title Guaranty Company,*[11] a case involving recorded Notices of Substandard Conditions, took that position. The property owner ("Elysian") purchased a residence from a lender who had acquired the property through foreclosure. The residence had a garage which had been converted into a second dwelling unit without permits. Prior to Elysian's acquisition of the property, the Department of Building and Safety in Los Angeles recorded in the official records of Los Angeles County a Notice of Substandard Condition ("Notice"). The title insurance policy issued by Stewart Title Guaranty Company ("Stewart") did not list the Notice as an exception to coverage in Schedule B of the title insurance policy. Upon discovery of the Notice, Elysian submitted a claim under the policy. Stewart denied the claim on the basis that (i) the Notice was not a defect in, lien, or encumbrance on the title[12]; (ii) any enforcement action by the City would be a "post policy" event not covered by the policy[13]; (iii) the Notice did not render the title to the property "unmarketable"[14]; and lastly, (iv) Elysian could not rely upon an Exclusion From Coverage to extend coverage under the policy.

The trial court agreed with Stewart and entered summary judgment in its favor. The Court of Appeal affirmed, holding

that the Notice did not affect the title. Any loss resulting from the Notice did not fall within the basic insuring clauses of the policy, and an insurance policy exclusion cannot act as an additional grant or extension of coverage.[15]

In response, and with the intent of clarifying the coverage intended to be provided to the Insured, the ALTA removed all of the Exclusions to the Exclusions From Coverage and added the following additional insuring provisions to the 2006 Policies, now called "Covered Risks":

1. New Covered Risk

Covered Risk 5 insures against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, by reason of:

> [T]he violation or enforcement of any law, ordinance, permit or governmental regulation...restricting, regulating, prohibiting or relating to (a) the occupancy, use or enjoyment of the Land; (b) the character, dimensions or location of any improvement erected on the Land; (c) subdivision of land; or (d) environmental protection if a notice [as to any of (a) through (d)], describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

Any loss resulting from the mere existence of these laws or regulations and the effect of their violation is still excluded by Exclusion From Coverage 1(a).

2. New Covered Risk

Covered Risk 6 insures against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, by reason of "an enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice."

3. New Covered Risks

Covered Risks 7 and 8 address losses resulting from recorded evidences of the exercise of "rights of eminent domain" (Covered Risk 7) and the completion of eminent domain proceedings (Covered Risk 8) that would be binding on the rights of a purchaser or encumbrancer for value without knowledge, as "knowledge" is defined in the policies.[16]

4. New Covered Risk 9(b) (Owner's Policy) and 13(b) (Loan Policy)

One of the major differences between the 1970 Policies and 1992 Policies was the addition of an Exclusion From Coverage of certain claims arising under federal bankruptcy, state insolvency, or similar Creditors' Rights laws (the "Creditors' Rights Exclusion"[17]). The Creditors' Rights Exclusion in the 1992 Policies contains an exception for claims arising as a result of an allegation in a bankruptcy action that the transaction creating the insured interest is a fraudulent conveyance, a preferential transfer that would not have been asserted but for the Insurer's failure to timely record the instrument of transfer, or the failure of such recordation to impart notice to a purchaser for value, judgment, or lien creditor.[18]

The Exclusion to Exclusion From Coverage 4(b) in the 1992 Owner's Policy is now new "Covered Risk" 9(b). The Exclusion to Exclusion From Coverage 7(c) in the 1992 Loan Policy is now new "Covered Risk" 13(b). Along with new insuring provisions that address losses resulting from a court determination that any transfer prior to the insured transfer/mortgage was an avoidable fraudulent transfer or preference,[19] the new policies now contain a Covered Risk that insures against loss or damage resulting from a determination that the insured transfer/mortgage instrument constitutes a preferential transfer under federal bankruptcy or state insolvency laws by reason of (i) the failure to timely record the instrument of transfer; and/or (ii) the failure of the transfer deed or mortgage instrument to impart notice of its existence to a purchaser for value, judgment, or lien creditor. Any other basis for a "preferential transfer" arising out of the insured transaction is still excluded from coverage in Exclusion From Coverage 4(b) (Owner's) and Exclusion From Coverage 6(b) (Lender's) in the 2006 Policies.

> **Practice Tip:** Counsel should seriously consider whether a request for the removal by endorsement of Exclusion From Coverage 4(b) (Owner's) and/or Exclusion From Coverage 6(b) (Lender's) in the 2006 Policies creates the desired coverage in light of the *Elysian* holding. If coverage for potential "Creditors' Rights" challenges to the insured transfer or mortgage instruments is desired, counsel should request an ALTA Endorsement Form 21, available with respect to both Owner's and Loan Policies under appropriate circumstances. This endorsement requires the Insurer to provide a defense and to indemnify the Insured should there be a loss resulting from avoidability of the insured estate or interest as a result of a fraudulent transfer or preference in the insured transaction.[20]

D. Additional Insuring Clauses

The 1970 and 1992 Policies do not set out with any specificity what is considered a "defect in, or lien or encumbrance" on title as to which coverage is provided. The Insured, therefore, was left on its own to initially determine whether or not coverage may be available in a particular situation. Despite the fact that stating coverage more broadly is in the best interests of the Insured, many participants who assisted in the policy revisions requested that the policies provide "examples" of what is covered. In response to these requests, the 2006 Policies include non-exclusive enumerations of Covered Risks, thereby making it much easier for the Insured to recognize when coverage exists in a particular instance.

The 2006 Policies expressly include the following Covered Risks where coverage is clearly provided:

1. Forgery, fraud, undue influence, incompetency, incapacity or impersonation;[21]
2. Lack of authority of any person or entity executing on behalf of the actual Owner;[22]

3. Failure of any document affecting title or of the insured mortgage to be properly created, executed, witnessed, sealed, acknowledged, notarized or delivered;[23]

4. Failure of an electronic document to properly comply with applicable state and federal legislation pertaining to the creation of electronic documents;[24]

5. The invalidity of a document due to an invalid or unenforceable power of attorney;[25]

6. Failure of a document to be properly filed, recorded or indexed;[26]

7. Losses resulting from any defect in any judicial or administrative proceeding through which title or the lien of the insured mortgage is derived.[27]

8. Losses resulting from Creditors' Rights issues in transactions created and recorded prior to the insured transaction vesting title in an Owner or creating the lien of the insured mortgage.[28]

E. "Mechanics' Lien" Coverage (Loan Policy Only)

The Insurer on a title insurance policy agrees to indemnify and defend the Insured against defects in the title or encumbrances that exist as of the Date of Policy shown in Schedule A. In other words, unlike casualty policies, title insurance policies generally do not provide coverage for events that occur after the Date of Policy.[29]

One of the few exceptions to this rule involves losses resulting from mechanic liens. The 1970 and 1992 Loan Policies specifically provide coverage against loss or damage resulting from a loss of priority of the insured mortgage due to mechanics' liens whether or not the lien is recorded as of the policy issuance date. The exception to this coverage is for mechanics' liens that arise from work contracted for or commenced after the policy date and where that work is not financed with proceeds from the insured loan.[30]

The 2006 Loan Policy mechanics' lien coverage (Covered Risk 11(a)) language is much clearer than in earlier Loan Policies. It clarifies that priority coverage extends to each and every advance of the insured loan proceeds when:

1. The work is commenced or contracted for on or before the Date of Policy; or

2. The work is commenced, contracted for, or continued after the Date of Policy, the loan secured by the insured mortgage is financing (at least in part) the construction and the insured lender has either advanced funds or is obligated to advance funds on the Date of Policy.

Finally, the 2006 Loan Policy does not contain a counterpart to Exclusion From Coverage 6 in the 1992 Loan Policy. The ALTA deleted this exclusion, viewing it unnecessary in light of the language of Covered Risk 11(a) and "post-policy" Exclusion From Coverage 3(d).

Practice Tip: In real life, the Insurer may, under appropriate circumstances, refuse to provide the otherwise available coverage over mechanics' liens afforded by new Covered Risk 11(a). The Insurer may do so because (i) of an inability to meet the Insurer's underwriting requirements for mechanics' lien coverage, and/or (ii) applicable state law governing mechanics' liens makes the risk unacceptable to the Insurer. Frequently, the Insurer's hesitancy to provide mechanics' lien coverage can be overcome by provision of an acceptable indemnity agreement from the borrower or another financially responsible party (coupled with provision of appropriate financial information and, in some cases, security for the indemnity) to mitigate the financial risk of mechanics' liens taken on by the Insurer to the insured lender. If construction has commenced prior to recordation of the insured mortgage, or if applicable state law provides for special priority for mechanics' liens, counsel should anticipate the Insurer's concern and address the Insurer's underwriting requirements well in advance of the loan closing. If the Insurer remains hesitant to issue mechanics' lien coverage at the outset, counsel should request that the Insurer provide limited mechanics' lien coverage by endorsement[31] on a disbursement-by-disbursement basis with the lender conditioning the issuance of each endorsement on its review of a "date down" search of title and its receipt of, and satisfaction with, lien releases from all contractors, subcontractors, and material suppliers through the most recent previous disbursement.

F. Changes in Schedule A

To make policies easier to use and to avoid the common situation where the policy jacket gets separated from the body of the policy and the Insurer can not be identified, Schedule A in the 2006 Policies was revised to set forth the following additional items:

1. The name and address of the Insurer;

2. The address of the insured property;

3. A "Check-the-Box incorporation of commonly requested endorsements (Loan Policy only).[32]

Practice Tip: Counsel should make sure that the address specified in Schedule A is in fact the property in question. In many instances, especially in commercial transactions, the "common" street address is not the same as the "legal" address, so the insured property may not in fact be the intended property.

G. Endorsements

The 2006 Policies add new Conditions—Condition 15(d) in the Owner's Policy and Condition 14(d) in the Loan Policy that clarify that any endorsement to the policy, whether issued with, or subsequent to, the policy, is a part of the policy and is subject to the policy terms and provisions "except as expressly stated in the endorsement."

III. MAJOR SUBSTANTIVE CHANGES FROM PRIOR POLICIES

Because the 2006 Policies have substantially broader express coverage and are more easily read and understood, it is anticipated the new policies will be preferred over the earlier policies. While many of the changes are cosmetic in nature, the following changes are significant.

A. Covered Risks/ Insuring Provisions

1. "Survey" Coverage

Title insurance policies, absent endorsements providing broader coverage, generally limit the coverage to matters affecting the land described in the policies. "Land" is defined in the 1992 Policies as "the land described or referred to in Schedule [A] [C], and improvements affixed thereto which by law constitute real property. The term 'land' does not include any property beyond the lines of the area described or referred to in Schedule [A] [C]…"[33] Coverage disputes between the Insurer and the Insured frequently arise when there an encroachment of improvements on the insured land onto land not described in Schedule [A] [C] is discovered, and the policy issued does not contain a survey exception in Schedule B of the policy.

The 2006 Policies expand coverage to include losses for encroachments onto the others' land by the addition of Covered Risk 2(c). Covered Risk 2(c) insures against loss or damage, not exceeding the amount of insurance stated in Schedule A, sustained or incurred by reason of "any encroachment… affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term 'encroachment' includes encroachments of existing improvements located on the Land onto adjoining land and encroachments onto the Land of existing improvements located on adjoining land."

> **Practice Tip:** In some Loan Policies and most Owners' Policies,[34] the Insurer will likely add a survey exception to Schedule B when an ALTA/ACSM survey, certified to and acceptable to the Title Insurer, is not available.[35] If a suitable survey is not available due to time or financial constraints, and counsel is concerned about encroachments onto the land of another, or uncomfortable accepting a survey exception, counsel should consider using one of the survey alternatives offered by the title industry, such as First American's **ExpressMap.**™[36] Counsel should also consider requesting an ALTA 9 series endorsement, which will provide some encroachment protection.[37]

2. "Gap" Coverage

The 2006 Policies have a new insuring provision, Covered Risk 10 (Owner's) and Covered Risk 14 (Loan), which gives express "Gap" coverage to the Insured. Counsel should take note, however, that a new exclusion, Exclusion From Coverage 5 (Owner's) and Exclusion From Coverage 7 (Loan), has been added to the 2006 Policies. The Insurer does not wish to be responsible for taxes and assessments that may be created and attach during the "Gap."

The new Covered Risk provides coverage against losses that occur post-closing but prior to recording, when circumstances require the closing of an escrow and disbursement of acquisition or loan proceeds prior to recording the deed(s) or mortgage documents.[38] The "Date of Policy" on the title insurance policy in this context will be the funding/ settlement/ closing date and not the recording date. The 2006 Policies shift the risk of any deeds, mortgages, judgment liens, and other documents recording during the "Gap" from the Insured onto the Insurer.

> **Practice Tip:** The Insurer may insist on inserting an exception for "Gap" matters in the policy if the Insurer is unable to obtain a "Gap Indemnity" from the seller, borrower, or other financially viable party. Counsel should determine well in advance of closing if a Gap Closing is likely and address the title Insurer's underwriting requirements for providing Gap coverage. Failure to do so can result in confusion and/or delay the closing.

3. Assessments for Street Improvements (Loan Policies Only)

Depending upon the Insurer and the region of the country, a 1970 or a 1992 Loan Policy might or might not have included coverage for loss or damage by reason of assessments for street improvements under construction or completed at Date of Policy. To the extent the coverage was not built in, many lenders requested an ALTA Form 1 endorsement for street assessments when utilizing the earlier policies. The 2006 Loan Policy includes this coverage as Covered Risk 11(b).

4. Duty to Defend

The obligation to provide a defense for matters insured under the policy is contained in the preamble to the 1970 Policies. The 1992 Policies moved the defense clause to a separate paragraph located after the insuring provisions and changed the "defense" language to clarify that while the "loss or damage coverage" was limited by the Amount of Insurance stated in Schedule A, the defense obligation is in addition to the loss coverage; i.e., it does not reduce the Amount of Insurance available to the Insured.

The 1992 policy changes limited the Insurer's defense obligation to only those matters affecting the title to the property or the lien of the insured mortgage. As such, they appeared to exclude defense coverage for non-title matters such as access and police power issues even though the Insurer has an obligation to indemnify in the event of a loss under the policy. The 2006 Policies' defense clause makes clear that the Insurer will provide a defense in any litigation involving any matter insured by the policy.

B. Exclusions from Coverage

Though it can be argued that removal of the Exclusions to the Exclusions is a major "substantive change" and not a "structural change," there are no major substantive changes to the Exclusions From Coverage except for: (i) the addition of an exclusion for real estate taxes or assessments created and attaching between the Policy Date and the recording of the deed,

deed of trust, or other instrument of transfer,[39] as discussed above; and (ii) the deletion of Exclusion From Coverage 6 in the 1992 Loan Policy. While the Exclusions From Coverage to the policy have been modified, most of these changes are cosmetic as opposed to substantive.

C. Conditions

The Conditions and Stipulations, called "Conditions" in the 2006 Policies, set forth the obligations of the Insurer and the Insured and assist in interpreting the terms of the policy. The major substantive changes to the Conditions include: (i) changes to certain definitions; (ii) changes to the proof of loss requirements; (iii) changes to the provisions regarding the determination and extent of liability; (iv) elimination of the coinsurance requirement and the apportionment provision in the Owner's Policy; (v) elimination of the non-cumulative liability and the last dollar provisions in the Loan Policy; (vi) modifications to the arbitration provision; and (vii) the addition of a choice of law provision.

1. Definitions

a. Amount of Insurance

The 1970 and 1992 Policies did not define "Amount of Insurance." It was generally assumed that when a policy referred to "Amount of Insurance," the policy was referring to the dollar amount set forth in Schedule A. This created confusion since the dollar amount of insurance available to pay claims may fluctuate due to post policy events. The 2006 Policies resolve this problem by adding Condition 1(a), which specifically defines the term "Amount of Insurance" as the amount stated in Schedule A, as increased or decreased by endorsement to the policy, as increased by Condition 8(b),[40] or as decreased by Condition 10 (Lender's)[41] or Conditions 10[42] and 11[43] (Owner's).

b. Entity

A definition of "Entity" was added to support expanding the definition of "Insured." Condition 1(c) in the 2006 Policies defines the term by giving examples of entities – "a corporation, partnership, trust, limited liability company, or other similar legal entity."

c. Indebtedness (Loan Policy Only)

Arguably one of the most important changes in the 2006 Loan Policy is the addition of a definition for "Indebtedness" in Condition 1(d) which includes post-policy principal advances secured by the insured mortgage—amounts that were written out of both the 1992 Loan Policy[44] and the 1970 Loan Policy.[45] In addition, "Indebtedness" now includes interest on the loan, prepayment penalties, exit fees, foreclosure expenses, and other expenses involved in protecting the security.

> **Practice Tip:** Remember, even though the 2006 Loan Policy includes post-policy advances when determining the insured lender's measure of loss, with the exception of post-policy construction loan advances that are pursuant to an agreement underlying the insured loan, the 2006 Loan Policy *does not* insure against the invalidity, unenforceability, or lack of priority of the lien of the insured mortgage as security for post-policy advances. Where the loan includes a future advance feature, other than construction loan advances, counsel should request the issuance of one of the ALTA 14 series endorsements addressing future advances.

d. Insured

Another significant change in the new ALTA policies is the expansion of the definition of "Insured" contained in Condition 1(d) in the 2006 Owner's Policy and Condition 1(e) in the 2006 Loan Policy. The changes are quite expansive and are a significant improvement over the 1970 and 1992 ALTA Policies.

A policy of title insurance protects, for the most part, only the named Insured in the policy. Under the 1970 and 1992 Policies, with little exception, those who succeed to the interest of the property by operation of law, as opposed to voluntary conveyance, also fall within the definition of "Insured."[46] However, determining what is a voluntary transfer, as opposed to a transfer by operation of law, has resulted in substantial confusion and uncertainty.

The new definition for "Insured" in the 2006 Owner's and Loan Policies more clearly defines the term "Insured" and recognizes as an Insured the following additional entities or persons not addressed in the 1970 and 1992 Policies:

1. The party who has "control of a transferable record" (as that term is defined under applicable electronic transactions law) where the Indebtedness is evidenced by a transferable record;[47]
2. Successors to a named Insured by dissolution, merger, consolidation, distribution, or reorganization;[48]
3. Successors to a named Insured by conversion to another kind of entity;[49]
4. Certain "voluntary" conveyances by the named Insured that are made without receipt of valuable consideration, including:
    a. Where the equity interests of the grantee are wholly owned by the named Insured—a "subsidiary transfer;"[50]
    b. Where the grantee owns the named Insured—a "parent transfer;"[51]
    c. Where the grantee is wholly owned by an "affiliate" of the named insured and that affiliate and the named insured share a common parent company—an "affiliate transfer;"[52]
    d. And, in the Owner's Policy, where the grantee is the trustee or beneficiary of a trust established by the named Insured for estate planning purposes.[53]

> **Practice Tip:** Because the policy reserves all rights and defenses the Insurer may have had against any predecessor Insured,[54] and because "voluntary" transfers for "actual valuable consideration"[55] are not included in the new expanded definition of "Insured," counsel should still consider whether a new policy should be requested and whether "Non-Imputation" endorsements are in order.

"Non-Imputation" endorsements (the new ALTA Form 15 series) protect against imputation of knowledge and acts from the original equity interest holders to the insured entity. Underwriting the issuance of the "Non-Imputation" endorsements involves (i) the receipt of affidavits containing appropriate indemnities from the continuing and/or departing investors as to their knowledge and actions; (ii) review and approval of financial statements from the affiants/indemnitors; and (iii) confirmation from the new investors of the absence of knowledge of facts that adversely affect the title.

e. Public Records

The term "Public Records" is used several times in each of the Covered Risks, Exclusions From Coverage, and Conditions sections of the 2006 Policies.[56] The term is also used in certain Schedule B exceptions to coverage, particularly those designed to limit coverage in certain respects to "recorded" as opposed to "unrecorded" or "off-record" risks. The presence of these types of generic exceptions in Schedule B results in what is commonly called "standard" as opposed to "extended" coverage. The 2006 Policies essentially retain the 1992 definition of "Public Records" but also take into account the addition of new Covered Risk 5(d) (recorded notices of environmental protection law violations) by including, for purposes of that Covered Risk, the records of the U.S. District Court for the district where the land is located. This has its primary import in states, not including California, that have not enacted the Uniform Federal Lien Registration Act.[57]

The title insurance industry has always intended the term "Public Records" to be defined consistent with the body of records that under state law encompass the grantor-grantee or geographic indices searched and examined by the title insurance personnel to determine record ownership of, and to find those defects, liens, and encumbrances that affect title to, the land that is the subject of the title insurance transaction. At least one court concluded that the definition of "Public Records" contained in the 1970 Policies included the Federal Register.[58] This led to a more precise definition of "Public Records" in the 1992 Policies that has been carried substantively into the 2006 Policies.

f. Unmarketable Titled

The 1992 Policies added a definition of "unmarketability" to better explain the scope of the insuring clause for "unmarketability of the title." For there to be coverage under this insuring clause, the defect must rise to such a level as to permit a reasonable buyer to be released from its contractual obligation to purchase by virtue of a contract provision requiring the delivery of marketable title. In interpreting this somewhat circular definition, courts have held that title is "marketable" if it is free from reasonable doubt that a reasonable purchaser would be willing to accept.[59]

The definition of this term in the 2006 Policies, now called "Unmarketable Title," is more expansive than its 1992 Polices counterpart because it expressly addresses lessee and lender interests. As a consequence, coverage will now exist under the 2006 Policies whenever a prospective purchaser, lessee, or lender would be permitted to be released from its contractual obligation to purchase, lease, or lend due to a defect to which no exception to coverage is taken in Schedule B.

2. Proof of Loss

Title insurance policies, like most insurance policies, require an Insured to set forth in writing any claim being made under the policy, including how the Insured has been damaged. The 1970 and 1992 Policies require the Insured to submit a "Proof of Loss" that describes the defect, lien or encumbrance, or other matter insured against by the policy that constitutes the basis of the loss or damage. The Proof of Loss was required to (i) be signed and sworn to; (ii) set forth the defect in title; and (iii) state, to the best of the Insured's ability, how the amount of loss or damage has been calculated. Failure to submit a Proof of Loss under the 1970 or 1992 Policies terminates any responsibility of the Insurer to indemnify or defend the Insured.[60]

The 2006 Policies make it easier for an Insured to submit a claim.[61] The new policies eliminate the requirement of a "sworn" Proof of Loss and no longer require that the Proof of Loss be submitted to the Insurer within 90 days. Under the 2006 Policies, the Insurer must attempt to determine the amount of loss to the Insured. If the Insurer deems it necessary to request a signed but not sworn Proof of Loss, it may request one from the Insured. Lastly, the new policies eliminate the provisions pertaining to the Insurer's remedy in the event an Insured refuses to provide a signed Proof of Loss. Implicit in the new policies is the right of the Insurer to withhold payment until the Insured furnishes a requested Proof of Loss.

3. Determination and Extent of Liability

Condition & Stipulation 6 of the 1970 Policies, Condition & Stipulation 7 of the 1992 Policies, and Condition 8 of the 2006 Policies set out how the Insured will be compensated in the event of a covered loss. The provisions give the Insurer the option of either paying the Insured (i) the "Amount of Insurance," as defined in the policy; or (ii) the difference between the value of the "title" as insured and the value of the "title" subject to the defect, lien or encumbrance, or other matter insured against under the policy. Under each of the Loan Policies, the Insurer also has the option of paying the Insured Claimant the "indebtedness" as that term is defined under each policy.

In response to industry demand and judicial interpretation, this provision has undergone significant change over the years. An opening paragraph was added to the 1992 Policies, which states that a title insurance policy is a contract of indemnity against actual monetary loss or damage. The 1992 policies also reorganized the provision so it was more logical and sequential, defined how "actual loss" was to be determined, and set forth the amount to be paid to an insured lender should the Insurer elect to purchase the loan and take an assignment of the mortgage.

Condition 8 in the 2006 Policies carries forward the changes made in the 1992 Policies and makes two significant additional changes that benefit the Insured. Subsection 8(b) in the 2006 Policies contains a new provision that increases the amount of available insurance to the Insured by 10% when the Insurer elects to pursue its right under Condition 5 to eliminate a defect and establish the title as insured, or the lien of the insured mortgage, but is unsuccessful in doing so. Condition 8(b) also gives the Insured claimant the right to elect what point in time the loss or damage is to be determined.[62] The insured claimant can elect to have the loss determined as of the date the claim is made or as of the date the claim is settled and paid.

This new provision will protect the Insured in a fluctuating real estate market.

4. Coinsurance (Owner's Policy Only)

In 1992, the ALTA added a coinsurance provision to the Owner's Policy. Condition & Stipulation 7(b) had the effect of making the insured owner a coinsurer of the risk of loss when (i) the owner purchased insurance in an amount less than 80% of the then value of or full consideration paid for the land; or (ii) when the insured constructed improvements on the property post-policy that increased the value of the land by 20% or more over the amount of the insurance designated in the policy.[63] In practice, the 80% provision has rarely been a material issue as most Insurers insist that the title policy be issued for the approximate fair market value of the land insured, and sophisticated commercial clients often insist that the 80% provision be deleted by endorsement. The 20% post-policy improvement provision, however, has been a cause for concern and has caught many sophisticated commercial clients by surprise.

The ALTA elected to eliminate the coinsurance provision from the 2006 Owner's Policy. Elimination of this provision greatly enhances the value of the policy to the Insured over time as properties are rehabilitated or more intensely developed and avoids the surprise of unintended coinsurance.

5. Apportionment (Owner's Policy Only)

The 1970 and 1992 Owner's Policies contain an "Apportionment" provision[64] that has the potential to limit the Insured's recovery in single policy multi-site transactions. This provision applies whenever (i) an Owner's Policy included two or more parcels of real estate that were not used as a single site; and (ii) when a covered risk occurred that affected one or more but not all of the parcels described in the policy. In such cases, if the Insurer and the Insured have not agreed upon and included in the policy a specific value allocation among the separate parcels, the Insurer may allocate the amount of insurance available under the policy pro-rata among the various parcels insured irrespective of their actual relative values. Unlike the coinsurance provision, only rarely did the most sophisticated commercial clients negotiate specific value allocations at the time of policy issuance or require that the Apportionment provision be deleted from their policies by endorsement. Often this would result in surprise and consternation in the claims context.

The ALTA elected to eliminate the Apportionment provision from the 2006 Owner's Policy. Elimination of the Apportionment provision places the Insured in the same position the Insured would be in if separate policies had been issued on each parcel and a "tie-in" or "aggregation endorsement"[65] had been issued by the Insurer. Thus, under the 2006 Owner's Policy, the Insured will be able to apply the full amount of the insurance to any separate parcel on which a covered loss occurs and will be able to recover actual loss up to the lesser of the amount of the insurance or the then full value of the particular parcel affected by the covered defect.

6. Liability Noncumulative (Loan Policy Only)

The 1970 Policies and the 1992 Policies all contain a "Liability Noncumulative" provision[66] which serves to reduce the funds available to an Insured under its policy by the amount (i) in the case of an Owner's Policy, that the Insurer has paid under a covered claim on a policy on a mortgage shown as an exception in the Owner's Policy; or (ii) in the case of a Loan Policy, and after the lender has acquired the insured land in satisfaction of its indebtedness, that the Insurer has paid under a covered claim on a policy on certain mortgages. The 1970 Loan Policy limits the provision to payments on junior loans shown in Schedule B of the policy and instances where the insured lender, after acquisition of the property, executes a mortgage secured by the property, and a claim is subsequently paid on that mortgage.[67] The 1992 Loan Policy has a broader provision that also includes mortgages assumed, agreed, or taken subject to by the insured lender.

While leaving the Liability Noncumulative provision intact in the 2006 Owner's Policy, the ALTA elected to delete the provision from the 2006 Loan Policy, thereby avoiding problematic situations where the senior and the junior lenders were insured by the same Insurer.[68] Elimination of this provision enhances the value of the 2006 Loan Policy in the context of loan transactions that involve a "senior" and one or more "junior" loans that are secured by a separate mortgage.

7. Last Dollar Issues (Loan Policy Only)

A provision was added to the 1992 Loan Policy that was not contained in the 1970 Loan Policy and has proven problematic to lenders in certain types of loan transactions. Condition & Stipulation 9(b) reads in pertinent part, as follows:

> Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of the insurance pro tanto.

This provision proved problematic for lenders in mixed collateral, multi-site, and partially-secured or under-secured loan transactions. In each of these situations, the loan amount is likely to be greater than the amount of the title policy and the lender can find itself without any remaining insurance once the loan principal has been reduced by an amount equal to the amount of the title policy. To protect against this possibility, lenders frequently request a "Last Dollar" endorsement.[69]

The elimination of Condition & Stipulation 9(b) from the 2006 Loan Policy resolves this problem and makes the "Last Dollar" endorsement unnecessary. Under the 2006 Loan Policy, only claim payments for indemnity obligations serve to reduce the amount of insurance available under the policy. However, if the lender has not yet acquired title to the insured land by foreclosure or deed-in-lieu-of-foreclosure, then the amount of insurance is reduced only to the extent that the claim payment reduces the amount owed on the subject loan.

8. Arbitration

The 1992 Policies added a provision for arbitration that was not included in the 1970 Policies.[70] The 1992 Policies provide that either the Insurer or the Insured may demand binding arbitration when the Amount of Insurance shown in Schedule A is

$1 million dollars or less. If the Amount of Insurance is greater then $1 million dollars, both the Insurer and Insured must agree in order for there to be binding arbitration. All arbitration proceedings under the 1992 Policies are to be conducted under the applicable Title Insurance Arbitration Rules of the American Arbitration Association ("AAA").[71]

The arbitration provision was modified in the 2006 Policies to increase the Amount of Insurance threshold from $1,000,000 to $2,000,000 and provide that the applicable rules are the Title Insurance Arbitration Rules of the American Land Title Association set out on the ALTA website (www.alta.org), as opposed to the Title Insurance Arbitration rules of the AAA. In addition, the 2006 Policies state that arbitration is limited to those parties that are a party to the insurance contract. No joinder or consolidation with claims of third parties is permitted.

> **Practice Tip:** It is anticipated that many Insureds will continue to request the deletion of the arbitration provision from the new policies, which has been a common practice with the 1992 Policies. Where regulatorily permissible, most Insurers are likely to continue to agree to the request.

9. Choice of Law; Forum

The 2006 Policies add a completely new "choice of law" provision (Condition 17 in the Owner's Policy and Condition 16 in the Loan Policy). The ALTA determined that this provision would be beneficial to all parties given the increased number of national and international transactions. The law of the situs of the land described in the transfer document or mortgage will govern the interpretation, rights, and remedies under the policy. The provision also holds that any litigation or other proceeding brought by an insured against the Insurer must be brought in a state or federal court within the United States or its territories, provided, of course, that the court has jurisdiction over the matter at issue.

IV. CONCLUSION

Although the 2006 Policies were adopted in June 2006, the policies will not be available in all jurisdictions until they have been filed and approved by each state's regulatory authority—in California, the Department of Insurance. This process will probably be completed in 2007. It is conceivable that one or more states will require state-specific modifications to the 2006 Policies; however, experience suggests that any state-specific modifications will be minor.

Overall, the 2006 Policies provide materially better title insurance coverage to Insureds than was available through the 1970 Policies or the 1992 Policies. The ALTA listened to its constituency and took the best of the 1970 and 1992 Policies from the Insured's perspective, added some significant new benefits in favor of the Insured, and updated and clarified the policy language. The net result is an improved product and better value for the title insurance customer.

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ENDNOTES

1. The ALTA is the national trade group for the title insurance industry. The ALTA was formed in the 1940s in order to standardize the policies of insurance offered by the title insurance industry.
2. A review of the policies initially created in 1940 occurred in 1969, and as a result of the review, new policies were adopted by the ALTA in 1970. These policies were subsequently amended in 1984 to address issues regarding the police power exclusion. That same year the ALTA Forms Committee commenced the last complete rewrite of the ALTA Owner's and Loan Policies culminating in adoption of the 1987 forms that morphed ultimately into what is now referred to as the "1992 Policies."

3. The ALTA Forms Committee consists of title insurance industry veterans with an average of 27 plus years in the industry and represents each of the major title insurance companies.
4. Customers frequently raised concern regarding (i) the interpretation of policy provisions when there were exclusions to Exclusions From Coverage (*Elysian Investment Group, LLC v. Stewart Title Guaranty Co.* (2002) 105 Cal. App. 4th 315), (ii) the difficulty of dealing with electronic conveyance and mortgage transactions, and, (iii) increasing variation in required policies and provisions among institutional investors.
5. Substantial input on the 2006 Policies was received throughout the drafting process from representatives of the American College of Real Estate Lawyers, the American College of Mortgage Attorneys, Fannie Mae, and Freddie Mac.
6. These forms are the ALTA Homeowners Policy of Title Insurance, adopted in October 1998, and the ALTA Expanded Coverage Residential Loan Policy, adopted in October 2001. The ALTA Forms Committee is currently working on modifications to each of these forms to bring them into conformity to the relevant beneficial changes that have been made in the 2006 ALTA Policies.
7. "Withdrawal" by the ALTA does not necessarily mean that prior policies may not be issued by specific title companies upon request.
8. It can be argued that the removal of the Exclusions to the Exclusions From Coverage and the addition of Covered Risks that provide coverage for the matters discussed in the Exclusions to the Exclusions From Coverage is a "Major Substantive Change" (adding insurance that was not previously there) and not a "Major Structural Change." Since many Insureds believed that coverage could be found in the Exclusions From Coverage, the authors have elected, for the purposes of this article only, to treat the deletion of the Exclusion to the Exclusions From Coverage as a "structural change" and not as a "substantive change."
9. The Owner's Policy contains exclusions to Exclusions From Coverage in (i) Exclusion 1(a), "Governmental Regulation," (ii) Exclusion 1(b), "Governmental Police Power," (iii) Exclusion 2, "Rights of Eminent Domain," and lastly, (iv) Exclusion 4(b), "Preferential Transfers." The Loan Policy also contains exclusions to Exclusions From Coverage in (i) Exclusion 1(a), "Governmental Regulation," (ii) Exclusion 1(b), "Governmental Police Power," (iii) Exclusion 2, "Rights of Eminent Domain," and lastly, (iv) Exclusion 7(b), "Preferential Transfers."
10. A title insurance policy is a contract between the Insurer and the Insured pursuant to which the Insurer agrees to indemnify and defend the Insured against losses resulting from specified matters. Like most other insurance policies, a title insurance policy contains basic insuring clauses and a statement of specific matters that are excepted or excluded from coverage. Ordinarily, a particular loss is covered only if it results from a matter that (i) is within the scope of the insuring clauses, and (ii) is not expressly excepted or excluded from coverage as provided in the policy. Endorsements modify the basic policy by either adding an additional insuring provision or deleting exceptions, exclusions, and/or provisions within the Conditions and Stipulations to the policy. *See* Cruz & Rogers, *Commercial Title Endorsements* (2004) vol. 22, No. 2, Cal. Real Prop. J., 4.
11. (2002) 105 Cal. App. 4th 315.
12. Insuring Clause 2 in the 1970 and 1992 Policies and Covered Risk 2 in the 2006 Owner's Policies.
13. Exclusion From Coverage 3(d) in the 1970 and 1992 Policies, and Covered Risk 3(d) in the 2006 Owner's Policy.
14. Insuring Clause 4 in the 1970 Owner's Policy, Insuring Clause 3 in the 1992 Owner's Policy, and Covered Risk 3 in the 2006 Owner's Policy.
15. *See also Lick Mill Creek Apartments v. Chicago Tit. Insurance Co.* (1991) 231 Cal. App. 3d. 1654.
16. *See* Conditions 1(f) in the 2006 Owner's Policy and Condition 1(h) in the 2006 Loan Policy.
17. Exclusion 4 in the 1992 ALTA Owner's Policy and Exclusion 7 in the 1992 ALTA Loan Policy.
18. The Creditors' Rights Exclusion was originally added to the 1987 ALTA Policies in 1990. It excluded any claim arising by reason of federal bankruptcy, state insolvency, or similar creditors' rights laws. The industry's customer groups expressed concern over the breadth of the exclusion and, as a result, in 1992, the ALTA Policies contained a more limited Creditors' Rights Exclusion. The 1992 Loan Policy excludes:

    > Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
    >
    > -The transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
    >
    > -The subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
    >
    > -The transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure: (i) to timely record the instrument of transfer; or (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

    The 1992 Owner's Policy was also modified. Exclusion 4 to the 1992 Owner's Policy excludes:

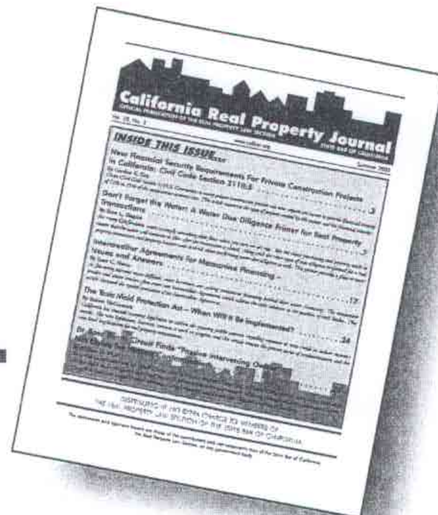
    > Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
    >
    > -The transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
    >
    > -The transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure: (i) to timely record the instrument of transfer; or (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.
19. New Covered Risk 9(a) in the 2006 Owner's Policy and new Covered Risk 13(a) in the 2006 Loan Policy.
20. ALTA Endorsement Form 21 makes clear that it does not cover loss or damage if the insured (a) knew the subject transfer was intended to hinder, delay, or defraud any creditor, or (b) is not a good faith transferee or purchaser. For a detailed discussion on Creditors' Rights risks in the context of title insurance, see Hammann & Murray, *Creditors' Rights Risks: A Title Insurer's Perspective* (2004) 38 J. Marshall L. Rev. 223.

21. New Covered Risk 2(a)(i) in the 2006 Owner's and Loan Policies and new Covered Risk 9(a) in the 2006 Loan Policy.
22. New Covered Risk 2(a)(ii) in the 2006 Owner's and Loan Policies and new Covered Risk 9(b) in the 2006 Loan Policy.
23. New Covered Risk 2(a)(iii) in the 2006 Owner's Policy and Covered Risk 9(c) in the 2006 Loan Policy.
24. New Covered Risk 2(a)(iv) in the 2006 Owner's Policy and new Covered Risk 9(d) in the 2006 Loan Policy.
25. New Covered Risk 2(a)(v) in the 2006 Owner's Policy and new Covered Risk 9(e) in the 2006 Loan Policy.
26. New Covered Risk 2(a)(vi) in the 2006 Owner's Policy and new Covered Risk 9(f) in the 2006 Loan Policy.
27. New Covered Risk 2(a)(vii) in the 2006 Owner's Policy and new Covered Risk 9(g) in the 2006 Loan Policy.
28. New Covered Risk 9(a) in the 2006 Owner's Policy and Covered Risk 13(a) in the 2006 Loan Policy.
29. Exclusion From Coverage 3(d) in the 1970, 1992, and the 2006 Policies. *See Rosen v. Nations Tit. Insurance Co.* (1997) 56 Cal. App. 4th 1489 and *Rice v. Taylor* (1934) 220 Cal. 629.
30. Exclusion From Coverage 6 in the 1992 Loan Policy and the exception in Insuring Provision 7 in the 1970 Loan Policy.
31. CLTA 101 series.
32. The following endorsements can be incorporated by reference into the policy if the Insurer elects to add paragraph 6 to its filed form:
    - ALTA 4-06 (Condominium)
    - ALTA 4.1-04
    - ALTA 5-06 (Planned Unit Development)
    - ALTA 5.1-06
    - ALTA 6-06 (Variable Rate)
    - ALTA 6.2-06 (Variable Rate-Negative Amortization)
    - ALTA 8.1-06 (Environmental Protection Lien)
    - ALTA 9-06 (Restrictions, Encroachments, Minerals)
    - ALTA 13.1-06 (Leasehold Loan)
    - ALTA 14-06 (Future Advance-Priority)
    - ALTA 14.1-06 (Future Advance-Knowledge)
    - ALTA 14.3-06 (Future Advance- Reverse Mortgage)
    - ALTA 22-06 (Location)
33. Conditions And Stipulations (1)(d) in the 1992 Owner's and Loan Policies.
34. Insurers are more conservative in underwriting Owner's Policies then when they are issuing a Loan Policy. This is because in almost every situation an owner suffers a loss in situations in which title is defective. The Insurer must immediately exercise one of its options under the Owner's Policy to either establish title as insured, indemnify the Insured for the amount of the loss caused by the defect, or pay the Insured the amount of insurance stated in Schedule. A. A lender does not suffer a loss under a title insurance policy until (i) a defect exists, (2) the underlying debt will not be repaid, and the lender forecloses on its collateral, and (3) there are insufficient proceeds to pay off the amount owed on the note and related expenses. *See Karl v. Commonwealth Land Tit. Insurance Co.* (1993) 20 Cal. App. 4th 972 and *Cale v. Transamerica Tit. Insurance Co.* (1990) 225 Cal. App. 3d 422.
35. For example, "discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose and which are not shown by the public records."
36. First American's ExpressMap™ is an alternative to an ALTA Survey. First American's ExpressMap™ team, which is made up of title underwriters and cadastral engineers, investigate and review all matters relating to extended survey coverage and overlay an aerial photograph on a map of the insured property that contains color-coded boundary lines and record matters that can be plotted on the aerial. The aerial map can be produced in any size and serves as a survey substitute for underwriting "survey" coverage. To learn more about ExpressMap™, please visit First American Title's website at: <http://www.firstam.com>
37. The ALTA 9 series is called "Restrictions, Encroachments, Minerals" after the basic subject matter addressed in this series of endorsements. They are also sometimes referred to as "Comprehensive endorsements," which is a misnomer because, in fact, they are limited in their subject matter to the stated coverage.
38. On the East Coast and occasionally in the West, all parties to a transaction meet in a conference room, negotiate the final terms of a deal, exchange deeds and funds, finalize what is acceptable in the title insurance policy, shake hands, and close the deal. The insurance policy is usually dated as of the date of the close, a date prior to the recording of the deeds or loan documents. (Thus, creating a "Gap.") This is called a "New York Style Closing" or a "Table Closing." On the West Coast, for the most part, all documents are submitted to the Escrow Holder (either the Title Insurer or an independent escrow holder), and the escrow closes on the same date all documents are recorded.
39. Exclusion From Coverage 5 in the 2006 Owner's Policy and Exclusion From Coverage 7 in the 2006 Loan Policy.
40. Condition 8(b)(i) in the 2006 Policies provides for an increase in the Amount of Insurance by 10% when an Insurer pursues its right under Section 5 of the policies to establish title as insured, however is unsuccessful in doing so.
41. Condition 10 in the 2006 Loan Policy states that all payments under the policy, except payments made for costs, attorney's fees, and expenses, reduce the Amount of Insurance by the amount of the payment.
42. Condition 10 in the 2006 Owner's Policy states that all payments under the policy, except payments made for costs, attorney's fees, and expenses, reduce the Amount of Insurance by the amount of the payment.
43. Condition 11 in the 2006 Owner's Policy provides for a decrease in coverage by any amount paid under any policy insuring a mortgage shown in Schedule B or which the Insured has agreed to assume or take subject to after the date of the policy.
44. Condition & Stipulation 8(d)(i).
45. Condition & Stipulation 8(b).
46. Condition 1(a) in the 1970, 1992, and the 2006 Owner's Policies. See *Van Winkle v. Transamerica Tit. Insurance Co.* (1984) 697 P.2d 784 for a case involving a transfer to a joint venture; *Lawyers Tit. Insurance Corp. v. CAE-Link Corp.* (1994) 878 F. Supp. 767 for a case involving a transfer to

an affiliate corporation and *Gebhardt Family Inc., L.L.C. v. Nations Tit. Insurance of N.Y., Inc.* (2000) 132 Md. App. 457 for a case involving a transfer to an L.L.C.

47. Condition 1(e)(i)(B) in the 2006 Loan Policy.
48. Condition 1(e)(i)(C) in the 2006 Loan Policy and Condition 1(d)(i)(B) in the 2006 Owner's Policy.
49. Condition 1(e)(i)(D) in the 2006 Loan Policy and Condition 1(d)(i)(C) in the 2006 Owner's Policy.
50. Condition 1(e)(i)(E)(1) in the 2006 Loan Policy and Condition 1(d)(i)(D)(1) in the 2006 Owner's Policy.
51. Condition 1(e)(i)(E)(2) in the 2006 Loan Policy and Condition 1(d)(i)(D)(2) in the 2006 Owner's Policy.
52. Condition 1(e)(i)(E)(3) in the 2006 Loan Policy and Condition 1(d)(i)(D)(3) in the 2006 Owner's Policy.
53. Condition 1(d)(i)(D)(4) in the 2006 Owner's Policy.
54. Condition 1(d)(ii) in the 2006 Policy and Condition 1(e)(ii) in the 2006 Loan Policy.
55. Condition 1(d)(i)(D) in the 2006 Owner's Policy.
56. The term "Public Record" (which is capitalized in the 2006 Policies but not in the earlier policies) is used in Covered Risks 2(a)(iv), 5,6,7,9(b) and 10 and in Exclusions From Coverage 3(a) and 7 in the 2006 Owner's Policy. It is used in Covered Risks 2(a)(iv), 5,6,7,9(f), 13(b) and 14 and in Exclusions From Coverage 3(a) and 7 in the 2006 Loan Policy. The term is also used in the Conditions in the definition of "knowledge" at Condition 1(f) and Condition 1(h) in the 2006 Owner's and Loan Policies, respectively.
57. Uniform Federal Lien Registration Act, Vol.7A, Pt.I Uniform Laws Annotated, Master Edition or ULA database on Westlaw, which was adopted in CA and can be found at Cal. C.C.P. §§ 2100 to 2107. The proper place for recording of notices of federal liens upon real property being the office of the recorder of the county in which the real property is located, C.C.P.§2101(b).
58. *Hahn v. Alaska Tit. Guaranty Co.* (1976) 557 P.2d. 143.
59. *See Davis v. Stewart Tit. Guaranty Co.* (1987) 726 S.W.2d 839 and *Keown v. West Jersey Tit. & Guaranty Co.* (1978) 390 A.2d 715, 717.
60. Condition 4 "Notice of Loss-Limitation of Action" in the 1970 Owner's and Loan Policies and Condition 5 "Proof of Loss or Damage" in the 1992 Owner's and Loan Policies.
61. Conditions 3 and 4 in the 2006 Policies.
62. Condition 8(b)(ii).
63. This provision only applied to the indemnity provisions. It did not apply to the Insurer's defense obligation.
64. Condition 10 in the 1970 Owner's Policy and Condition 8 in the 1992 Owner's Policy.
65. ALTA Form 12.
66. The Liability Noncumulative Provision (Condition 11 in the 2006 Owner's Policy) states that the Amount of Insurance shown in Schedule A is reduced by the amount of any payment made on another policy issued by the same Insurer that insures an item shown as an Exception From Coverage in Schedule B of the policy. Any amount paid on the other policies is considered a payment to the Insured under the policy issued to the insured Owner.
67. The 1970 and 1992 Owner's Policies are similar to their lender counterparts. The provision, however, remains in the 2006 Owner's Policy.
68. The junior lender often found itself without any insurance if the common Insurer paid a claim under the senior Loan Policy and the amount of the payment was at least equal to the liability under the junior Loan Policy.
69. *See, e.g.*, First American Endorsement Form 51.
70. Condition & Stipulation 13 in the 1992 Loan Policy and Condition & Stipulation 14 in the 1992 Owner's Policy.
71. The content of the rules has not changed in any substantive respect. Because of an insufficient volume of arbitrations referred to the AAA, the AAA disbanded the Title Insurance division, and as a consequence, the ALTA decided to publish the rules themselves. Presently, the National Arbitration Forum administers arbitrations for the ALTA.

Do you have an article you would like published? Or maybe an idea for one?



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CRPJ MCLE Test No. 6 (Vol. 24, No. 4)

THE NEW 2006 ALTA POLICIES

1 Hour MCLE Credit

How To Earn MCLE Credit

After reading the article, "The New 2006 ALTA Policies: the Industry Listens!" complete the following test to receive 1.00 hour of MCLE credit. Please mark all answers on the sheet provided. The Real Property Law Section of the State Bar of California certifies that this activity is approved for and will earn 1 hour of MCLE credit.

1. True/False. The 2006 Policies represent the first comprehensive revision of the policy forms in nearly 20 years.

2. True/False. The 2006 Policies are intended for use only with respect to commercial properties.

3. True/False. The 2006 Policies continue the use of the traditional insurance policy legalese so as to assure interpretation consistent with prior case law.

4. True/False. The courts have consistently held that an exclusion or exception from an exclusion is effective to create coverage in an insurance policy.

5. True/False. The addition of the "Creditors' Rights Exclusion" to the 1992 Policy distinguishes it from the prior 1970 Policy.

6. True/False. For clarity, the 2006 Policies enumerate all Covered Risks and any risks not specified are excluded from coverage.

7. True/False. Mechanics liens are excluded from policy coverage as they arise from events occurring after the date of the title policy.

8. True/False. Coverage is provided against encroachment of improvements on the Insured's land across the property line onto a neighbor's property under the 2006 Policies.

9. True/False. Coverage has been added to the 2006 Policy to cover risks that arise during the gap period between the date of closing/settlement and the date of recordation of transaction documents.

10. True/False. Coverage against assessments for street improvements has been eliminated from the 2006 Loan Policy.

11. True/False. The 2006 Policies clarify the Insurer's obligation to defend extends to any insured matter, not just matters affecting title.

12. True/False. "Amount of Insurance" continues to be undefined in the 2006 Policies.

13. True/False. A definition of the term "Indebtedness" has been added to the 2006 Loan Policy to clearly include post policy principal advances.

14. True/False. Only minor changes were made to the definition of the term "Insured" in the 2006 Policies.

15. True/False. The concept of "Unmarketable Title" has been expanded in the 2006 Policies to account for loan and lease transactions.

16. True/False. The Insured's loss is determined as of the date the claim is submitted to the Insurer.

17. True/False. Coinsurance continues to be a major concern for the Insured under the 2006 Owner's Policy.

18. True/False. Elimination of the Apportionment provision from the 2006 Owner's Policy allows the insured to recover up to the policy limit for a loss on any single parcel even in situations where the policy covers multiple parcels.

19. True/False. A "Last Dollar" endorsement is not necessary in connection with the 2006 Loan Policy.

20. True/False. The arbitration provision in the 2006 Policies was not materially changed.

MCLE Test Instructions -- Test No. 6 (Vol. 24, No. 4)

This MCLE test is a free benefit for members of the Real Property Law Section of the State Bar of California. In order to receive credit, you must submit this original Answer Sheet from the *California Real Property Journal*. Photocopies of the test and answers are not permitted.

Please read and study the MCLE article in this issue of the *California Real Property Journal*. Then answer the questions by marking "true" or "false" next to the appropriate number on the answer sheet below. There is only one correct answer to each question.

After you finish the test, mail the original completed Answer Sheet to:

Real Property Law Section
State Bar of California
180 Howard Street
San Francisco, CA 94105

You may wish to retain a copy of the test for your records. Within approximately eight weeks, the Real Property Law Section will return your test along with the answers and a certificate for this self-assessment MCLE activity.

ANSWER SHEET TO CRPJ MCLE TEST NO. 6

1. ______**True** ______**False**
2. ______**True** ______**False**
3. ______**True** ______**False**
4. ______**True** ______**False**
5. ______**True** ______**False**
6. ______**True** ______**False**
7. ______**True** ______**False**
8. ______**True** ______**False**
9. ______**True** ______**False**
10. ______**True** ______**False**
11. ______**True** ______**False**
12. ______**True** ______**False**
13. ______**True** ______**False**
14. ______**True** ______**False**
15. ______**True** ______**False**
16. ______**True** ______**False**
17. ______**True** ______**False**
18. ______**True** ______**False**
19. ______**True** ______**False**
20. ______**True** ______**False**

Name: ______________________________ **State Bar Number:** ______________

Law Firm/Organization: ______________________________

Address: ______________________________

City: ______________________ **State**______________ **Zip:**__________

Email: ______________________________