

New ALTA 2021 Loan Policies of Title Insurance—Some Practical Considerations for Lenders

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Introduction

As you've no doubt heard by now, the American Land Title Association (ALTA) has completed its arduous multi-year effort to revise and update the 2006 ALTA Loan and Owner Title Policies, which were made available, together with redlines to the 2006 Policies, as of July 1, 2021. You can access and download those here: [2021 ALTA Clean and Redline Title Policies](#).

In a comprehensive, thoughtful, encompassing survey of revisions effected in the 07-01-2021 ALTA Loan Policy of Title Insurance ("2021 Loan Policy"), my esteemed ACMA colleagues commented that "[t]hese changes will improve customer experience, speed up delivery, improve accuracy in the title exam and escrow process, and address legal rulings that have impacted the industry" and that "[t]he new policies will also complement current and anticipated technological changes in the purchase, sale, and financing of real property." While there is no doubt many of these expectations will be fulfilled, lender clients want to know: do any changes potentially spell more risk for the insured; has coverage been limited or narrowed; has coverage been clarified or added to benefit the insured?

This article will focus on a curated collection of selected revisions to the Covered Risks, Exclusions, Schedule B Part I and Part II Exceptions and Conditions in the 2021 Loan Policy,

keeping these practical inquiries in mind.

As background, the ACMA Title Insurance Committee formed a sub-committee ("ACMA Title Sub-Committee") to review, consider, and comment on the ALTA new policy discussion drafts, which work insured from 2017–2020.

Covered Risk #10: Your 2021 Loan Policy will not secure the entirety of your Mortgage Lien. Covered Risk #10 in the 2006 ALTA Loan Policy ("2006 Loan Policy") insures, as of the Date of the Policy, against loss or damage (not exceeding the Amount of the Insurance) incurred by reason of the lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance. This is straight-forward statement of basic coverage, limited in dollar amount by the Amount of the Insurance. By contrast, Covered Risk #10, in the 2021 Loan Policy reduces this basic insurance to cover only specifically enumerated parts of the Indebtedness, see new sub-sections a.-e., set forth below.

10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance on the Title as security for the following components of the Indebtedness:

a. the amount of the principal disbursed as of the Date of Policy;

b. the interest on the obligation secured by the Insured Mortgage;

c. the reasonable expenses of foreclosure;

d. amounts advanced for insurance premiums by the Insured before the acquisition of the estate or interest in the Title; and

e. the following amounts advanced by the Insured before the acquisition of the estate or interest in the Title to protect the priority of the lien of the Insured Mortgage:

i. real estate taxes and assessments imposed by a governmental taxing authority; and

ii. regular, periodic assessments by a property owners' association.

The following components of the Indebtedness are specifically excluded by omission: principal advanced after the Date of the Policy (including construction loan advances), prepayment premiums, expenses of foreclosure or other enforcement, advances for insurance, advances to prevent deterioration of improvements and advances to protect the validity, enforceability or priority of the lien. But note, the ALTA 14 Future Advance-Priority

Endorsement picks up coverage for advances of principal made after the Date of the Policy as well as expenses of foreclosure, insurance and reasonable amounts expended to prevent deterioration of improvements. The import here is, under the 2021 Loan Policy, notwithstanding how much of the loan is advanced on closing (even if 100% is advanced) Counsel should consider whether an ALTA 14 should now become as standard a request as an ALTA 9 is on all Loan Policies. Also, note that Stewart Title Guaranty Company has an STG Amendment of Covered Risk 10 available that will substitute the 2006 Covered Risk #10 (“The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance on the Title”) for the 2021 Covered Risk #10 above, at no charge. I have not researched other title companies to see if they will offer a similar endorsement, but it will be worth asking for if you are getting the 2021 Loan Policy.

Schedule B

Part I. A new General Exception emerges in Schedule B Part I. The 2021 Loan Policy encompasses a new general exception for “the terms and conditions of any lease or easement identified in Schedule A” thus using language that often has been added to except *contractual* terms within an insured lease or easement (“Appurtenant Estate”) and moving it to the introductory clause in Schedule B Part I, creating a new General Exception applicable to all insured Appurtenant Estates.

~~This~~ policy does not insure against loss or damage, and the Company will not pay costs, attorneys’ fees, or expenses ~~that arise by reason of:~~ resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys’ fees, or expenses resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:

When reviewed in early drafts, the ACMA Title Sub-Committee recommended either omitting this or inserting “non-title” as a modifier of “terms and conditions” of any Appurtenant Estate. If there are title related terms or conditions in the Appurtenant Estate, the instrument creating the Appurtenant Estate should be separately listed by the Title Company as a stand-alone Exception in Part I. and specifically called out. But what is the import for lender insureds? Given that all Appurtenant Estates will now constitute Schedule B Part I Exceptions, Counsel should review same and obtain affirmative coverage on every one, to mitigate these now automatic Schedule B Part I exceptions.

Part II. When is a Schedule B-II subordinate matter not entirely insured to be subordinate? The narrowing of coverage in Covered Risk 10 is imported as a limitation on the entirety of Schedule B-II Exceptions. The 2006 Loan Policy, Exception from Coverage, Part II, provides insurance against “loss or damage sustained in the event [the matters listed thereon] are not subordinate to the lien of the Insured Mortgage.” A straightforward, clean statement of what lenders expect of B-II matters, *i.e.*, same are insured to be subordinate to the Insured Mortgage. Not so any more. The 2021 Loan Policy now provides:

PART II

~~In addition to the matters set forth in Part I of this Schedule, the Title is subject to the following matters, and the Company Covered Risk 10~~ insures

against loss or damage sustained ~~in the event that they are not subordinate to~~ by the Insured by reason of the lack of priority of the lien of the Insured Mortgage over the matters listed in Part II, subject to the terms and conditions of any subordination provision in a matter listed in Part II:]

Accordingly, notwithstanding that senior lender (holder of the Insured Mortgage) may have negotiated a recorded subordination that expressly provides advances to protect the security are part of the senior Indebtedness and senior in right to payment of subordinate debt, the 2021 Loan Policy will not insure it as such.

In addition, this Part II revision further narrows the insurance that B-II matters are subordinate by the proviso that this insurance is “subject to the terms and conditions of any subordination provision in a [B-II] matter,”-well no, not really. If this were literally the case, then the foregoing example of an express subordination of advances would mean that Covered Risk #10. advances are insured, but I digress. This proviso undermines the insurance that Schedule B-II matters are subordinate to the Insured Mortgage and adds insult to injury by failing to limit this subjective proviso to *only* to *non-title* matters. Your reviewer is not a litigator however, it seems this will open the door for creative title insurer defenses that notwithstanding inclusion on Schedule B-II, you are either not insured such matters are subordinate or limited in the amount subordinated.

IV. CONDITION #8. The 2021 Loan Policy new Section 8(b) gives the insured lender the right to measure fair market value (for purposes of determining loss) of the title from either the date the insured lender acquires the Title as a result of a foreclosure or deed in lieu of foreclosure or the

date the lien of the Insured Mortgage is rendered unenforceable by a matter insured by the Policy.

8. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by ~~the an~~ Insured Claimant who has suffered loss or damage by reason of matters insured against by this ~~policy~~. This policy is not an abstract of the Title, report of the condition of the Title, legal opinion, opinion of the Title, or other representation of the status of the Title. All claims asserted under this policy are based in contract and are restricted to the terms and provisions of this policy. The Company is not liable for any claim alleging negligence or negligent misrepresentation arising from or in connection with this policy or the determination of the insurability of the Title.

~~(a) a.~~ The extent of liability of the Company for loss or damage under this policy ~~shall~~ does not exceed the least ~~of~~ of:

~~(i) i.~~ the Amount of Insurance;

~~(ii) ii.~~ the Indebtedness;

~~(iii) iii.~~ the difference between the fair market value of the Title, as insured, and the fair market value of the Title subject to the ~~risk~~ matter insured against by this policy, ~~or~~; or

~~(iv) if a government agency or instrumentality~~ iv. if a Government Mortgage Agency or Instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage or in satisfaction of its insurance contract or guaranty, relating to the Title or the Insured Mortgage.

b. Fair market value of the Title in Condition 8.a.iii. is calculated using either:

i. the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of foreclosure of the Insured Mortgage; or

ii. the date the lien of the Insured Mortgage or any assignment set forth in Item 4 of Schedule A is extinguished or rendered unenforceable by reason of a matter insured against by this policy.

The takeaway is that fair market value may thus be measured from the Date of the Policy where the deemed invalidity or defect is in existence as of that date. This is a clarification that is great news for lenders in that it makes clear that determination of loss is not tied to value as of the date the claim was made or acquisition of title, where the defect claimed was in existence as of the date of the Policy. This revision is directly attributable to the ACMA Title Sub-Committee's Professor Joyce Palomar suggestion that the following

be added, "*the Date of the Policy, where Insured Mortgage is deemed invalid/the loss is based upon defect is in existence as of the Date of the Policy.*" The exact language was not used but the concept is embodied in the new b. ii.

Concluding Thoughts

The 2021 Loan and Owner Policies are now available in 42 states and jurisdictions. The exact, final forms may or may not be tweaked in individual jurisdictions from the official ALTA 2021 forms. Effective dates for use varies by state, and you should check your jurisdiction in the event you would like to opt in now. The ALTA 2006 Policies will remain available for such period of time as may be determined by the individual states in their respective approvals and promulgated regulations or procedures concerning transition to the ALTA 2021 Title Policies. Freddie Mac accepted submission of either 2006 or 2021 ALTA Title Policies as of December 16, 2021.

I am not in the title insurance industry, and I'm not a litigator; I'm a consumer on behalf of my lender clients, and I negotiate title insurance coverage on a regular basis. From that perspective, I think there were some wins, some losses, and a large disappointment that no attempt was made to clarify the conundrum presented by the divergent case holdings regarding coverage under Covered Risk #11. and interpretations denying coverage thereunder by way of Exclusion #3. In my opinion, Title Insurance Policies are contracts of adhesion, notwithstanding that industry comment is sought, considered, and in a very few instances, employed (!) but it is the only form of risk mitigation available for title matters, so I'll keep calm and negotiate on, and look forward to engaging with the 2021 Loan Policy!

Endnotes

- ¹ Marion A. Aaron and Dena M. Cruz.
- ² “Summer Blockbuster: New ALTA Policies in July of 2021,” Marion A. Aaron and Dena M. Cruz, ACMA Abstract, Fall 2021.
- ³ Subject to the Exceptions in Schedule B and the Conditions of the 2006 ALTA Loan Policy.
- ⁴ Taken from American Land Title Association Loan Policy of Title Insurance (2021 v. 01.00 (07-01-2021) Redline of 2021 Loan Policy (Published 07-30-2021) Against 2006 Loan Policy (6-17-2006), hereinafter, “ALTA 2021 Redline.”
- ⁵ See 2021 Loan Policy Conditions, 1. Definition of Terms, subsection i.
- ⁶ Exclusive of government taxes and assessments and property owner association assessments, which are included in 10. e.i. and ii.
- ⁷ ALTA 2021 Redline.
- ⁸ ALTA 2021 Redline.
- ⁹ ALTA 2021 Redline.
- ¹⁰ See *Harrigan v. Fidelity Nat'l Title Ins. Co.*, No. CV 17-6075934 (Conn. Super. Ct. Nov. 19, 2020).
- ¹¹ Per the knower of all ALTA form matters and my personal title guru, Jim Gosdin.
- ¹² See M2021-6 Multiple Subjects (12/16/21), “Freddie Mac Multifamily Seller/Service Guide”; 2021 Bulletins and Letters and Section 29.1(f), “Freddie Mac Multifamily Seller/Service Guide.”
- ¹³ See Professor Joyce Palomar’s Chapter 5, Section 5:16 in *Title Insurance Law* (2018 ed).
- ¹⁴ Which I only learned about because of my involvement with the ACMA Title Sub-Committee (!)